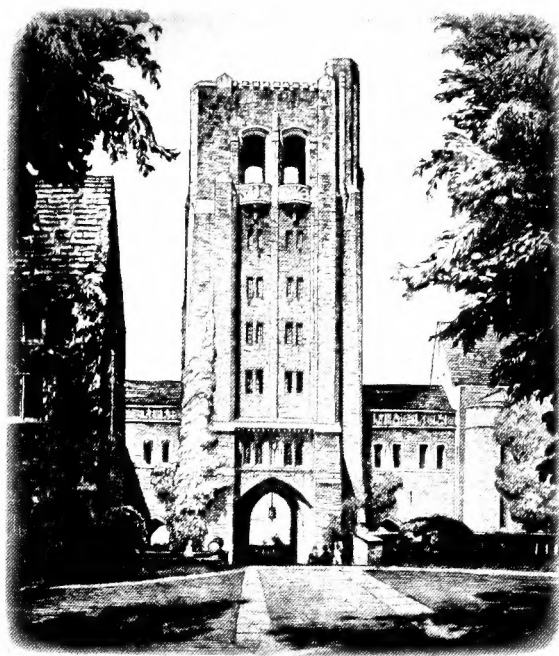


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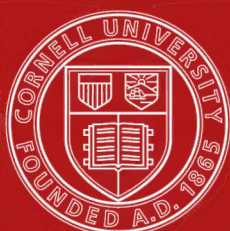
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COMMENTARIES

ON THE LAW OF

MASTER AND SERVANT

INCLUDING THE MODERN LAWS ON WORKMEN'S
COMPENSATION, ARBITRATION, EMPLOYERS'
LIABILITY, ETC., ETC.

BY

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IN EIGHT VOLUMES

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2057. Introductory.—So far as can be ascertained, apprenticeships were altogether unknown to the ancients. For the word "apprentice" there is no classical equivalent, either in Greek or Latin; and the Roman law is silent with regard to the relationship which it denotes.¹ The contract apparently originated in the Middle Ages, and formed an integral part of the system of guilds and corporations by which skilled laborers of all kinds sought protection against the feudal lord

¹The statement to this effect, in that article it is also observed that Smith's *Wealth of Nations*, I., x, 2, is there is nothing to show that the institution had any connection with the article on Apprentices in the 10th edition of the *Encyclopædia Britannica*. In tribes or colleges.

and the maintenance of those exclusive privileges with which, in the interest of the public, they were favored.²

The term "apprentice" was originally applied indifferently to such as were being taught a trade or a learned profession. When barristers were first appointed by Edward I. of England, they were styled *apprenticii ad legem*,—the serjeants being *servientes ad legem*,—and these names corresponded respectively to the trade names of apprentices and journeymen.³

In England the whole system of apprenticeships, except as regards pauper children, was for a considerable period regulated by the celebrated statute, 5 Eliz. chap. 4, which declared that certain trades should be exercised only by persons who had served as apprentices for seven years. The expediency of this law was not universally conceded, even at the time when it was passed;⁴ and after the lapse of a century the attitude of the courts in regard to it had become one of pronounced hostility.⁵ This circumstance indicates that, so far at least as the higher classes of the community were concerned, it had already fallen into very general discredit. During the second half of the eighteenth century the disfavor with which it was regarded by those classes was greatly intensified by the spread of the doctrines of Adam Smith and other economists concerning the impolicy of all restriction upon the freedom of trade.⁶ The current of adverse opinion

² *Encyclopædia Britannica, ubi supra.*

In his work on Apprentices (p. 1), Mr. Austin remarks that the guilds or corporations established by craftsmen for mutual protection in all market towns "made their appearance about the twelfth century, and established themselves in Italy, Germany, France, England and Scotland, and apparently had the exclusive privilege of trading within their respective localities. We have a very good example of these trading guilds or corporations in the still existing London City Companies."

³ *Encyclopædia Britannica, ubi supra.*

⁴ A statute enacted during the reign of Edward VI., by which everyone was prohibited from making cloth unless he had served an apprenticeship of seven years, was repealed in the first year of the following reign (1553), for the reason that it had occasioned the decay of the woolen manufacture and ruined several towns. Hume, *History of England*, chap. 37, *ad finem*.

⁵ "Soon after the . . . [Restoration, 1660] we find the apprentice laws

strongly reprobated by the judges, who endeavored, on the theory that the act could apply to no trades which were not in existence at its date, to limit its operation as far as possible. Such limitation of the act gave rise to many absurd anomalies and inconsistencies."

Encyclopædia Britannica, ubi supra.

⁶ The arguments urged by Adam Smith and his school against the institutions were (1) that it interfered with the property everyone has or ought to have in his own labor, and interfered not only with the liberty of the workman, but that of such as chose to employ him, and who were the best judges of his qualifications: (2) that apprentice laws tend to restrain competition to a much smaller number than would otherwise enter a trade; (3) that a long apprenticeship, or indeed any at all, was unnecessary even for the most mechanical arts; and (4) that the whole system of apprenticeship, like that of the corporations of which it formed a part, was a mere devise by which masters sought to limit the number of entrants

at last became so strong that in 1814 the apprenticeship clauses of the statute were, in spite of the strenuous opposition of the labor organizations, wholly abrogated.⁷

Apprenticeship, having been by the legislature converted from a compulsory into a purely voluntary contract, rapidly fell into desuetude, except in those occupations in which it was found by experience to be necessary or desirable as a means of acquiring the appropriate qualifications. That category does not embrace large factories and shops in which there is a minute subdivision of labor; and as the trend of modern industry has been steadily in the direction of an augmentation of the number of such establishments, the inevitable consequence has been that the number of workmen who have never served as apprentices has constantly tended to become proportionately larger and larger in comparison with the whole body of employees. The same conditions have produced a similar result in the United States and other countries.⁸

But the evils arising from this progressive extension of the field of labor to which access is customarily obtained without any systematic training are becoming more and more manifest. Employers are experiencing more and more difficulty in procuring artisans who possess a general proficiency in their trades.⁹ Capable workmen are appreciating more thoroughly the injurious consequences of the destructive competition to which they are subjected by reason of the constant enlargement of the class of imperfectly taught operatives. Sociologists are contending with much apparent reason that the grave

into their respective trades, and so enhance their monopolies at the expense of the general public. *Encyclopædia Britannica*, *sub voc. Apprentices* (9th ed).

⁷ See Webb's *History of Trade Unionism*, pp. 54, 55. The significant fact is mentioned that, although the opinion of Parliament as a whole was decidedly against the old system, the select committee appointed to investigate the matter was so strongly impressed by the testimony of the witnesses who advocated the retention of the apprenticeship clauses of the Elizabethan act, and their extension to new trades, that it found itself unable to fulfil its virtual mandate to recommend the repeal of those provisions.

⁸ Under the large-scale production of to-day, specialization, the minute division of labor, and the extended use of

machinery, have made it unnecessary that a worker serve an apprenticeship, and thus be skilled in all branches of his trade. In an ordinary factory but one or two all-round mechanics are required, the remainder of the workers being machine hands, mere automata, who feed the material into the machine, and make but a small portion of the finished product. In the majority of cases the worker cannot learn all the branches of the trade, even though he desired to do so, because of the fact that it is seldom that they are to be found under the roof of one establishment. Bless, *Dict. of Social Evolution*, *sub voc. Apprentice*.

⁹ In the United States this difficulty is especially noticeable, owing to the diminution in the number of skilled workmen emigrating from Europe; but even in Europe it has become a subject of serious complaint.

deterioration, mental, moral, and bodily, which results from the monotonous and narrow round of duties in all modern factories, may be greatly lessened by the broadening influence of a preliminary training of a general character. Statesmen, political economists, and practical men of business, are finding in the want of such instruction a potent cause of that chronic unemployment which is one of the disgraceful features of modern civilization.¹⁰ Unskilled laborers themselves who have never received a systematic course of instruction in any particular occupation are realizing more clearly that, under the industrial conditions of modern times, their lot is already a very hard and miserable one, and that it will certainly become still harder and more miserable as competition becomes keener with the increase of population.¹¹ In short the urgent need of finding some remedy for the evils of the existing situation is universally recognized. The only subject of controversy at present is the method by which these evils can be most effectually combated.

The alternative to apprenticeship is teaching at technical schools.¹² But experience seems to have demonstrated beyond a reasonable doubt that, however intelligently they may be conducted, such institutions can never entirely fill the place of apprenticeship in industrial training. It has been found—and in fact no other result could reasonably have been expected—that, for the purpose of imparting a capacity for practical work, the teaching received in them is much less effective than that which is imparted through the performance of services under the supervision of a master or a skilled fellow employee.¹³ In estimating the comparative merits of the rival methods,

¹⁰ In many parts of London, voluntary committees have recently been established to revive the institution of apprenticeship, and the official labor exchanges have now associated themselves with this enterprise. (Daily Mail, Overseas ed. March 11, 1911.)

On Sept. 21, 1910, at the International Congress on Unemployment, M. Villemin, president of the Employers' Association of the Building Industries, in which labor troubles are most common in Paris, delivered an impressive address, in which he blamed the decay of apprenticeship as the chief cause of non-employment. Children, he said, left school and found employment. They worked without knowledge, and always remained poor workers. Unemployment followed as a natural result.

¹¹ This remark is of course intended

to apply principally to European countries, and to those portions of the New World in which the economic situation is similar to that which exists in Europe. But even in the more sparsely settled portions of the United States and the British Colonies, the superiority of the position which skilled workmen enjoy, with respect both to the amount of the remuneration and the permanency of their employment, is so distinct as to furnish of itself a strong argument in favor of technical training.

¹² Some interesting facts with regard to the French "apprentice schools" will be found in an article in 38 *Contemp. Rev.* (Engl.) 474 (S. D. Thompson).

¹³ In a recent English work we find the following statement: "In all probability the Elizabethan system of apprenticeship was the most efficient system

this consideration is of itself decisive. But it is also material to remember that, so far as regards the poorer classes, the very section of the community which is most in need of the elevating influences of a broad and thorough training, the expense of attending such schools

of training which has ever been available for the mass of the nation. Certainly in its best days it was the cheapest system of training and education we have ever possessed. The nation neither paid for class rooms nor for teachers and inspectors, and master and boy entered into an agreement for their mutual advantage, which required, therefore, no payment on either side." English Apprenticeship and Child Labor, 1912, by O. Jocelyn Dunlop and R. D. Denman, M. P., quoted in the *Edinburgh Review* for Oct. 1912, p. 412.

In *Contemp. Rev.* (Eng.) 1897, p. 856, Mr. George Howells, a high authority on labor questions, thus stated his conclusions: "The one great lesson to be learned is this, that technical education can, at its best, only be supplementary to something that has gone before,—that something being a knowledge of the practical details of the trade, which can only be obtained in the workshop. . . . Apprenticeship is absolutely necessary for the purpose of acquiring a practical knowledge of a trade; without this, there can be no guaranty for good and efficient workmanship."

In the *Engineering Magazine* (U. S.) Nov. 1907, Mr. O. M. Becker expresses the opinion that the adoption of the apprenticeship system is the only remedy for the deficiency in skilled workers; but that the scheme must include the employment of apprentice tutors of the right sort.

That railway shops are invariably in favor of a thorough-going apprentice system is stated by Mr. F. T. Carlton in *Cassier's Mag.* (U. S.) April, 1905. The customary term is four years. The company usually agree that the apprentice shall be advanced from machine to machine, or from job to job, as fast as practicable or desirable. The writer proposes, as a remedy for the increasing deficiency of skilled workmen, a combination of school and shop training. In some shops a foreman of apprentices is employed, whose duty it is to see that the boys are shifted from one machine or one department to another at the proper time. School training is given in

night schools, where they try to round out and complete the shop instruction.

The following remarks of Mr. Austin (*Apprentices*, p. 14) may also be quoted: "No matter what may be said against the system, it is maintained that it is the only effectual means of imparting such knowledge of the various trades as is necessary to practice them with advantage to all parties. The old system must last, at all events, until technical schools are thoroughly established. But the 'apprenticeship schools' which are now being established as a result of the cry for technical education cannot improve the system of apprenticeship in its true sense. No schools can ever take away the effect of or supersede the teaching to be gained in the workshop under competent teachers. Again, technical schools have not, and it is doubtful if they ever will, reach the working classes properly so called. Owing to the expense incidental to the attendance of a boy at a technical school, it is only well-to-do parents who can afford to send their sons there. Unless these schools are established in every city and town, so as to be within reach of all, this can never be of use, except in special cases. . . . State teaching and so-called apprenticeship schools can never be good substitutes for the old system. And a boy is far more likely to gain a complete knowledge of his trade, and to acquire habits of industry, by serving a reasonable term as apprentice than by working as an ordinary journeyman; for he is not subject to the same restraint as in the case of an apprentice, and therefore not so likely to acquire habits of thrift and application, without which he cannot make a good workman."

On the other hand, Mr. Jackson, in a recent article on Apprenticeship (*Edinburgh Rev.*, Oct. 1912, p. 420), expresses the opinion that the only feasible remedy for the evils of the existing situation is "to extend the period of compulsory school attendance, and to use the additional school time, partly or wholly, for industrial training." Mr. Bray, whose book entitled "Boy Labor and Appren-

will be prohibitive,—at all events until they are entirely supported by the public funds.

In considering the probable future of apprenticeship the attitude of labor organization towards it is, of course, an element which must be taken into account. There is nothing to show, however, that these bodies have ever been, or are now, hostile to the institution itself.¹⁴ What they have fought against in the past, and will doubtless continue to fight against, is the employment of a number of apprentices disproportionate to that of the skilled workmen in the same establishment.¹⁵ So far as the question of technical training is a ques-

ticeship" (1912), is one of those which are commented upon in that article, advocates what he calls "Apprenticeship by the State," meaning more compulsory education and an extension of control over juvenile labor through the new advisory committees connected with the labor exchanges. That such a system would greatly increase the efficiency of the industrial classes may be conceded, and it may really be the only one which is available under the present economic and social conditions of England. But even those who advocate its adoption would scarcely contend that its results would be as satisfactory as those derived from an apprenticeship.

¹⁴ In the *Contemporary Review* (Engl.) for 1877, p. 851, we find the following remarks in Mr. George Nowell's very instructive article: "It is generally supposed that the decline of the apprenticeship system has been due to the rules and regulations of the trade unions; whereas, whatever remains of it is chiefly owing to their action. Their whole history is one long record of persistent, and sometimes not overwise, efforts to maintain and enforce the system, as the only means, in their opinion, for securing good and capable workmen. The real cause of the decline of apprenticeships has been the opposition of employers—especially those of the capitalists class, which has arisen during the present century—to any restrictions whatever in regard to those whom they choose to employ, and which, when attempted, they resented as an act of interference with the freedom of labor."

The vigorous efforts made by workmen, during the earlier years of the nineteenth century, to prevent the repeal of the Elizabethan statute, have already been mentioned.

In the *Dictionary of Social Evolution* (Bliss), *sub voc. Apprentices*, it is stated that, during the first half of the nineteenth century, some of the American labor unions were strongly in favor of allowing no member to work with anyone who had not served.

¹⁵ By Mr. Webb (*History of Trade Unionism*) it is stated that in England the hatters were formerly protected by the strict limitation of the number of apprentices, presented by the acts of 1566 and 1603, and enforced by the Felt-makers' Company (p. 46); that in 1808 petitions for a legal limitation of the number of apprentices were rejected by the English House of Commons, under the influence of the free trade idea, by which the governing classes were then entirely dominated (p. 50); and that towards the end of the first half of the nineteenth century the pronounced policy of several of the trades was in favor of a strict limitation of the number of apprentices (p. 184).

In the *Dictionary of Social Evolution* (Bliss), *sub voc. Apprentices*, the views of the modern labor organizations in the present connection are thus contrasted with those of the employers: "The employers claim that, in restricting the number of apprentices, the unions are trying to obtain monopoly of the trade, are preventing hundreds of boys from learning a trade, and are seriously hindering the development of industry. The unions, however, argue that they have no desire to obtain any monopolies. They claim that if there were no regulations fixing the number of apprentices allowed an employer, the skilled mechanics would be soon replaced by ignorant and unskilled apprentices, and that the standard of the trade would deteriorate, wages decrease, and employment be-

tion between instruction by apprenticeship and instruction by attendance at a school, their preference is distinctly in favor of the former.¹⁶ In this point of view their sentiments may well be regarded as one of the specific forces which are operating in favor of a more general recurrence to the institution of apprenticeship. Indeed, it seems not unreasonable to anticipate that they may be impelled by their dislike of technical schools to elaborate, by way of an alternative, some form of apprenticeship which will supply an efficient training, and at the same time be free from what they regard as the objectionable incidents of those institutions.

The strong probability that there will be, in the immediate future, a much more general resort to apprenticeship, seems to afford an ample justification for including in the present treatise a fairly complete discussion of the legal aspects of the contract. It is apparent, moreover, from an examination of the reports, that, even during the period which witnessed the lowest stage of the decline of the institution, it has never been of so little juristic importance as is sometimes assumed.¹⁷ The subject of sea apprentices is not discussed, because

come less steady and continuous. In support of their arguments they point to the conditions which existed in the various trades before the unions were strong enough to enforce restrictions and regulations. They also claim that it is the employer who is to be blamed for the shortage of skilled labor, inasmuch as he often refuses to take as many apprentices as the unions permit, because he dislikes to be bothered with their instruction, and will not teach them all the branches of the trade. In short, he has brought about a shortage of skilled labor because he has been more anxious to have his workers acquire speed—which means a greater output, and consequently greater profits to him—than to have them acquire a thorough knowledge of the trade. The unions further state that it is only by means of the trade unions that conditions can be maintained which makes it worth a boy's efforts to learn a trade."

¹⁶ Their opposition to the schools is based upon the ground that they tend to add excessively to the number of workmen, and foster in their pupils, ideas and opinions different from those generated in persons who learn their trades "on the job" while in constant association with members of trade

unions. Dictionary of Social Evolution (Bliss) *sub voc. Apprentices.*

¹⁷ Exclusive of those relating to personal injuries, the cases which have been decided by appellate tribunals concerning apprentices, since the middle of the nineteenth century, amount to about one hundred and seventy, somewhat over two thirds of that number being American. This total is certainly not large, when contrasted with the immense multitude of those decided during the same period with respect to ordinary servants. But it is really far from being insignificant, if we advert to three considerations: (1) However much in favor apprenticeship may be at any given time, the number of apprentices must, in the nature of the case, be quite small, as compared with that of servants. (2) The circumstances that apprenticeship must be authenticated by a written instrument, that the provisions of such an instrument are, on the whole, extremely simple, and, in respect to each particular trade, or business, framed on similar lines, and that the phraseology in which those provisions shall be embodied has been fixed by long usage and in many jurisdictions by statute, necessarily operate so as to exclude a large proportion of those descriptions of uncertainties which produce litigation be-

this treatise does not profess to deal, except incidentally, with maritime employment.¹⁸ The cases with respect to apprenticeship in the city of London, except in so far as they illustrate general principles, have also been omitted, as being of too special a character to be treated in a work of this description.¹⁹

The right of the master to recover damages from a third person for enticing away or harboring an apprentice is treated in chapter CXIII., *post*.

The right of a master to the earnings of an apprentice is treated in § 2036, *ante*.

A. NATURE AND INCIDENTS OF THE CONTRACT OF APPRENTICESHIP. GENERALLY.

2058. Apprenticeship defined.—The expression “apprentice” is derived from the French word *apprendre*, meaning “to learn.”¹ This derivation indicates the essential and characteristic incident of the contract of apprenticeship, *viz.*, that it is one which contemplates a relationship of which the primary purpose is the giving and receiving of instruction. From some contracts which involve a similar relationship it is distinguishable in these respects: (1) That the instruction for which it provides is not concerned with the same subject-matter as a general scholastic education, but is designed to impart, by means of practical work, the technical skill and knowledge required for the pursuit of some particular avocation; and (2) that the person to whom the instruction is given occupies, with respect to the person who gives it, a position similar to that of a servant, so far as regards his assumption of the duty of obeying orders given to him with regard to the manner in which his work is to be performed. In view of these differentiating factors, apprenticeship may be succinctly defined as a contract by which one person agrees to perform certain services under the control of another, for the purpose of re-

tween masters and servants. (3) Owing to the fact that special summary remedies have been provided for a breach of the contract, a large proportion of such litigation as does arise never reaches the superior courts whose decisions are reported.

¹⁸ A summary of the English law regarding such apprentices is given in the *Encyclopedia of the Laws of England*,

vol. 1, p. 443, and in Austin on Apprentices, pp. 137 *et seq.*

¹⁹ The reader who wishes to obtain further information regarding these apprenticeships may consult the exhaustive and carefully compiled chapter 5 in which they are discussed in Mr. Austin's work.

¹ See the Oxford, Century, and other dictionaries.

ceiving such special instruction as will qualify him for the occupation to which the services have reference.²

The term "apprenticeship" is usually applied to service under a master who exercises a manual occupation or is engaged in commerce. But its applicability to any kind of employment for which a technical training is necessary would seem, on general principles, to be sufficiently clear. The preponderance of authority is also in favor of this theory.³

² "An apprentice seems to be a person who is bound to and who serves another for the purpose of learning something which the other is to teach him." Cockburn, Ch. J., in *St. Pancras v. Clapham* (1860) 2 El. & El. 742.

An apprentice is "one who gives his services in order to be taught." Blackburn, J., in the same case.

"Another species of servants are called apprentices (from *apprendre*, to learn), and are usually bound for a term of years, by deed indented, or indentures to serve their masters, and to be maintained and instructed by them. This is usually done to persons of trade . . . but it may be done to husbandmen, nay, to gentlemen and others." 1 Bl. Com. * 426.

By the English stamp act 1870, chap. 97, § 39, an instrument of apprenticeship is defined to be "every writing relating to the service or tuition of any apprentice, . . . placed with any master, to learn any profession, trade, or employment."

"A contract of apprenticeship is one whereby, in consideration of the premium, or for no consideration at all, one person becomes bound to teach another a certain profession or trade, and the latter is bound to learn it, and to serve the master as an apprentice." Austin on Apprentices, p. 16, adopting the language of Fraser in *Master & Servant*.

An apprentice is "one that is bound by covenant to serve another man of trade, for a certain term of years, upon condition that the artificer or tradesman shall in the meantime endeavor to instruct him in his art or mystery." Johnson's Dict.

An apprentice is "a young person bound by indentures to a tradesman or artificer who, upon certain covenants, is to teach him his mystery or trade." Tomlin's Law Dict.

"Apprentice is defined to be a young person bound by indenture to a tradesman or artificer who, upon certain covenants, is to teach him his trade." *Lyon v. Whitmore* (1811) 3 N. J. L. 846.

By Wis. Sess. Laws 1911, chap. 347, § 2 (which supersedes § 2377 of Sanborn & S. Anno. Stat.), it is provided: Every contract entered into between a minor and employer, by which the minor is to learn a trade, shall be known as an indenture. Every minor entering into such a contract shall be known as an apprentice.

In *Winstone v. Linn* (1823) 2 Dowl. & R. 465, 476, 17 Eng. Rul. Cas. 186, Holroyd, J., observed that "an indenture of apprenticeship is a contract for the instruction of a young person in a trade or business." But this definition is obviously imperfect as omitting the element of the performance of services in consideration of the instruction.

In a Scotch case it was observed by Lord Jeffrey that the contract with an apprentice, though it may include a contract to work for hire, is primarily a contract to teach and learn a certain trade or handicraft. *Frame v. Campbell* (1836) 5 Sc. Sess. Cas. 1st series, 1176. But the more precise conception seems to be that an apprentice is essentially an employee working for a consideration, which may consist only of the giving instruction, or may embrace other benefits as well.

³ See the passage quoted from Bl. Com. in the preceding note.

With reference to the provision in § 49 of the repealed bankruptcy act of 6 Geo. IV. chap. 16, which entitled an apprentice to a return of a reasonable portion of his premium in the event of his master's becoming bankrupt, it was held in *Ex parte Fussell* (1837) 2 Deacon, 158, Bankr., 3 Mont. & Arr. 67, that an attorney's articulated clerk was

2059. Distinction between apprenticeship and service. Generally.—

From the remarks made in the preceding section it is manifest that an apprentice is in effect merely a servant of one particular description. The scope of some statutes has been defined with reference to this circumstance. Thus, it has been held that an apprentice is a "servant" within the meaning of the rule that, if one gains entrance into a dwelling house in the nighttime by conspiring with a servant, with intent to commit a felony, it is a constructive breaking which will render him guilty of burglary.¹ But the differentiating elements of the relationships which are designated by the two expressions have formed a far more frequent topic of judicial exposition than the points in which they coincide. From the standpoint of statutory construction the distinction between them is so far fundamental that a statute which contains an express clause excepting from its purview certain contracts for the hire of "servants" will not be construed as being applicable to contracts of apprenticeship also.² The conception which furnishes the ultimate test with reference to which the distinction is, for this and other purposes, defined, is this—that the work of that species of servant styled an apprentice is performed primarily with a view to acquiring a certain kind of technical knowledge, while the work of an ordinary servant is performed mainly for the purpose of earning remuneration.³ Far the larger part of the cases which have turned upon the application of this test distinction were concerned with the right to a settlement under the poor laws. These it will be convenient to review separately.

2060. Distinction as affecting the right to a settlement under the poor laws.—a. Generally.—In all the English cases decided while the older statutes regarding the acquisition of a settlement by servants and apprentices were both in force (see § 2063, *post*), the essential ques-

an apprentice. But the opposite doctrine was adopted by a higher court in *Ex parte Prideaux* (1837) 3 Myl. & C. 327, 7 L. J. Ch. N. S. 202, 2 Jur. 366, reversing 3 Mont. & Ayr. 516.

With reference to the provision of the poor law under which an apprentice gains a settlement by "inhabiting" a town or parish, it has been held that the articulated clerk of an attorney is an apprentice. *St. Pancras v. Clapham* (1860) 2 El. & El. 742. Cockburn, Ch. J., observed: "It is said that the statute of Elizabeth, by not mentioning attorneys, impliedly precludes them from taking apprentices. But I think that it was not the object

of that statute to do more than to legislate for the particular classes of trades to which it expressly refers, and that there may be valid apprenticeships, independently of the statute, to classes of masters not enumerated in it."

¹ *State v. Rowe* (1887) 98 N. C. 629, 4 S. E. 506.

² *Rex v. St. Paul's, Bedford* (1795) 6 T. R. 452 (ruling made with reference to the stamp act, 23 Geo. III. chap. 58).

³ "Apprentices and servants are characters perfectly distinct; the one receives instruction, the other a stipulated price for his labor." Lord Kenyon, Ch. J., in *Rex v. St. Paul's, Bedford, supra*.

tion involved was the applicability of a principle thus formulated: "Where the contract itself clearly appears to have been intended as a contract of apprenticeship, and not as a contract of hiring and service as a servant, it cannot, if defective as a contract of apprenticeship, be converted into a contract of hiring and service, so as to give the party a settlement as a servant."¹ For the purposes of this principle, "an imperfect contract of apprenticeship exists when the parties have had a perfect contract of apprenticeship in view, but it has not been thoroughly carried into execution."²

b. Circumstances under which an apprenticeship is inferable.—In determining the rights of a pauper to a settlement, the courts have proceeded upon the theory that two principal conclusions are directly deducible from the consideration that apprenticeship is primarily and essentially a contract which is entered into for the purpose of giving and receiving instruction:

(1) A contract which merely provides for the performance of services, and contains no stipulation with regard to instruction, creates the relation of master and servant, and not that of master and apprentice.³ In this connection it is material to observe that the authorities are conflicting with respect to the question whether a con-

¹ *Le Blanc, J., in Rex v. Laindon* (1799) 8 T. R. 385. The cases cited in the following subsection all turned upon this principle. It was also supplied in *Rex v. Whitechurch* (1763) Burr. Sett. Cas. 540, 1 Bott, Poor Law, 532 (parol binding); *Rex v. All Saints* (1770) Burr. Sett. Cas. 656; *R. v. Little Bolton* (1784) Cald. 367; *Rex v. Highnam* (1785) 2 Bott, Poor Law, 371 (agreement made on unstamped paper to save expense); *Rex v. Ditchingham* (1792) 4 T. R. 769 (indenture not stamped); *Rex v. St. Paul's, Bedford* (1795) 6 T. R. 452; *Rex v. Shinfield* (1811) 14 East, 541; *Rex v. Burbach* (1813) Maule & S. 370; *Rex v. St. Margaret's Kings Lynn* (1826) 9 Dowl. & R. 160 (no indenture executed on account of poverty of apprentice's mother); *Rex v. Combe* (1828) 8 Barn. & C. 82.

² *Coleridge, J., in Rex v. Great Wishford* (1835) 5 Nev. & M. 540.

³ In *Rex v. Billingham* (1836) 5 Ad. & El. 676, 1 Nev. & P. 149, 2 H. & W. 419, 6 L. J. Mag. Cas. N. S. 38, after the cancelation of one indenture the pauper let himself to another person in the same trade, under a written agreement

signed by the master, the pauper, and his father, by which the father, on behalf of the pauper, agreed that the pauper should serve the master in his business for a specified period, the master paying, at the expiration thereof, a certain sum to the pauper, and in the meantime finding him meat, drink, and lodging; the father finding him clothes, washing, and all other necessities. The pauper testified that he served as an apprentice; and the respondents offered evidence of conversations between the parties, before and at the time of signing the instrument, and also of an indorsement thereon, which, however, was not proved to have been on the paper when the instrument was signed. Held, as there was not provision for teaching and learning, the agreement was one of hiring and service, and that the service must be understood to have been performed under the agreement:

In *Nickerson v. Easton* (1831) 12 Pick. 110, a written agreement, not under seal, signed by a minor, his mother, and stepfather of the one part, and by the defendant, of the other part, recited that the minor had been living with the defendant as an apprentice to

tract of apprenticeship can be created without using the word "apprentice."⁴ In one of the cases in which it was held that the question should be answered in the affirmative, it was held that parol evidence was admissible for the purpose of showing that, at the time when a written instrument offered as embodying the contract between the parties was executed, it was agreed that the hirer was to give instruction in a certain trade.⁵

learn the trade of a cooper, but that no indenture had been executed; and stipulating that the minors should go on a whaling voyage, and should do the duty he shipped to perform; that the defendant should furnish him with outfits, and should receive all his earnings on the voyage; and that, at the end of the voyage, the minor should be free from his apprenticeship. Held, that the written agreement did not constitute a contract of apprenticeship. The court said: "There is no stipulation for the instruction of the apprentice in his trade, nor even that he shall be employed as cooper, no stipulation for the care and maintainance of him during the term of his service, and no provision for him at its termination. It was a contract for a separate and independent service and purpose."

⁴ In *Rex v. Little Bolton* (1783) Cald. 367, Lord Mansfield took the position that unless the word "apprentice" was used in the contract, the relation of master and servant might be implied for the purpose of giving the servant a settlement as such, although the master was to teach him a trade and take half his earnings for doing so.

In *Rex v. Highman* (1784) Cald. 371, note, on the other hand, it was distinctly laid down that the use of the expression was not requisite. This doctrine was indorsed, and that of Lord Mansfield was criticized by Lord Kenyon in *Rex v. Laindon* (1799) 8 T. R. 379, "I am sorry" said the learned judge, "that nice distinctions were ever taken in the determination of cases on this subject; but notwithstanding those little differences, we must consider the whole class of decisions on this point, and extract the principle from them. It is admitted in all of them that if two persons intend to enter into the relation of master and apprentice, and, owing to some circumstance, the relation of apprenticeship is not duly constituted,—

as, if the indentures be not stamped,—this shall not change the condition of the parties; if they cannot avail themselves of the consequences of the condition in which they intended to stand, they shall not be put into another condition in which they did not mean to place themselves. But when it is urged that this relation can only be formed by using the term 'apprentice,' it may be observed that the argument would lead to an absurd consequence; for then if the word 'clerk' were used in regular indentures of apprenticeship, the clerk could not gain a settlement by serving under the indenture, merely because he was not retained *eo nomine* 'as an apprentice;' but it would be a disgrace to our laws if we were obliged to decide according to words without considering their meaning. It was very properly said by Lord Hardwicke that there is no magic in words; and he said this, not as a discovery just then made by him, but as a maxim that was handed down to him from his predecessors. If the relation of master and servant be created by the contract of the parties, though they do not use the very words 'master and apprentice,' yet if they use words tantamount, it is sufficient."

The rule laid down in *Rex v. Laindon* was also affirmed in *Rex v. Rainham* (1801) 1 East, 531. But in *Rex v. Eccleston* (1802) 2 East, 298, the court though with some reluctance, followed *Rex v. Little Bolton*, *supra*, and declined to adopt Lord Kenyon's opinion in *Rex v. Laindon*, on the somewhat unsatisfactory ground that, although he disapproved the earlier case, he had not though proper to overrule it in terms.

In one of the American states the doctrine of *Rex v. Little Bolton* was adopted at a date subsequent to the the latest of the English decisions. *Hopewell v. Amwell* (1808) 3 N. J. L. 4220.

⁵ *Rex v. Laindon* (1799) 8 T. R. 379.

(2) A contract which provides both for the performance of services by one of the parties, and for the giving of instructions by the other, is to be deemed a contract of hiring and service, or of apprenticeship, according as it may appear that its primary and essential purpose is the performance of services, or the imparting of instruction.⁶ In determining the nature of various contracts with reference to the test thus indicated, the courts have laid it down that if the contract expressly provided that the pauper was to learn, an obligation on the part of the master to teach must be implied.⁷

The following points have also been determined: That a stipula-

The evidence was regarded as having reference to a fact collateral to the instrument,—explanatory of an equivocal agreement, not contradictory thereof.

⁶ In *Rex v. Edingale* (1830) 10 Barn. & C. 739, it was remarked by Bayley, J.: "A plain, intelligible rule is laid down in *Rex v. St. Margaret's, King's Lynn* (1826) 6 Barn. & C. 97, 5 L. J. Mag. Cas. 18, which was acted upon in *Rex v. Combe* (1828) 8 Barn. & C. 82, that where the substantial object of the parties to a contract is to learn, and not to serve, the contract should be deemed one of apprenticeship, and not one of hiring and service."

In *Rex v. Crediton* (1831) 2 Barn. & Ad. 493, Taunton, J., observed: "I take the true distinction in these cases to be this: Where teaching on the part of the master, or learning on the part of the pauper, is not primary, but only the secondary, object of the parties, that will not prevent (where work is to be done for the master) the contract being considered one of hiring and service. In all the cases cited, where the contract was so considered, it appeared that the pauper agreed to work for his master, and the master undertook to teach him the particular trade in which he was conversant; but the teaching and learning were incidental, and therefore it was held to be a contract of hiring. But where teaching and learning are the principal object of the parties, though there was a service, the contract is considered to be one of apprenticeship."

In *Rex v. Great Wishford* (1835) 4 Ad. & El. 216, Williams, J., remarked: "The sessions appear to have acted upon the case of *Rex v. Crediton* (1831) 2 Barn. & Ad. 493, 9 L. J. Mag. Cas. 89, where this court overruled a multitude

of former cases (such as *Rex v. Little Bolton* (1783) Cald. 367, and *Rex v. Eccleston* [1802] 2 East, 298), which had created great confusion by establishing that a contract in which the servant was not expressly retained as an apprentice might not be a contract of apprenticeship, although there was no doubt that the intention of the parties was teaching and learning. Now, a more plain and intelligible ground has been laid upon which to decide such cases, namely, the object contemplated by the parties.

⁷ Littledale, J., in *Rex v. Crediton* (1831) 2 Barn. & Ad. 493, 9 L. J. Mag. Cas. 89. The rule thus formulated would seem to be logical and reasonable. But it is inconsistent with the position taken in an earlier case, that where an agreement was made to serve during a certain period to learn a specified trade, on condition of being found in board, lodging, and clothes, the fact that it did not explicitly bind the master to give instruction was an element which tended strongly to show that no apprenticeship was contemplated. *Rex v. Shinfield* (1811) 14 East, 541. The effect of the agreement in question, which had been made between two persons previously connected as master and servant, was thus discussed by Bayley, J.: "The meaning of the parties, therefore, was that the general service before contracted for should be restrained to such service as would enable the boy to learn his master's business. If an apprenticeship had been intended, there would have been words introduced into the agreement binding the master to teach the boy; and there being no such words of obligation on the master, and the written contract not having the ordinary words of binding to serve as an

tion for the payment of wages does not necessarily imply that the relation constituted was that of master and servant;⁸ that the fact that no such stipulation was made does not conclusively prove that the contract was one of apprenticeship;⁹ that a contract of apprenticeship may be formed without the payment of a premium,¹⁰ such payment being strong, but not decisive, evidence to show that the parties contemplated such a contract;¹¹ that the creation of a contract of service is not inferable, in point of law, from the mere fact that the party hired agreed to do any work that might be assigned to him, as well as that in respect of which instruction was to be given;¹² that explicit evidence to the effect that it was merely on account of the poverty of the parent of the party hired that no indentures were executed "shows beyond all doubt that it was the intention to contract the relation of master and apprentice."¹³ The effect of some cases which have turned upon the applicability of one or other of these doctrines is stated below.¹⁴

apprentice, and the intent of the parties, as collected from the terms of it, being at least equivocal, we are warranted by the case in saying that the object of it was merely to confine the general service before contracted for to such parts of the master's employ as would enable the boy to learn his business. If this, therefore, were to give an extraordinary benefit to the servant, the master might well stipulate for receiving such service without the payment of wages."

⁸ *Rex v. Tipton* (1829) 9 Barn. & C. 888; *Rex v. Newtown* (1834) 1 Ad. & El. 238; *Rex v. Ightham* (1836) 4 Ad. & El. 937, 941, 6 Nev. & M. 320, 5 L. J. Mag. Cas. N. S. 105, per Patteson, J.
⁹ *Rex v. Shinfield* (1811) 14 East, 541.

¹⁰ *Rex v. Ightham* (1836) 4 Ad. & El. 937, 6 Nev. & M. 320, 5 L. J. Mag. Cas. N. S. 105, per Denman, C. J.

¹¹ *Rex v. St. Margaret's, King's Lynn* (1826) 6 Barn. & C. 97, 5 L. J. Mag. Cas. 18; *Rex v. Nether Knutsford* (1831) 1 Barn. & Ad. 727, 9 L. J. Mag. Cas. 52.

¹² *Rex v. Tipton* (1829) 9 Barn. & C. 888 (defective; apprentice inferred;—see note 14 (a) *infra*). This decision has possibly been overruled by the earlier case of *Rex v. Coltishall* (1793) 5 T. R. 193 (see note 14 (b), *infra*).

¹³ *Rex v. St. Margaret's, King's Lynn*

(1826) 6 Barn. & C. 97, 5 L. J. Mag. 18.

¹⁴ (a) *Defective contract of apprenticeship inferred.*—*Rex v. St. Mary, Kidwelly* (1824) 2 Barn. & C. 750, the father of A, a minor, agreed by parol to give B a guinea for teaching his trade to A for twelve months. A served the twelve months under that agreement. At the end of that period, the father agreed that A should work for B for twelve months, making shoes at 5d. per pair the first six months, and 4d. per pair the last six months; under this latter agreement the pauper served six months only. Held, that this latter service could not be connected with the service of the former year so as to give a settlement, inasmuch as the first agreement created the relation of teacher and scholar, and not that of master and servant, and the whole year's service, required to confer a settlement, must be under a contract or contracts creating the relation of master and servant.

In *Rex v. Combe* (1828) 8 Barn. & C. 82, the father of a pauper was about to put him out to service, when it was suggested to him by A, a carpenter, that it would be better for the pauper to learn his (A's) trade, instead of going to service; and A afterwards hired the pauper to learn his trade, and to do any other work, as well as that of a carpenter. The pauper went to A, and served him for five years, living during

that time with his parents, who provided him with victuals and part of his clothing, the remainder being provided by A. The pauper did any work his master ordered him to do, and at the end of that time he agreed to work for the master as a journeyman at weekly wages. A finding that this was a defective contract of apprenticeship was sustained.

In *Rex v. Tipton* (1829) 9 Barn. & C. 888, A, being of full age, entered, together with his father, into the following agreement (not under seal), that he would serve B as an articulated servant for four years, to learn his art or trade of a plumber, glazier, and painter, at weekly wages; and it was agreed that A should be considered an out apprentice. A was to do gardening, or any other work his master should set him about, and in case A should be ill, the master should not pay him any wages during the time he should be ill. The master agreed to teach and instruct A in the art and mystery of a plumber, glazier, and painter. Held, that this was a defective contract of apprenticeship. Bayley, J., said: "In this instrument, the character in which the pauper was to act is described both as that of an articulated servant and of an apprentice. We must therefore look to the whole of the instrument to learn whether the parties contemplated the relation of master and servant, or that of master and apprentice. Now, first, it is not usual for a father to be a party to a contract whereby his son (of full age) contracts to serve. The fact of the pauper having contracted to do gardening or any other work does not necessarily show that the parties contemplated a mere hiring. . . . So the stipulation to pay wages does not necessarily imply that the parties contemplated the relation of master and servant. Here the master undertook to teach his trade to the pauper. Learning the trade, therefore, was one great object of the parties to the contract. There is a provision in the instrument that if the pauper should be ill, the master should not pay him any wages during the time of his illness. That is not an improper stipulation in a bargain for an apprenticeship; but the law imposes on the master the obligation of providing for a servant during illness. There are some circumstances in this case tending to show that the parties

contemplated a contract of apprenticeship, and others that they contemplated a contract of hiring. But, on the whole, as it appears that the main object of the parties was that the pauper should learn the trade of plumber, and as the court of quarter sessions may probably have thought the wages too low for a mere servant, we think that, though the case admits of great doubt, this contract was an imperfect contract of apprenticeship."

In *Rex v. Edingale* (1830) 10 Barn. & C. 73, a pauper applied to a master to take him as an apprentice, and the master said he would not, because if he did he should offend the farmers, but would take him on agreement for four years; and a week afterwards it was agreed between the master and the father-in-law of the pauper that the pauper should serve the master four years to learn his trade, to have meat, drink, washing, and lodging the whole time, and 2s. 6d. a week for the last two years. Held, that the principal object of the parties being that the pauper should learn the trade of the master, it was to be deemed a contract of apprenticeship.

In *Rex v. Nether Knutsford* (1831) 1 Barn. & Ad. 726, "the pauper, by an unstamped memorandum, to which his father was a party, hired himself in the service of T. W. to labor at the art and mystery of a cotton weaver for three years; and he promised T. W. that his secrets he would keep, all his lawful commands strictly obey, and serve him faithfully for the said term. By the same memorandum the master undertook, as a reward for pauper's labor, to give him half his just earnings; and further covenanted, as a complete compensation for his industrious services, to instruct him in all the art and mystery of a cotton weaver, to the utmost of his power, in the above term. When the agreement was read over, at the word 'hire' T. W. gave pauper a shilling. There was no premium. At the making of the agreement nothing was said about work on Sundays; the pauper did none on those days, and never did any but weaving. At the end of two years T. W. removed, and pauper served the rest of his time out with his father. He lived with his father all the three years: Held, that the agreement with T. W. was a defective contract of apprenticeship."

In *Rex v. Bilborough* (1817) 1 Barn. & Ald. 115, A agreed by parol with B to teach him to make stockings during the year, for which A was to receive two guineas, and B was to have his earnings, paying the master for the use of the frame, etc. Held, that no settlement was acquired by living out the year under the agreement, for the pauper never contracted to serve the master, the only agreement being that the master should teach the pauper for a year.

In *Rex v. Crediton* (1831) 2 Barn. & Ad. 493, a pauper agreed with a sawyer for a twelvemonth to learn sawing, and was to have 7s. 6d. out of every 20s. earned by his master and himself. Held, that, inasmuch as the principal object of the agreement between him and his master was that he should learn and his master teach him sawing, it was a defective contract of apprenticeship.

In *Rex v. Newtown* (1834) 1 Ad. & El. 238, the pauper agreed by parol to go to W., a flannel manufacturer, for three years, to learn flannel weaving, and was to be paid half his earnings and find himself necessaries, and the master to have the other half for teaching him the art. Pauper went into W.'s employ, and wove some flannel; he then left W. by consent, and went to E., another flannel manufacturer, told him of his former employment with W., and requested E. to take him on the same terms; but E. told him that one year would be long enough, if he was a good boy. They had also some conversation as to what pauper had learnt with W. The sessions further stated "that the pauper agreed to go to E. for twelve months to learn weaving, and E. agreed to take him, and teach it, and give him half his earnings;" and that the pauper went to E., and worked with him for the year on the former terms; they also found that the pauper could not leave or be turned away during the twelve months. Held, notwithstanding the conclusion drawn by the sessions as to the power of leaving or of turning away, that the object of the pauper's engagement with E. was learning, not service, and therefore that it was an imperfect contract of apprenticeship.

In *Rex v. Great Wishford* (1835) 4 Ad. & Bl. 216, pauper's mother applied to W., a carpet weaver, to take him into his employment. W. agreed with her to take pauper for two years on

trial, after which, if W. and pauper agreed, he was to be apprenticed to W. He was to have board, lodging, and washing, but no stated wages, and he was "to draw." Every carpet weaver is at first taught drawing. The finding of the sessions that the service of the pauper under this contract was a service under an imperfect contract of apprenticeship, was held to be justifiable, inasmuch as it might be collected from the case that, the object of the parties was learning and teaching. Patteson, J., said: "Here it might have been inferred from the circumstances of the contract, either that the master was to take the pauper for two years, to see whether he was a teachable boy, and likely to learn the business; or that he was to take him for two years to do all kinds of work, and that, if liked at the end of that time, he was to be received as an apprentice. The sessions have adopted the first construction, and have found an imperfect contract of apprenticeship. My own inclination is towards the same conclusion, but I think the circumstances will admit of a contrary one."

In *Rex v. Ightham* (1836) 4 Ad. & El. 937, pauper's brother worked with W., a carpenter, as apprentice, under a verbal contract; on his leaving W. he applied for pauper to be taken in his place. W. said he would take no more apprentices unless they would agree to work on his land as well as at the carpentry business, saying, "I will have no more apprentices, unless he is agreeable to do other work as well; I will take him to do work as a servant." W. occupied three or four acres of hop ground. It was agreed that pauper should live with W. three years, to learn the business of a carpenter, and to do any other work W. required; pauper to have 9s. a week the first year, 10s. the second, 11s. the third, and to be paid for overwork at the same rates. He entered into W.'s service in pursuance of the agreement, boarding and lodging at his own expense. Littledale, J., said: "This belongs to a class of cases, some of which are very doubtful. But here I think that there clearly was no settlement by hiring and service, but only an imperfect contract of apprenticeship. First, there is a verbal contract of apprenticeship by the brother; and then a proposal that the pauper shall be taken in his place. The master answers that he will have no more apprentices

2061. Distinction for other purposes.—In cases which do not involve the operation of the poor laws, the question whether the relationship of a person hired to his hirer is that of an apprentice or a servant is, so far as can be ascertained from the small number of

unless they will do other work. That is as much as to say that, if they will do so, he will take them as apprentices. The primary object was that the pauper should be an apprentice, only on terms of also working as a servant; the working, therefore, was subsidiary. That is assented to. There are, indeed, wages; and it is true that this fact agrees better with the supposition of service than with that of apprenticeship. But under a qualified contract of apprenticeship like this, there might be such a stipulation; and the fact of the pauper taking the place of his brother, who was an apprentice, joined with the express terms used in the negotiation, shows a contract of apprenticeship." Patteson, J., said: "It was clearly the pauper's object to be taught; and the master refused to take him as apprentice unless he would do other work as well, and that the pauper assented to; that is, he assented to work as well as to be apprentice. It is true that the master would not have agreed unless the pauper had assented to work; but, on the terms of his also working as servant, he did agree to take him as apprentice."

An intention to create an apprenticeship was also held to be inferable under the following circumstances:

Where the essence of the contract was that, in consideration of a certain sum paid by the pauper, the master undertook to teach him a business, and that the pauper was to serve for a specified period. *Rex v. Laindon* (1799) 8 T. R. 379.

Where a father agreed with one R. that R. should take his son for six years, to teach him a trade, and that R. was to be allowed a certain sum per week for three years, in consideration of the teaching and of the son's board and lodging. *Rex v. Mt. Sorrell* (1814) 2 Maule & S. 460.

Where the hirer agreed to teach the party hired a trade for a certain sum, the latter to have his earnings and pay the former for the use of a machine. *Rex v. Bilborough* (1817) 1 Barn. & Ald. 115.

(b) *Hiring and service inferred.*—In *Rex v. Hitcham* (1760) Burr. Sett. Cas. 489, where A agreed to let himself to his brother, who was a carpenter, for a year, and was to receive no money by way of wages; but his brother was to teach him as much as he could of the trade during the time, and provide him with meat, drink, washing, and lodging, and A was to do all his brother's business in the farming way. Held, that this was clearly a contract for service and hiring.

In *Rex v. Coltishall* (1793) 5 T. R. 193, A clubbed with B (which signifies serving another for the purpose of learning a trade) for three years. No premium was paid, and it was agreed that A was to do "any work that B set him about." Held, that this was a contract of service.

In *Rex v. Martham*. (1801) 1 East, 239, A clubbed with B for three years at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages. Held, that A gained a settlement by serving a year (the period required for servants).

In *Rex v. Burbach* (1813) 1 Maule & S. 370, it was held that an agreement made by A, that B, his son, should work for C for a specified period, and have what he got, could not be construed as apprenticeship, merely because B was to allow C a certain weekly sum out of his wages for teaching him. But in *Rex v. Newtown* (1834) 1 Ad. & El. 238, Patteson, J., said that this case seems to have been overruled by *Rex v. Crediton* (1831) 2 Barn. & Ad. 493 (see *supra*.) In fact, having regard to the controlling importance attached by later decisions to the element of a provision for instruction, it is at least open to doubt how far any of the cases cited in this subdivision of the note can be regarded as good law.

See also *Rex v. Shinfield* (1811) 14 East, 541, subd. *a*, *supra*.

relevant authorities, determinable upon precisely the same footing as in cases which deal with the right to a settlement. A contract which contains no stipulation with regard to teaching is treated as one of service.¹ The legal effect of such a contract is not changed by the fact that the parties designate it as an apprenticeship.² On the other hand, a contract of which the primary object is the teaching and learning of a business, and not the performance of services, is deemed to be an apprenticeship.³

¹ A verbal agreement to adopt and bring up a child is not one of apprenticeship, so as to entitle the adopter to detain the child as against its father. *State ex rel. Payne v. Baldwin* (1846) 5 N. J. Eq. 454, 45 Am. Dec. 399.

An informal memorandum, "A. B. began work 11th September," and a note of an ascending scale of wages, do not show that an apprenticeship was entered into. *Gow v. McEwan* (1901) 8 Scot. L. T. 484 (action to compel defendant to execute a formal contract of apprenticeship was dismissed).

In *James v. Krauth* (1910) 26 Times L. R. (K. B. Div.) 240, the plaintiff, a person of full age, was engaged as an "improver" to the trade of watch-repairing, under a written agreement which bound the master to teach or cause to be taught certain parts of the trade, and to pay certain weekly wages. The plaintiff paid a premium, and stipulated to employ himself industriously and to the best of his abilities. The contract also provided that the plaintiff should work the weekly standard hours, that any short time occasioned by the plaintiff, either from sickness or from any other cause, should be deducted from his weekly wages in proportion to the loss of time, and that whatever time he should work over the standard time should be paid for in the same ratio. Annexed to the agreement were the following terms: "(1) Improvers are required on trial one week. No wages paid during time of trial. (2) Improvers must supply their own tools. (3) If improver's time is completed at or under twenty-one years of age he must be articulated as an apprentice; but if his term commences after the age of twenty-one, a written and stamped agreement must be drawn up and duly signed." Held, that the contract was not one of apprenticeship, and that the plaintiff might be dismissed

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for misconduct. *Bray, J.*, approved the statement in *Smith on Master & Servant*, p. 48. He pointed out that the contract contemplated two classes of persons, *viz.*, apprentices and improvers, and that the fact of the plaintiff's having been hired as an improver went far to show that he was not an apprentice. Stress was also laid on the circumstances that he was over twenty-one years when he was hired, and that the last clause in the contract was an unusual one for an apprenticeship agreement.

By the Victoria factories and shop act 1903 (No. 1857), § 7, it is provided that all apprentices, except such as are bound by indentures of apprenticeship which bind the employer to instruct such apprentice for at least three years, shall be deemed "improvers" within the purview of § 15 of the factories and shops act 1900. Accordingly, an apprentice bound by a contract which does not provide that he shall be instructed is entitled to the wages of an "improver," as determined by the wages board of the employer's trade, and not those fixed by the contract. *Hines v. Phillips* (1906) Vict. L. R. 417.

² *Dwyer v. Rathbone* (1889) 52 Hun, 615, 1 Silv. Sup. Ct. 418, 5 N. Y. Supp. 505, involving a contract by which a mother agreed that her minor son should labor for a fixed period at a specified rate of wages, the employer reserving the right to discharge him if he should be found incompetent or unsatisfactory.

In *Aborn v. Janis*, 62 Misc. 95, 113 N. Y. Supp. 309 (order affirmed 121 App. Div. 923, 106 N. Y. Supp. 1115), it was held that the portion of the New York domestic relations law (see § 2086, *post*) which relates to apprentices has no application to a contract binding an infant to render services as an actress for designated theatrical seasons.

³ *Horan v. Hayhoe* (1903) 20 Times

Apprentices are not within the Pennsylvania statute "for preventing clandestine marriages," which prohibits clergymen, etc., from joining in marriage "indentured servants" without the consent of their masters.⁴

2062. Apprenticeship as a business qualification.—*a. In respect of trades or professions.*—The general rule, accepted both in England and the United States, is that, apart from statute, service as an apprentice is not a condition precedent to the acquisition of a right to follow a particular trade or profession.¹ In England this rule was for a considerable period abrogated by the comprehensive enactment in § 31 of 5 Eliz. chap. 4, by which it was declared to be "unlawful . . . to set up, occupy, use, or exercise any craft, mystery, or occupation now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at the least as an apprentice." The footing upon which this provision was construed is indicated by the statement of Blackstone (Com. p. 233) that the resolutions of the courts have in general rather confined than extended the restriction, and following the trade seven years without any effectual prosecution, either as a master or a servant, is sufficient without an actual apprenticeship.² This part of the act was repealed by 54 Geo. III. chap. 96, § 1, and the whole of it by the conspiracy and protection of property act 1875.

L. R. (K. B. Div.) 118 [1904] 1 K. B. 288, 73 L. J. K. B. N. S. 133, 68 J. P. 102, 52 Week. Rep. 231, 90 L. T. N. S. 12, where a stableman's apprentice was held not to be a "male servant," in respect of whom his master could be taxed under §§ 18 and 19 of the customs and inland revenue act of 1869.

In *Lyon v. Whitmore* (1811) 3 N. J. L. 846 (action for enticement), it was agreed between L. and W. that L.'s son should work for three years for W. in consideration of wages to be paid to L., and that W. was to teach the boy and employ him in and about his trade. The court was doubtful whether the contract was one of apprenticeship; but in view of the more recent English cases, this doubt may safely be pronounced unwarrantable.

⁴ *Altemus v. Ely* (1832) 3 Rawle, 305.

¹ "Without an act of Parliament, no man may be restrained, either from working in any lawful trade, or using divers mysteries or trades." 2 Co. Litt. 53.

"In this country the doctrine of the

common law prevails. Here, as a general rule, every man may use whatever lawful trade he pleases. It is left to the community in which he resides to determine by his practice the extent of his knowledge and skill, and to extend their patronage according to their individual wants and judgment." *State ex rel. Atty. Gen. v. Jones* (1878) 16 Fla. 306, 317.

² In *Reg. v. Maddox* (1707) 2 Salk. 613, the court said: "Upon indictments on the statute of 5 Eliz., in evidence we allow following the trade for seven years to be sufficient without any binding, this being a hard law." To the same general effect was the ruling in *Reg. v. Morgan* (1712) 10 Mod. 70.

On the ground that the words of the provision were quite general, an apprenticeship served out of England was held to be sufficient to exempt from the prohibition. *Anonymous* (1682) 2 Shower, K. B. 155.

That the service of an apprenticeship seven years beyond the sea, though the defendant was not bound, entitled him

It may also be mentioned that the whole of the control which was formerly exercised over trade by corporations was taken away by the municipal corporations act, 5 & 6 Will. IV. chap. 76, § 14, except with respect to the city of London, which was not included in that act.³

In some of the American states special laws have been enacted, by which an apprenticeship of a specified duration has been declared to be a necessary qualification for the exercise of certain occupations which require not only technical skill and knowledge, but also acquaintance with the actual conditions under which the work in question will have to be performed. Of this description are the enactments which relate to pilots. With reference to the Florida statute it has been held, on the authority of the decisions in which the act of 5 Eliz. was construed, that actual service, though without a formal binding, constitutes a sufficient compliance with a provision which requires "a regular apprenticeship of two years."⁴

to follow his trade, was ruled (at nisi prius) by Holt, Ch. J., in *Frith v. Torin* (1699) 1 Ld. Raym. 738, s. c. sub nom. *Rex v. Fox* (1699) 1 Salk. 67.

That a man might exercise as many trades as he had worked at or served to for seven years, was held in *French v. Adams* (1763) 2 Wils. 168.

Many other decisions with reference to this statute and others of a similar character are collected in Bacon's *Abr. Master & Servant* (D). But they are of no interest at the present day.

On the ground that, in order to satisfy the statutory requirement, there must have been an actual "service," it was held in *Reg. v. Taylor* (1745)—an unreported case cited in Bull. N. P. 193,—that a partner of a person qualified was subject to the penalty of the act, unless he had served him also.

³ Austin, Apprentices, p. 3.

⁴ *State ex rel. Atty. Gen. v. Jones* (1878) 16 Fla. 306 (quo warranto against defendant, directing him to show by what authority he was exercising his office): After referring to the English cases cited in note 1, *supra*, the court proceeded thus: "An apprenticeship is required as a qualification only in cases where the employment is connected with quasi public functions or public franchises, as in the present case. This statute does not in express terms require a binding. The purpose of the law is to secure knowledge, capacity,

and skill in pilots. This is accomplished by regular, faithful, and active service under a competent pilot, as well without a binding as with it. In view of the fact that our legislation on the subject of apprenticeship is restricted to minors [a reference to the statute regarding the binding out of poor children], a construction of this statute which would strictly confine the apprenticeship there required as a qualification to such apprenticeships as are provided for by statute would disqualify an adult from acquiring the position of a pilot. It would likewise have the effect of restricting the common-law rights of the parent, with the assent of the child, to apprentice the child to a pilot without the intervention of a judicial officer, for this is the only authority which, under the statute, has power to bind out. We cannot hold that the legislature required such an apprenticeship as this. When we leave the statute, we must look to the accepted definition of the word 'apprentice' at the common law, under the decisions controlling the subject. We find that under these decisions, in a matter affecting materially the whole trade and commerce of England, the courts have held that a service in the trade or a following of the occupation for the time required is an apprenticeship, and that a binding is not necessary." Among the authorities cited was Buller's *Nisi Prius*, p. 193, where it was

b. In respect of membership of a company.—In a case involving the question whether an apprentice had served his master “duly and truly” within the meaning of a statute entitling him to become a member of the defendant company, provided he had done so, a fulfilment of the necessary condition was held to have been established by evidence which showed that he had been employed under other persons with the consent of his master.⁵

2063. Service under apprenticeship as a means of gaining a settlement under the poor laws. Contents of statutes.—*a. English provisions.*—The enactments to which it is necessary to refer in this connection are the following:

14 Car. II., chap. 12, § 1. The purport of this provision was that, at any time within forty days after poor persons came to settle in any tenement under the yearly value of £10, a justice might, if they were likely to become chargeable to the parish, remove them to the parish where they had been last legally settled as “householder, sojourner, apprentice, or servant, for the space of forty days at the least,” unless they gave security for the discharge of the parish.¹

3 Wm. & Mary, chap. 11, § 8. It was enacted that “if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement.”²

By the amending statute, 31 Geo. II. chap. 11, § 1, it was provided that an apprentice who had served under “any deed, writing, or contract, not indented, being first legally stamped,” should acquire a settlement.

By 4 and 5 Wm. IV. chap. 76, it was provided that no settlement could thenceforth be acquired by being apprenticed in the sea-service.

b. American provisions.—There is a considerable difference in the terms of the clauses in the American poor laws. The purport of some typical provisions is stated below.

Indiana.—Burns’s Anno. Stat. 1908, § 9745 (8146), subz. 6. Every minor, upon being bound in good faith, immediately gains thereby a settlement where his master has a settlement.

Maine.—Rev. Stat. 1903, chap. 27, § 1 (V). “A minor who serves as an apprentice in a town for four years, and within one year thereafter sets up his trade therein, being then of age, has a settlement therein.

laid down that, for the purposes of the statute of 5 Eliz., “if the defendant can in any manner prove the following the trade for seven years, it will be sufficient without any binding.”

⁵ *Richardson v. Colne Fishery Co.* (1897) 77 L. T. N. S. 501.

¹ By 4 and 5 Wm. IV. chap. 76. § 64, it was provided that no settlement

should thereafter be acquired by hiring and service.

² On the ground that this statute extends only to the poor in parishes, it was held in one case that no settlement had been gained by a boy who was apprenticed and served and resided in a extra-parochial place. *Clerkenwell v. Bridewell* (1699) 1 Ld. Raym. 549, 2 Salk. 486.

Massachusetts.—Rev. Laws 1902, chap. 155, § 1 (9). A minor who serves an apprenticeship to a lawful trade for four years in any place, and actually sets up such trade therein within one year after the expiration of the term, being then twenty years of age, and continues there to carry on the same for five years, other than as a hired journeyman, shall thereby acquire a settlement in that place.

Michigan.—Comp. Laws, 1897, § 4534. A settlement is gained by serving as apprentices for one year under an indenture.

Gen. Stat. 1895, "Poor," § 1. A settlement is gained by serving an apprenticeship under an indenture for a year. (Stat. of 1774.)

New York.—Consol. Laws 1907, p. 3947. An emancipated minor may gain a settlement by being bound as an apprentice and serving one year (Rev. Stat. chap. 20, § 29).³

Rhode Island.—Gen. Laws 1896, chap. 78, § 1, same provision as in Massachusetts.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 1500 (6). Apprentice, if binding is in good faith, gains settlement where his master has a settlement.

2064. Same subject. Construction and effect of statutes.—A comparison between the English and American enactments, and between the enactments in the several American states, discloses various points of difference with regard to the obligatory period of service, and in other respects. Irrespective of these divergences, however, it is apparent from the cases that, in order to establish the right of a pauper to claim a settlement by serving as an apprentice, the following facts must be proved:

(1) That the contract in question was one of apprenticeship. The *ratio decidendi* in one case was that the relationship produced by the given contract was that of master and scholar, not that of master and apprentice.¹

(2) That, if a contract of apprenticeship was entered into, it was either valid for all purposes, or valid as regards all parties except the master and the apprentice themselves. The decisions bearing upon the distinction between absolute and qualified validity are discussed in subtitle F, *post*.

(3) That the pauper was inhabiting, or residing in, the locality in question during the period with reference to which his right to a

³ Under 1 N. Y. Rev. Laws, 279, a settlement was gained by service of not less than two years. See *Niskayuna v. Albany* (1824) 2 Cow. 537.

¹ In *Jerrison's Case* (1697) Comb. 445, 12 Mod. 132, 2 Salk. 479, it was held that no settlement was gained by a footboy who had been placed by his master with a barber to learn how to shave and make periwigs. The theory

of the court was that the boy was merely boarding with the barber for the purpose of instruction, and was under no obligation to render services for any specific period. The circumstances and parties in this case were the same as in one reported *sub nomine*. *Rex v. Walton* (1698) Carth. 400, 2 Bott, Poor Law, 182.

settlement is claimed.² For the purposes of this requirement, an apprentice is deemed to be resident in the place where he lodges, and not where he serves.³ It has also been laid down that an apprentice may gain a settlement in a parish where his master has none.⁴

(4) That his inhabitancy or residence was in the character of an apprentice,—that is to say, in some way or other in furtherance of the object of his apprenticeship.⁵

(5) That his inhabitancy or residence in the character of an ap-

² The fact that the word "service" is not mentioned in the English statute, but "binding" and "inhabitation," was adverted to in *Rex v. Linkinghorne* (1832) 3 Barn. & Ad. 413, 1 L. J. Mag. Cas. N. S. 42; *Rex v. Sandhurst* (1837) 6 Ad. & El. 130, 1 Nev. & P. 296, 6 L. J. Mag. Cas. N. S. 57, and other cases.

That a colored apprentice, within the purview of the act for the gradual abolition of slavery, had a settlement in the township where he was born, was held in *Franklin v. Bridgewater* (1846) 20 N. J. L. 563.

³ *St. Mary's Colechurch and Radcliffe* (1717) 1 Strange, 60, 2 Bott, Poor Law, 386 (holding that a boy apprenticed to a seafaring man residing in a certain parish gained no settlement in that parish by serving for the statutory period on shipboard); *St. Olave's Southwark v. Allhallows*, cited in Viner's *Abr. Apprentices*, K, 21; *Rex v. St. John the Baptist* (1737) 8 Mod. 285, 1 Strange, 594, 2 Bott, Poor Law, 522.

See also cases cited in note 5, *infra*, in which a settlement was held to have been gained by apprentices who had temporarily suspended their ordinary work, and, while sick in another parish, had continued to perform services for their masters.

The cases cited *supra*, overruled *St. James v. Devizes* (1724), cited in Viner's *Abr. Apprentices*; K, 19, where the settlement of an apprentice was held to be where he served, and not where he lodged.

⁴ *St. Bride's and St. Saviour's* (1707) 2 Salk. 533; Viner's *Abr. Apprentices*, K, 11, citing a M. S. case, and *Rex v. Bury-Pomroi* (1714) 10 Mod. 279; *Rex v. Bath Easton* (1774) Burr. Sett. Cas. 774 (settlement held to have been gained by an apprentice who performed services for his master during the time when the latter was staying at a watering place for the benefit of his health), over-

ruling *Rex v. Alton* (1757) Burr. Sett. Cas. 418. The doctrine of the English courts was applied in *South Brunswick v. Independence* (1835) 14 N. J. L. 549.

⁵ *Rex v. Charles* (1772) Burr. Sett. Cas. 706; *Rex v. Linkinghorne* (1832) 3 Barn. & Ad. 413, 1 L. J. Mag. Cas. N. S. 42.

In *Rex v. Smarden* (1811) 13 East, 452, 2 Bott, Poor Law, 533, where an apprentice had, with the assent of his original master, transferred his services to another master, it was held that there was no lodging under the original indenture, where he had casually lodged for one night in the same parish as his first master, without any intention to resume service under him.

In *Rex v. Ilkestone* (1825) 6 Dowl. & R. 64, 4 Barn. & C. 64, it was held that inhabitancy could not be predicated in respect to periods of occasional and temporary absence from the master's parish, where they were granted as an indulgence, and were unconnected with the contract.

In *Rex v. Chelmsford* (1820) 3 Barn. & Ald. 411, it was held that a settlement had been gained by an apprentice who had resided in the same parish as his master, and performed services for him, although both he and the master were on the permanent staff of the militia, and consequently he might not have been serving his master for a portion of the statutory period.

In *Rex v. St. Mary Bredin* (1819) 2 Barn. & Ald. 382, there was held to have been such a suspension of the apprenticeship as to prevent the acquisition of a settlement, where the master of a sea-apprentice had given him the alternative of going back to school during a period when there was no occasion for his services, or of serving under another master.

An apprentice does not gain a settlement by residence in a parish different

prentice continued for the terms specified by the statute in question.⁶ Under this head it has been held that two or more detached periods of inhabitancy may be joined together for the purpose of making up the total obligatory term;⁷ that the settlement of an apprentice is in the last place in which there was an inhabitancy by him for that term with reference to the objects of the contract;⁸ and that, if there was an inhabitancy by him for that term in more than one place, his settlement is in that place where he lodged on the last night of his term, provided he did so in furtherance of his contract, and not for recreation, or by the indulgence of his master.⁹

2065. Apprenticeship as a means of acquiring a franchise.—In England the privileges of a “freeman” in a municipal corporation may

from that of his master, merely for the purpose of being treated for an illness, even though the residence is with the master's consent (*Rex v. Barmby-in-the Marsh* (1806) 7 East, 381, 3 Smith, 335); unless he continues to perform services for the master during the period of residence (*Rex v. Stratford-upon-Avon* (1809) 11 East, 176; *Rex v. Bunbury* (1833) 5 Barn. & Ad. 176, 2 L. J. Mag. Cas. N. S. 66, 2 Nev. & M. 105; *Reg. v. Somerby* (1838) 9 Ad. & El. 310, 1 Perry & D. 180); or, without performing any services, continues to receive his maintenance from his master (*Rex v. Banbury* (1832) 3 Barn. & Ad. 706, 2 L. J. Mag. Cas. N. S. 64).

No settlement is gained by the residence of an apprentice with his parents in a parish different from that of his master, upon the understanding that he is to be maintained by them, and his services dispensed with. *Rex v. Brotton* (1820) 4 Barn. & Ald. 84.

In *Upper Alloways Creek v. Elsingborough* (1795) 1 N. J. L. 389, where it was held that an apprentice who had been deserted by his master, and thus became chargeable to the town, might be removed to his last previous place of settlement, the decision proceeded upon the ground that his residence after the desertion was not a continuation of the service under the indenture.

⁶In *Jefferson Twp. v. Pequannock* (1832) 13 N. J. L. 187, it was held that no settlement had been gained by an apprentice who, during the year which was alleged to have qualified him for a settlement, had frequently absented himself and roved about the country.

⁷*Rex v. de Cirencester* (1724) 1 Strange, 579, 2 Bott, Poor Law, 386; *Rex v. Sandford* (1786) 1 T. R. 281; *Rex v. Brighthelmston* (1793) 5 T. R. 188, 2 Bott, Poor Law, 393; *Rex v. Aldstone* (1831) 2 Barn. & Ad. 207. Littledale, J., said: “There is a distinction between contracts for service and for apprenticeship. In the former case there must be a year's service under a yearly hiring to confer a settlement; the forty days' residence must therefore be within the year. But the service under a contract of apprenticeship has no reference to the term of a year.”

For cases in which it was held that, for the purpose of ascertaining the settlement of servants, two or more periods might be joined together, subject to the limitations thus explained, see *Rex v. Lowess* (1776) Burr. Sett. Cas. 825; *Rex v. Hulland* (1781) 2 Dougl. K. B. 657, Cald. 118.

⁸*Rex v. Charles* (1772) Burr. Sett. Cas. 706, 2 Bott, Poor Law, 413; *Rex v. Ribchester* (1814) 2 Maule & S. 135.

For cases in which this rule was affirmed with respect to servants, see *Rex v. Lowess* (1776) Burr. Sett. Cas. 825; *Rex v. Hulland* (1781) 2 Dougl. K. B. 657, Cald. 118.

⁹*Reg. v. Barton-upon-Irwell* (1863) 32 L. J. Mag. Cas. N. S. 102, 3 Best & S. 604, 9 Jur. N. S. 795, 7 L. T. N. S. 853; *Reg. v. Elswick Twp.* (1860) 7 Jur. N. S. 45, 30 L. J. Mag. Cas. N. S. 66, 3 L. T. N. S. 321.

be acquired by service under an apprenticeship to a person who is himself a freeman.¹

For the purposes of a general treatise it will be sufficient to summarize in a note the effect of the cases which relate to this subject.²

2066. Manumission of slaves by apprenticeship.—In a case decided before the abolition of slavery in the United States, the rule laid down with regard to a person of color who had been bound by the overseers of the poor, and had performed the stipulated services, was that, as the master had enjoyed all his rights under the indenture, he was estopped from denying the freedom of the apprentice.¹

2067. Legal domicil or residence of an apprentice.—It has been laid down broadly that the residence of the master is the residence of his

¹By 5 Geo. III. chap. 46, § 18, it was provided that the proper officer of every city where any apprentice obtains his freedom by servitude should enroll the name of the apprentice and of his master, and other particulars. Bacon, Abr. Title Master & Servant, p. 335.

In *Rex ex rel. Coates v. Coopers' Co.* (1798) 7 T. R. 543, a by-law limiting the number of apprentices to be taken by a member of a company was held to be void as being in restraint of trade.

The municipal corporations act of 1835 and 1882 also provides for the acquisition of a franchise by servitude.

²In *Doggerell v. Pokes* (1595) F. Moore, 411, an action of covenant upon an indenture, the defendant pleaded that the common council of London, the city in which the contract was made, had declared that, if any freeman took the son of an alien as apprentice, the covenants and bonds should be void. Adjudged no plea, for the council could not make the covenants and bonds void, but might fine and punish the master.

In *Rex v. Tappenden* (1802) 3 East, 186, a by-law was held bad on the ground that, in respect of the persons eligible to be taken as apprentices, it attempted to add a new qualification beyond what the original constitution had required.

In *Nevesby v. Webster* (1755) 1 Ld. Kenyon, 243, a by-law directing that a sum of money should be paid for the use of a corporation, upon the enrolling of indentures of apprenticeship to one of its members, was held bad as contravening a statute which limited the amount that could be taken for the entry of indentures.

Mandamus lies to compel a city to enroll the indentures of an apprentice. (*Rex ex rel. Coates v. Coopers' Co.* (1798) 7 T. R. 543; *Rex v. Tappenden* (1802) 3 East, 186); or to admit him to his freedom after having duly served his time (*Rex v. Selbye* (1682) 2 Shower, K. B. 154).

The fact of his having broken an express covenant does not deprive him of his right to be admitted. *Townsend's Case* (1663) 1 Lev. 91, 1 Sid. 107. This case involved a covenant not to marry. But the rule declared is presumably one of general application.

For the purpose of settling the validity of a claim for admission, the term of service is regarded as beginning from the date of the indenture. *Re Terrell* (1846) Bl. D. & O. (Jr.) 16.

The question whether the service has continued during the whole of the obligatory period is determined as one of fact. *Rex v. Inman* (1820) 4 Barn. & Ald. 55 (quo warranto for exercising franchise of free burgess). There an apprentice bound for seven years to A served him in his house between five and six years, and afterwards, for the remainder of the term, resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master also, during this time, occasionally gave him work, for which he was not paid. Held, that this was not a continuance of the service for seven years under the indenture.

¹*Moore v. Ann* (1848) 9 B. Mon. 36.

apprentice for every purpose known to the law.¹ This statement requires some qualification, as the residence of an apprentice, for the purpose of acquiring a settlement, may be different from that of his master.² So far as regards any case in which the parties are viewed as having the same residence, the apprentice cannot, during his minority, change his residence by leaving his master and going to another state. But upon arriving at full age he may elect to change it; and whether in a given instance he did or did not make such an election depends upon his actual intention.³

2068. Proof of contract.—*a. By secondary evidence in settlement cases.*—In cases involving the question whether a settlement had been gained by service under an apprenticeship, the rule has frequently been applied, that parol evidence of the execution and contents of an indenture is admissible, if satisfactory proof of its loss or destruction is also given.¹ The fact of its execution may be established by direct proof, or in some instances, presumed from circumstances.²

¹ *Maddox v. State* (1869) 32 Ind. 111.

² See cases cited in § 2064, notes 3, 4, *ante*.

³ In *Maddox v. State* (note 1, *supra*), where the defendant was charged with having illegally voted, not having been a resident of Indiana for six months preceding the election, it appeared that he had been bound, when nine years of age, to a resident of Indiana, with whom he made his home till he was nineteen years old. He then left, to go to another county, where he fell in with a man going to Iowa, to whom he engaged himself, in consideration of having his expenses paid to that state. He wrote to his master, saying he was going to see the country, and intended to return as soon as he should accomplish that object. He remained in Iowa about three years, working at different places, and then returned to Indiana to the residence of his late master, to whom he had written from Iowa, soon after coming of age, that as soon as he could get money enough to pay his expenses he would return home. After his return to Indiana, he said that he did not expect to remain there. The conclusion of the court was thus stated: "If it was the intention of the appellant to return to this state, and he was only prevented from doing so by the lack of means to pay his expenses, and he

did in fact return in accordance with his intention, then he never lost his residence in this state, although it was not his intention to remain here permanently. A mere intention, unaccompanied by a removal, will not lose a man his residence."

¹ *Rex v. Castleton* (1795) 6 T. R. 236, and the cases cited in the following notes.

In *Reg. v. Braintree* (1858) 1 El. & El. 51, 4 Jur. N. S. 1238, 28 L. J. Mag. Cas. N. S. 1, 7 Week. Rep. 48, appellants against an order of removal, set up a settlement of a pauper by apprenticeship under an indenture which had been lost. To prove proper search they proposed to ask certain witnesses what inquiries they had made of, and what answers they had received from, parties who were likely to have the document in their possession; but the parties themselves were not called. The sessions refused to allow the questions to be put. Held, that the evidence was admissible upon the preliminary inquiry whether proper search had been made, though it might not be admissible in the main issue before the court.

For a general review of the authorities with regard to the sufficiency of the proof of the loss of documents, see Wigmore, Ev. §§ 1193 *et seq.*

² In *Rex v. St. Mary-le-bone* (1824) 4 Dowl. & R. 475, there was evidence

The testimony relied upon for the purpose of establishing its loss or destruction must be sufficient "to show that a bona fide and diligent search was made for the instrument where it was likely to be found."³

that a fire had, twenty years previously, destroyed everything belonging to the pauper's father; that the pauper's father and mother were both dead and also the master and his wife; that the master had left no relatives and none were to be found; that a fellow apprentice of the pauper had seen an indenture in his master's hands, and supposed it to be the pauper's indenture; that the pauper's wife had been relieved in the parish where he was supposed to have served. Bayley, J., said: "The pauper's husband lived with his master in the character of an apprentice, doing the same work and receiving the same treatment as his other apprentices did, and, surely after an interval of twenty years, it is not too much to presume that he really was an apprentice."

See also *Rex v. St. Michael's Bath* (1773) 2 Bott, Poor Law, 450 (where it was laid down that the presumption from a person's serving four years was that there was an indenture); *Reg. v. St. Anne Westminster* (1847) 8 Q. B. 561, 16 L. J. Mag. Cas. N. S. 33, 2 New Sess. Cas. 517 (testimony of witness that he saw the indenture executed fifteen years previously, held, sufficient evidence of a binding).

For a general review of the authorities as to presumptions regarding the execution of documents, see Wigmore, Ev. § 1196.

³ Bayley, J., in *Rex v. Denio* (1827) 7 Barn. & C. 620, 1 Mann. & R. 294. There it was proved by a pauper that he had been bound apprentice, twenty-three years previously by the overseers of a parish, to A for seven years; that the indenture was signed and sealed, and that he served the seven years, and that A had the indenture; that, when the apprenticeship expired the pauper asked A for the indenture, who said the overseers had it. Held, that the declarations of A, who might have been called as a witness, were not admissible, and that parol evidence of the contents was not admissible, the indenture not having been sufficiently accounted for.

In *Reg. v. Fordinbridge* (1858) El. Bl. & El. 678, 4 Jur. N. S. 951, 27 L. J. Mag. Cas. N. S. 290, 6 Week. Rep. 649, evidence was given that proper

search had been made for an indenture, but in vain; and a person deposed that more than sixty years back he worked with the same master as the pauper, and always believed him to be apprenticed to that master; that the pauper was instructed there by a journeyman, and lodged and boarded in the house with two others, who were apprentices. Held, evidence from which a settlement by apprenticeship under an indenture might be presumed.

For other cases turning upon the rule stated in the text, see *Rex v. East Farleigh* (1825) 6 Dowl. & R. 147, 3 L. J. K. B. 172 (secondary evidence of the contents of an indenture thirty-seven years old, and supposed to be lost, held admissible, reasonable diligence having been used to obtain the primary evidence); *Rex v. Morton* (1815) 4 Maule & S. 49 (in a case where due inquiry had been made, the declarations of a deceased pauper whose master was also dead, were held to be admissible to show that the indenture had been burnt by him, and so let in parol evidence of its contents); *Rex v. Stoke Golding* (1817) 1 Barn. & Ald. 173, 18 Revised Rep. 452 (indenture as established by parol evidence, held to have been wrongly admitted, as "all the proper means of procuring the primary evidence had not been exhausted"); *Reg. v. Hinckley* (1863) 3 Best & S. 885, 32 L. J. Mag. Cas. N. S. 158, 8 L. T. N. S. 270, 11 Week. Rep. 663, 9 Jur. N. S. 1054 (ineffectual search among papers of pauper held to warrant the admission of secondary evidence, although no search had been made among the papers of his master); *Rex v. St. Helens, Abington* (1750) Burr. Sett. Cas. 735; *Rex v. East Knoyle* (1741) Burr. Sett. Cas. 151; *Kingwood v. Bethlehem* (1832) 13 N. J. L. 211.

The general rule applicable to all cases of lost instruments has been thus stated in a standard treatise: "If an instrument be lost or destroyed, a party who seeks to give secondary evidence of its contents must, to begin with, give some evidence that the original once existed, and then either prove positively, or at least presumptively, that such instrument has been destroyed, or he

b. In a foreign state.—In an American case where the contract had been, in pursuance of a statutory provision, duly recorded in the state where it was made, a properly authenticated copy of the record was offered for the purpose of proving it in an action brought in another state. But the court was of opinion that, as the record in question was not a judicial one, and consequently did not come within the provisions of the acts of Congress, the indenture could not be proved by the copy alone.⁴

2069. Parol evidence, how far admissible to affect the liability of parties to indentures.—Some cases turning upon the applicability of certain elementary rules of the law of evidence are cited in the subjoined note.¹

2070. Clerical errors, contract not avoided by.—An indenture which is clearly intended to bind a certain person named will be treated as valid, although his Christian name is stated differently in two places, and the spelling and grammar of the instrument are very bad. It is competent to show by parol evidence who the person actually was by whom it was executed.¹

2071. Homologation of invalid indentures in civil-law jurisdictions.—Under the Scotch doctrine respecting homologation, *i. e.*, “consent or approbation inferred from circumstances supplying the want of legal evidence of consent, and establishing as a recognized engagement a

must show that it has been lost by proof that a search has been unsuccessfully made for it in the place or places where it was most likely to be found.” Taylor, *Ev.* 10th ed. § 429.

In *Rex v. Castleton* (1795) 6 T. R. 236, it was laid down that the indenture had not been properly accounted for, where it had been traced to the hands of a living person, and he had not been called as a witness.

In *Rex v. Rawden* (1834) 2 Ad. & El. 156, 4 Nev. & M. 97, it was held that the execution of the contract could not, without further inquiry, be presumed, where the pauper's wife had testified that during his last illness he had said that at the end of his apprenticeship his master had given him his indentures, and that he had worn them out in his pocket.

⁴ *Moore v. Ann* (1848) 9 B. Mon. 36.

¹ In *Misserden v. Painswick* (1692) cited in Viner's *Abr. Apprentices*, K, 2, a settlement case, it was held that a parol agreement was not admissible to

vary the terms of the indenture, as bearing upon the question of the apprentice's residence.

In *Harper v. Gilbert* (1850) 5 Cush. 417, where an instrument purporting to be an indenture of apprenticeship was executed, it was held that parol evidence was not admissible to show that the minor and his father both declined to sign an indenture, and were told by the other party that the instrument which they were about to sign was not an indenture.

In *McNulty v. Prentice* (1857) 25 Barb. 207, parol evidence was held to be competent for the purpose of reconciling two contradictory statements by showing that one of them was caused by a clerical error; the term, as specified in the master's counterpart, being several months longer than that specified in the apprentice's counterpart.

¹ *Reg. v. Wooldale* (1844) 6 Q. B. 549, 1 New Sess. Cas. 377, 14 L. J. Mag. Cas. N. S. 13, 9 Jur. 83 (settlement case).

contract defectively entered into,"¹ an indenture which has not been executed with due regard to legal solemnities may be validated by *rei interventus*, that is, by the apprentice's entering upon the service and continuing therein for a portion of the term.²

2072. Jurisdiction of equity to compel execution of indenture where apprentice is taken on trial.—In a case where a boy was taken on trial and continued working for several months, his bill praying that his master might be ordered to execute the indenture and take him into his employment was dismissed without costs, for the reason that the evidence showed that the boy's conduct had been objectionable in several respects.¹ As the authorities are overwhelmingly in favor of the doctrine that it is not advisable for courts of equity to exercise their coercive jurisdiction for the purpose of forcing the parties to a contract of service to continue their relationship (see chap. XII. *ante*), it would seem that the plaintiff was, on this ground alone, not entitled to the relief sought. But this aspect of the matter was not adverted to by the court.

2073. Conflict of laws.—*a. Lex loci contractus.*—The general rule that the validity of a contract made in one state, but to be performed in another, must be determined with reference to the laws of the latter state, is applicable to a contract of apprenticeship.¹

b. Enforceability of contracts made in a foreign state, generally.—It has been laid down that an indenture of apprenticeship, with covenants valid in the state where executed, should be enforced in another state, if not *contra bonos mores*, or against the policy of its laws.² In the case cited, the court proceeded upon the ground that the personal status of each individual is governed by the law of actual domicile. It was suggested that a question might be raised with regard to the power of the master to hold the apprentice to service. The question thus touched upon had previously been determined in the negative by one of the Federal courts.³ The point would therefore seem to be still open for discussion. It can scarcely be doubted that, where the removal of the apprentice is shown to have been made without his consent, he cannot justifiably be com-

¹ 1 Bell, Com. 144.

² *Rymer v. M'Intyre* (1781) Morison's Dict. 5726; *Neil v. Casten* (1800) Hume, 20 (apprentice who had homologated an informal indenture by serving a year was held incapable of entering into another service).

¹ *Brown v. Banks* (1861) 3 Giff. 190, 7 Jur. N. S. 1273, 4 L. T. N. S. 698.

¹ *Dyer v. Hunt* (1831) 5 N. H. 401.

² *Petrie v. Voorhees* (1867) 18 N. J. Eq. 285.

³ *United States v. Scholfeld* (1803) 1 Cranch, C. C. 130, 255, Fed. Cas. Nos. 16,230, 16,231, holding that a master could not bring his apprentice from Maryland, and hold him in Alexandria.

pelled to fulfil his contract. Under such circumstances a breach of duty on the master's part is manifestly predicable. See §§ 2142, 2143, *post*. But where the apprentice has consented to the change of domicil, and the formalities, if any, prescribed by the *lex loci contractus*, for the purpose of ensuring that he shall not be removed without his consent, have been complied with, there is apparently no satisfactory reason for excluding the master from the benefit of such remedies as would have been available if the apprentice had been originally bound in the foreign state.

It has been held that, irrespective of whether a contract made by a minor's parent in a foreign state was executed in such a manner as to be binding upon the minor himself, it will, in the absence of proof that the master is unfit to retain the custody of the child, operate so as to preclude the parent from reclaiming the minor.⁴

c. Rule applicable to poor apprentices.—Having regard to the grounds upon which the apprenticing of poor children is authorized, and the peculiar incidents of the relationship contemplated by statutes of the type discussed in subtitle D, *post*, the preferable view would seem to be that an indenture executed with reference to such a statute should be treated as having no force in a foreign jurisdiction.⁵

In one case we find it laid down that an apprentice bound in Maryland, and brought into the District of Columbia, may be ordered to be bound again, by two justices of the peace.^{5a} But the precise scope of the decision, and the grounds upon which it rested, cannot be determined from the brief and unsatisfactory report. However this may be, there can be but little doubt that an indenture which purports to bind a minor to a citizen of another state should be deemed invalid in that state, even though the provision under which action was taken by the officials in question empowered them to effect such a binding.⁶

⁴ *Curtis v. Curtis* (1855) 5 Gray, 535.

⁵ The language used by the court in the case cited in the following note renders it reasonably certain that they would have taken this position if the point had been directly involved in the case.

^{5a} *Gusty v. Diggs* (1820) 2 Cranch, C. C. 210, Fed. Cas. No. 5,878.

⁶ In *Himes v. Howes* (1847) 13 Met. 80, it was held that an indenture executed in Rhode Island did not constitute a bar to an action by the child in Massachusetts to recover of the person to whom he was bound payment for

labor done during the time for which he was bound. The court said: "The very nature of the trust, the source from which the authority to bind out is derived, the duties and obligations resulting from such contract, and the proper supervision of it by the appropriate tribunals, all tend to one view of this question, and clearly show it to be a local indenture, and one that must have its force and effect, as a statutory binding out to service, only within the territorial limits of Rhode Island. It is said, and truly said, that the statute of Rhode Island authorizes the over-

B. VALIDITY OF CONTRACT APART FROM STATUTES RELATIVE TO APPRENTICES.

2074. Binding of adults by themselves.—That any person who has reached his majority, and is otherwise *sui juris*, has a right to enter into a contract of apprenticeship, and is bound by any such contract to which he is a party, is clear upon general principles.¹

2075. Binding of minors by parents and others, how far valid at common law.—*a. Binding by father.*—In some cases we find unqualified statements to the effect that a father is, at common law, vested with the right to bind out a minor child as an apprentice.¹ But there is

seers of the poor to bind out to service the minor children of paupers, resident in Rhode Island, to persons resident in Massachusetts. But it is for Massachusetts, and not for Rhode Island, to declare whether such a statute shall have any force and effect in Massachusetts, beyond that of a local provision to be executed within the territorial limits of Rhode Island. It is difficult to perceive how the right of supervision, so plainly required by the statute of Rhode Island, can be exercised, in this commonwealth, over our citizens resident here. Great practical difficulties would arise in enforcing the provisions of this statute in Massachusetts. But aside from this, considerations of higher importance press upon us, when we are called upon to decide whether this statute can have validity here, authorizing, as it does, a contract to be made, by the overseers of the poor of a town in Rhode Island, with a citizen of Massachusetts, having the avowed purpose of transferring the residence of a minor son of a pauper from Rhode Island to Massachusetts. There are objections to giving effect to such an indenture, that seem to us insuperable. To say nothing of the rights of the minor, which would be violated by a forced removal from the state in which he had his domicile to another state, and, as the case might be, to a state at the other extremity of the Union,—for if it be competent for the legislature of Rhode Island to authorize the overseers of the poor in that state to bind out a minor, an inhabitant of that state, to a master resident in Massachusetts, with authority compulsorily to remove him to Massachusetts,

it is equally within the legislative authority of Rhode Island to authorize the binding out of such minor to a resident of Arkansas,—public policy and the security of our own commonwealth would lead us to pause and gravely examine the subject before we gave legal effect here to a course of legislation in another state, which might flood this commonwealth with the pauper children of a sister state. As it seems to us, statutes authorizing overseers of the poor to bind out minors, by indenture, who are the children of paupers, must, from their nature, be of a local character and have effect as police regulations, to be wholly administered within the limits of the state enacting them; that to render such binding to service a valid contract, the parties must all be residents within the state; or at least that the indenture must be one for services to be performed within the state in which it is made.”

¹For cases in which the right was explicitly recognized, see *Lanner v. Palace Theatre* (1893) 9 Times L. R. 165, per Chitty, J.

The repealed English act of 5 Eliz. chap. 4, related only to infants, and its restrictions were in nowise applicable to adults. *Smedley v. Gooden* (1815) 3 Maule & S. 189.

¹*Day v. Everett* (1810) 7 Mass. 145; *Re M'Dowle* (1811) 8 Johns. 328; *People ex rel. Barbour v. Gates* (1870) 45 N. Y. 40, 45; *State ex rel. Jewett v. Barrett* (1863) 45 N. H. 15; *State v. Taylor* (1808) 3 N. J. L. 467, 352, relying upon the passage in Comyns's Digest, which is cited in the following note.

a decided preponderance of authority in favor of the view that, while the father possesses such a right, the binding does not subject the child to any legal obligation unless he formally assents to it by executing the indenture.² A contract to which he does not assent is, however, binding upon the master in such a sense that, after the stipulated services have been performed, an action may be maintained against him for a breach of any of his covenants.³

b. Binding by mother.—It has been laid down that at common law a mother, even after her husband's death, has no power to bind out a minor child.⁴ This incapacity is referred to the notion that she is not its natural guardian.⁵ But it is difficult to see why the power of the mother in respect of the apprenticing of her children should not be treated as falling within the scope of the general rule of the common law, that, in the absence of a testamentary disposition by the father, she is entitled to the guardianship of their persons, and, in some cases, of the estates of her children, until they arrive at the age of fourteen, when they are deemed to be of sufficient age to choose

² So laid down in *Rex v. Arnesby* (1820) 3 Barn. & Ald. 584 (no settlement gained). There the statement to the contrary effect in 4 Comyns's Dig. sub. title *Justices of the Peace*, B, 55 (p. 579), was disapproved, and it was held that an assent as evidence merely by the child's serving under the deed was not sufficient, because an infant could not be bound by an act *in pais*. Best, J., explicitly declared that "there is no sufficient authority for saying that a father, at the common law, can bind his infant son apprentice without his assent, testified by the execution of the indenture."

Where the master and the father of a boy agreed under seal that the master should teach the son the art and mystery of weaving for five years, and find utensils, and the son should receive half his earnings, and the master the other half, under which the boy served out the time as an apprentice,—held that this agreement between the father and master (to which the son was no party), not binding the son, or the father for him, to any service for the master, but the son's service in fact being merely voluntary, was no apprenticeship in point of law. *Rex v. Cromford* (1806) 8 East, 25 (no settlement gained).

Other cases in which the necessity of the minor's assent is affirmed or recog-

nized are *St. Nicholas, Rochester v. St. Botolph, Bishopsgate* (1862) 31 L. J. Mag. Cas. N. S. 258, 12 C. B. N. S. 645, 9 Jur. N. S. 101, 6 L. T. N. S. 495 (no settlement gained); *State v. Taylor* (1808) 3 N. J. L. 467 (in dissenting opinion); *Musgrove v. Korne-gay* (1859) 52 N. C. (7 Jones, L.) 71; *Springfield v. Heiskell* (1832) 2 Yerg. 546; *Pierce v. Massenburg* (1833) 4 Leigh, 493, 26 Am. Dec. 333; *State ex rel. Neider v. Reuff* (1887) 29 W. Va. 751, 6 Am. St. Rep. 676, 2 S. E. 801 (*arguendo*). See also 2 Kent, Com. *262.

In *United States v. Bainbridge* (1816) 1 Mason, 78, Fed. Cas. No. 14,497, Story, J., expressed a doubt regarding the power of a father to bind a child without his consent, but did not give any definite opinion upon the point.

In *Austin v. McCluney* (1850) 5 Strobb. L. 104, the court declined to express any definite opinion in regard to the power of a father under the common law.

³ *Stewart v. Rickets* (1840) 2 Humph. 151.

⁴ *Ballard v. Edmonston* (1823) 2 Cranch, C. C. 419, Fed. Cas. No. 817; *Baker v. Lauterbach* (1887) 68 Md. 64, 11 Atl. 703.

⁵ *Clark v. Goddard* (1863) 39 Ala.. 164, 84 Am. Dec. 777.

a guardian for themselves.⁶ A general right of guardianship over children must, it would seem, include as one of its incidents the subsidiary right to make any arrangements which may be reasonably necessary in order to train them for the pursuit of some remunerative occupation.

c. Binding by stranger.—Where a stranger who has no authority over a minor undertakes to bind him as an apprentice, and covenants for his faithful service, the contract is not valid at common law, as to either of the parties.⁷

2076. Binding of minors by themselves. General review of the English authorities.—[This section and the three which follow it are to be read in connection with §§ 102–104, *ante*, in which the validity of infants' contracts of service is discussed. The reason for segregating the authorities with respect to the two classes of contracts is there explained.] The English authorities which pertain to the period anterior to the enactment of 5 Eliz. chap. 4 (see § 2084, *post*), and to the period between the date of that statute and the date when conformity to its provision was declared, by 54 Geo. III. chap. 96, to be no longer a condition precedent to the validity of indenture, are conflicting with respect to the question whether an infant is competent at common law to bind himself as an apprentice.¹ That the general consensus of opinion in modern times is in favor of predicating

⁶ See 2 Kent, Com. * 206.

⁷ *Butler v. Hubbard* (1827) 5 Pick. 250.

¹ The existence of this capacity was affirmed in the Year Books, 9 Hen. V. 8, 38 Hen. VI, and 4 Hen. VII, 12. But in 21 Hen. VI, 25, it was doubted whether an infant could bind himself except by virtue of a custom, and in 21 Edw. IV. 6, it was explicitly laid down that this was the only case in which he could bind himself.

In Comyns's Dig. title *Infants*, C, 2, and title *Justice of Peace*, B, 55, it was explicitly stated that at common law an infant cannot bind himself apprentice except by special custom. One of the authorities cited is the Year Book 21 Edw. IV. 6. But no mention is made of the other decisions to the opposite effect which are noticed *supra*. Reference was also made to *Whittingham v. Hill* (1618) Cro. Jac. 494 (action for price of goods), where the court, in holding that an infant's buying of goods, although it be for the maintenance of his trade as a shopkeeper, did not bind

him, laid it down, *arguendo*, that an infant shall not be bound by his bargain for anything but for his necessity, *viz.*, diet and apparel, or necessary learning. It was also declared that his covenant to serve as an apprentice did not bind him, except by special custom.

In Bacon, Abr. V, title *Master and Servant* p. 508, we find the following statement: "It seems clearly agreed that by the common law infants . . . cannot bind themselves apprentices in such a manner as to entitle their masters to an action of covenant, or other action, for departing their service, or other breaches of their indentures." So far as it predicates the nonliability of an infant apprentice to be sued on his covenant, this statement is amply supported by the authorities adduced. (These are all mentioned in § 2177, *post*). But the concluding assertion of the learned author is not explicitly sustained by any of the cases which he cites.

In *Rex v. St. Petrox, Dartmouth* (1791) 4 T. R. 196, it was said by Lord

such competency would seem to be a reasonable, if not necessary, conclusion, if we advert to the consideration that the virtual effect of the latter of these two enactments was to restore the right of contracting upon a common-law footing, and that in none of the cases decided since this situation has existed was it contended that the infancy of the apprentices constituted in itself a sufficient reason for treating the given contracts as voidable. The only subject of discussion was whether the contracts were beneficial or detrimental to the persons bound. The theory which in this point of view these recent decisions may be said to involve by implication may be supported upon the following grounds:

(1) The notion that an infant is not competent under the common law to bind himself apparently rests, to some extent at least, upon the hypothesis that an entirely new kind of capacity was created by § 43 of 5 Eliz. chap. 4, which declared that minors bound in accordance with the statute should be bound to serve as "amply and largely" as if they were of full age. (See § 2084, *post*.) But the object of that provision is expressly specified as being the "resolution of the

Kenyon to be very properly admitted that the indenture was "not absolutely void on account of the infancy of the parties; but only voidable."

In *Ex parte Davis* (1794) 5 T. R. 715, the same judge observed: "Every indenture of an infant is voidable at his election; and in such cases the master must trust to the covenant of those who engage for the infant. But where the binding is under the authority of an act of Parliament, that takes away the power of electing to vacate the indentures."

In *Rex v. Hindringham* (1796) 6 T. R. 557, Lord Kenyon, Ch. J., expressed his desire that "it might not be taken for granted that an infant who binds himself apprentice—a contract so notoriously for his benefit—may put an end to that contract at any time during his minority." He said it would be sufficient to decide that question when it necessarily arose.

The ruling in *Rex v. St. Mary's, Reading* (1717) 1 Bott, Poor Law, 605, Foley, 154, that the consent of the justices was not a prerequisite to the validity of a binding of a poor infant by himself, as it was in a case where the binding was effected by the overseers (see §§ 2102–2104, *post*), seems to im-

ply the acceptance of the doctrine that at common law an infant can bind himself.

In one of the Canadian Provinces the power of an infant to bind himself at common law has been denied. *Dillingham v. Wilson* (1841) 6 U. C. Q. B. O. S. 85, where evidence which showed that an infant bound by common-law apprenticeship had left the service of his master with the intention of never returning to it, and had gone to reside with his father, the defendant, immediately afterwards, was held to be sufficient to establish an avoidance of the contract by the infant. It was declared that the proper remedy was an action against the father for a breach of his covenant, and not an action of enticement. The statute, 5 Eliz. chap. 4, was held not to be in force in the Province of Upper Canada. The court relied mainly on the *dicta* of Lord Kenyon, quoted *supra*. A similar doctrine was affirmed in a later case, *Reg. v. Robertson* (1854) 11 U. C. Q. B. 621, where the conviction of an apprentice for absenting himself from work was quashed on the ground that his indenture had not been executed by anyone in his behalf.

scruple and doubt" which had been raised as to the binding effect of an apprenticeship in other places than London (where by custom an infant was as fully bound as an adult). This statement would seem to show that the provision should be regarded rather as one which was declaratory of what was conceived to be the common-law doctrine, than as one which introduced a new rule. The most reasonable construction which can be attached to such phraseology is that there had been some conflict of judicial opinion which it was deemed desirable to settle by a legislative pronouncement.

(2) So far as appears, the English courts have always treated beneficial contracts of *service* as being binding upon minors. See § 102, *ante*. No suggestion has ever been made, or in fact could be made, that this rule is dependent upon a statute; and if the beneficial quality of such a contract is to be regarded, upon purely common-law principles, as sufficient to render it obligatory, it is difficult to discover any adequate reason why the same quality in a contract of apprenticeship should not, under those principles, be treated as being productive of the same result.

(3) In the broad form in which it has been stated, the doctrine that an infant is, apart from statute, incompetent to apprentice himself, implies an incapacity to do so even for the purpose of providing himself with necessaries. But there seems to be no satisfactory ground upon which it can be maintained that apprenticeships entered into for this purpose are not controlled by the general rule regarding the obligatory quality of infant's contracts for necessaries. If an infant's agreement to serve as an apprentice, in consideration of being furnished with necessaries, is within the scope of the rule, the doctrine that he cannot bind himself as an apprentice must at least be taken as being qualified to the extent which such a classification imports. If so much be granted, analogy is in favor of going one step further, and holding that the beneficial quality of an apprenticeship will render it binding upon an infant. In this point of view the doctrine under review will be narrowed down to the proposition that an infant is not bound by a contract of apprenticeship, unless it is for necessaries or beneficial. See § 2077, *post*.

2077. Same subject. Under what circumstances the binding of a minor is deemed to be valid.—*a. Binding in consideration of the furnishing of necessaries.*—To this situation the general principle is applicable, that "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other neces-

saries, whereby he may profit himself afterwards.”¹ Upon this ground it has been held that an apprentice who has bound himself by deed for the payment of a premium can be compelled to perform his stipulation. The law is “that a bond given by an infant for the price of necessaries does not prevent the obligee from recovering that price from him, if the bond is a single one and it is not relied on simply as a bond. In the same way an infant can be sued upon a covenant by deed for the price of necessaries; but the case must be treated just as if there had been no deed. The court must inquire whether the things in question were in fact supplied to the infant, and whether, according to the ordinary rule, that which was supplied was necessary. The court must do exactly what it would do if there were no deed, and what it certainly would not do in the case of an ordinary deed not given by an infant.”²

b. Binding under a beneficial contract.—In another point of view a binding is treated as obligatory or nonobligatory according as the contract appears to be on the whole beneficial or nonbeneficial to the infant. “It is a general rule of law that an infant cannot do any act to bind himself, unless it be manifestly for his own benefit. Binding himself apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract.”³ “It has been clearly held that contracts of apprenticeship and with regard to labor are not contracts, to an action on which the plea of infancy is a complete defense; and the question has always

¹ Co. Litt. 172 a, quoted by Fry, L. J., in *De Francesco v. Barnum* (1890) L. R. 45 Ch. Div. 430.

² Lord Esher, M. R., in *Walter v. Everard* [1891] 2 Q. B. (C. A.) 369. In that case the defendant, being then seventeen years old, bound himself to the plaintiff to learn the business of an auctioneer, etc., for the term of four years, and covenanted to pay at the end of the term the balance of the premium left unpaid when the contract was executed. The jury found that the deed was a provident and proper arrangement for the defendant, if he wished to learn auctioneering, etc., and that the premium was a fair and reasonable one. The defendant insisted that, as the covenant was contained in a deed which was executed at a time when he was an infant, he was not bound by the deed even after he had come of age. The

Lords Justices, however, were unanimously of the opinion that an infant can be sued upon his single bond given for necessaries supplied to him, provided it is shown that the thing for the price of which the action is brought was necessary, and the charge made for it was reasonable. The conclusion of the jury, that the education given was a necessary, was approved of.

An infant's bond *with a penalty*, even if given for necessaries, does not bind him. See Co. Litt. 172 a.

As to the rule that an infant cannot be sued on his covenants of indenture, see § 2177, *post*,

³ Abbott, Ch. J., in *Rex v. Great Wigston* (1824) 3 Barn. & C. 484.

In *Rex v. Arundel* (1816) 5 Maule & S. 257, the contract was treated as binding for the reason that it was “clearly for the infant's benefit.”

been . . . whether the contract, when carefully examined in all its terms, is for the benefit of the infant."⁴

The criterion with reference to which the effect of a stipulation invalidating the contract should be determined has been thus defined: "If there be a stipulation in the contract entered into by an infant, so much to the detriment of the infant as to render it unfair that the infant should be bound by it, then the deed cannot be enforced at all."⁵ The purport of the cases decided from this standpoint is stated in the note below. They should be compared with those cited in § 102, notes, 11, 12, *ante*.⁶

⁴ Kay, L. J., in *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. (C. A.) 482. Approval was expressed of the following statement made by Fry, L. J., in *De Francesco v. Barnum* (1890) L. R. 45 Ch. Div. 430: "There is another exception [*i. e.*, to the rule as to an infant's incapacity to bind himself], which is based on the desirableness of infants' employing themselves in labor; therefore, where you get a contract for labor, and you have a remuneration of wages, that contract, I think, must be taken to be *prima facie* binding upon the infant."

⁵ A. L. Smith, L. J., in *Corn v. Matthews* [1893] 1 Q. B. (C. A.) 310.

The statement in the text was quoted with approval by Darling, J., in *Green v. Thompson* (1899) 68 L. J. Q. B. N. S. 719 [1899] 2 Q. B. 1, 80 L. T. N. S. 691, 48 Week. Rep. 31, 63 J. P. 486. The learned judge criticized adversely the following remark of Lord Coleridge, Ch. J.: "The law, as it stands, is, as I have always understood it, that you may not make a contract with an infant containing stipulations that cannot be for the benefit, but must be to the disadvantage, of the infant,—as, for instance, a stipulation for a penalty to be paid by the infant." *Meakin v. Morris* (1884) L. R. 12 Q. B. Div. 352. "If," said Darling, J., "Lord Coleridge meant that a contract with an infant is void unless every single stipulation is to the infant's advantage, I can only say that in my opinion that view is not in accordance with the general current of authority. There must in every contract with an infant be one or more clauses which, standing by themselves, would not be to the infant's advantage." Channell, J., also considered that upon the authorities it was "clear that the true

question is whether the particular stipulation complained of is so unfair as to make the entire contract disadvantageous to the infant. You may find in any contract a clause which by itself is not to the advantage of the infant; but that is not enough; the contract as a whole must be disadvantageous."

In an earlier case it was laid down that "a contract is binding on an infant unless it is manifestly to his prejudice, or at least so plainly so that the court can say that it is to his prejudice; it is then not voidable only, but absolutely void." *Cooper v. Simmons* (1862) 7 Hurlst. & N. 707, per Wilde, B., with whom Martin, B., agreed on this point. Sir F. Pollock, Contr. *66, has, however, expressed the opinion that the principle is too strongly stated in this passage. This criticism seems to be justifiable.

In a still earlier case it was said by Abbott, Ch. J., to be "a general rule of law that an infant cannot do any act to bind himself, unless it be manifestly for his benefit." *Rex v. Great Wigston* (1824) 3 Barn. & C. 484.

⁶ In *Cooper v. Simmons* (1862) 7 Hurlst. & N. 707, an infant apprentice was held liable to be convicted under the statute of 4 Geo. IV. chap. 34, § 3, for absenting himself from service without leave. Discussing the provisions of the deed, Martin, B., said: "How can we say that it must necessarily be a disadvantage to an infant to bind himself apprentice for a certain term, if his master lived so long, and in the event of his death to continue apprenticeship with his executor, provided he carries on the same business in the same town? It is possible that the executor may be a person with whom it may not be beneficial for the apprentice to continue; on the other hand, it may be of

the greatest benefit to the apprentice to remain in the service of the executor; and we must clearly see that it is not, before we can avoid the contract." Wilde, B., thus stated his views: "It was said, and I think correctly, that the contract must be looked at with reference to the time when it was made; and regarding it in that view, the question is whether such a contract as this will bind an infant. . . . It is laid down in the books that the binding of an infant as an apprentice is beneficial to him. Then is it less beneficial by reason of this clause, perhaps unusual, certainly not universal, by which he binds himself to serve the executors? That seems to me to make the contract more beneficial; at all events, I cannot say that the contract is manifestly to his prejudice."

In *Meakin v. Morris* (1884) L. R. 12 Q. B. Div. 352, the master covenanted to find the apprentice fair and reasonable work during the term, and pay him wages at a certain rate during the term. The apprentice (*an infant*) and his father covenanted that the master should not be liable to pay any wages to the apprentice so long as his business should be interrupted by any turnout, and the apprentice was expressly authorized by the deed during any such turnout to employ himself in any other manner or with any other person for his own benefit. The apprentice having absented himself from work, it was held that the magistrate had properly refused the application of the master under the employers and workmen act 1875 for an order to compel him to return. Lord Coleridge, said: "In this case the stipulation is that in the event of a turnout the master may refuse to find the apprentice work or to pay him wages, giving him only as an equivalent the power of getting work, if he can, elsewhere during the turnout, a period the uncertainty of which renders it practically impossible for the infant to enter into a satisfactory or advantageous engagement elsewhere, inasmuch as it is provided that when the turnout is over he must return to the service of the master. By the previous words of the deed the master would be bound, turnout or no turnout, to provide the apprentice with work and to pay him wages. Then he stipulates for his own protection, that in case of a turnout he need not find work

or pay wages. It is impossible to say that this stipulation is for the infant's advantage." Doubts were expressed regarding the correctness of the decision in *Leslie v. Fitzpatrick* (1877) L. R. 3 Q. B. Div. 229, 47 L. J. Mag. Cas. N. S. 22, 37 L. T. N. S. 461 (see § 102, *ante*).

In *Corn v. Matthews* [1893] 1 Q. B. (C. A.) 310, 62 L. J. Mag. Cas. N. S. 61, 4 Reports, 240, 68 L. T. N. S. 480, 41 Week. Rep. 261, 57 J. P. 407, an infant was apprenticed by a deed containing a provision that the masters should not be liable to pay wages to the apprentice so long as their business should be interrupted or impeded by or in consequence of any turnout, and that the apprentice might, during any such turnout, and for such reasonable time thereafter as might be necessary to enable him to determine such employment as thereafter mentioned, employ himself in any other manner or with any other person for his own benefit, and that, in case the apprentice should elect so to employ himself, the masters should not, during the time he should so employ himself, be bound to teach or instruct him. Held, that the apprenticeship deed could not be enforced against him under the employers and workmen act 1875, §§ 5, 6.

By a deed of apprenticeship of an infant it was provided that the apprentice should serve for a term of years, excepting the usual holidays and days on which the master's business should be at a standstill through accident beyond the control of the master, and that during the said term, excepting and subject as aforesaid, the master should pay the apprentice wages for her services. Held, that the provision that the master should not be liable to pay wages to the apprentice during the excepted period was not so disadvantageous to her as to render the apprenticeship deed incapable of being enforced against her under the employers and workmen act 1875. *Green v. Thompson* [1899] 2 Q. B. 1, 68 L. J. Q. B. N. S. 719, 80 L. T. N. S. 691, 48 Week. Rep. 31, 63 J. P. 486 Darling, J., was of the opinion that the case was covered by the remark of Lindley, L. J., in *Corn v. Matthews*, *supra*, to the effect that, if the proviso (as to the suspension of wages) were addressed to a state of things over which the master might have no control, such as a strike, the

2078. Same subject. Extent of the juridical recognition accorded to the binding of infants by themselves.—*a. In settlement cases.*—In several cases the rule has been applied, that a minor can gain a settlement by serving under a contract entered into by himself, provided it is beneficial.¹

b. Summary statutable proceedings.—An infant who binds himself apprentice is amenable to the summary remedies provided by statute for the adjustment of disputes between masters and apprentices.²

c. Action against the infant on his covenants.—Redress for a breach of contract cannot be obtained by an action of this description. See § 2177, *post*.

case before him would not have been so clear.

In *De Francesco v. Barnum* (1890) L. R. 45 Ch. Div. 430, 60 L. J. Ch. N. S. 63, 63 L. T. N. S. 438, 39 Week. Rep. 5, the ground upon which Fry, L. J., held that no action could be maintained against the defendant for enticing the apprentice was that the contract was unreasonable, which placed the infant almost absolutely at the disposal of the master, which required him to undertake any engagements at any theater in England, or any theater in the United Kingdom, or anywhere else in the world, which provided that he was to receive no remuneration and no maintenance, except when employed, which did not create any correlative obligation on the master to find employment for him, and which empowered the master to put an end to his chances of success at any time after trial. As to the other aspect of this case, see §§ 2078 (a), 2177, *post*.

In *MacGregor v. Sully* (1900) 31 Ont. Rep. (Div. Ct.) 535 (action for damages and fee which became payable in certain events provided for in the articles), articles of apprenticeship which required the apprentice during the term of four years of three hundred and ten working days of ten hours each, to give and devote to his master ten hours each working day, or such number of hours as might be the regulation of the workshop for the time being, or as special exigencies of the business might require, were held to be unreasonable and not enforceable either against the infant or against a surety for him. Street, J., remarked that the effect of the contract

was that, "if the plaintiffs should deem the exigencies of business to require them to cut down the hours of work in their workshop to two hours a day, the infant could earn only one working day's pay in five ordinary days; in other words, the plaintiffs reserved to themselves the right to stop his work and wages, in their discretion, from time to time during the period for which he was bound to them."

¹ *Rex v. St. Mary's, Reading* (1717) 1 Bott, Poor Law, 605, Foley, 154; *Newberry v. St. Mary's* (1730) 2 Bott, Poor Law, 363; *Rex v. St. Petrox* (1791) 4 T. R. 196, 2 Bott, Poor Law, 504; *Rex v. Great Wigston* (1824) 3 Barn. & C. 484, 5 Dowl. & R. 339.

In *Rex v. Arundel* (1816) 5 Maule & S. 257, Lord Ellenborough remarked: "this indenture must be considered clearly as for the infant's benefit, and not having been vacated, it must be considered as binding, so as to confer a settlement on him by reason of his service under it."

² This doctrine was established by the decision in the leading case of *Gylbert v. Fletcher* (1629) Cro. Car. 179. For later cases in which it has been applied, see *Cooper v. Simmons* (1862) 7 Hurlst. & N. 707, 31 L. J. Mag. Cas. N. S. 138, 8 Jur. N. S. 81, 5 L. T. N. S. 712, 10 Week. Rep. 270; *Meakin v. Morris* (1884) L. R. 12 Q. B. Div. 352, 53 L. J. Mag. Cas. N. S. 72, 32 Week. Rep. 661, 48 J. P. 344; *Corn v. Matthews* [1893] 1 Q. B. (C. A.) 310, 62 L. J. Mag. Cas. N. S. 61, 4 Reports, 240, 68 L. T. N. S. 480, 41 Week. Rep. 261, 57 J. P. 407; *Green v. Thompson* [1899] 2 Q. B. 1, 68 L. J. Q. B. N. S. 719, 80

d. Injunction against third parties who have hired the apprentice.—The doctrine referred to in the preceding subsection is considered to involve the corollary that his master is not entitled to the remedy of an injunction against a third person who takes him into his service.³

2079. Same subject. Review of American authorities.—In some of the American states the English doctrine that an infant is at common law competent to bind himself by a beneficial contract has been adopted.¹ But in the majority of the cases in which the matter has been adverted to, that doctrine has been rejected.² It seems clear,

L. T. N. S. 691, 48 Week. Rep. 31, 63 J. P. 486

³ *De Francesco v. Barnum* (1890) L. R. 43 Ch. Div. 165, 59 L. J. Ch. N. S. 151, 62 L. T. N. S. 40, 38 Week. Rep. 187, 54 J. P. 420. The decision of Chitty, J., was put upon the ground that it had been decided in *Gylbert v. Fletcher* (1629) Cro. Car. 179 (see § 2147, *post*), that no action would lie on such a deed against the apprentice himself, although it was for his advantage to be bound apprentice to be instructed in a trade, and that the only remedy available to the master, if the apprentice misbehaved himself, was to correct him or complain to a justice to have him punished. He considered that, as the right to the injunction asked for depended upon the master's legal right to sue upon the covenant in the deed to the effect that the apprentice should neither "contract professional engagements, nor accept such, unless with the full written permission of his master," the nonenforceability of that covenant necessarily involved the consequence that, apart from any question whether the contract was for their benefit or not, the master was not entitled to an injunction. The decision was approved by Fry, L. J., (1890) upon the subsequent trial of an action for damages resulting from the enticement (L. R. 45 Ch. Div. 430, 60 L. J. Ch. N. S. 63, 63 L. T. N. S. 438, 39 Week. Rep. 5).

¹ In *Kingwood v. Bethlehem* (1832) 13 N. J. L. 221, where this doctrine was applied, it was held that, for the purpose of obtaining a settlement by service, it was sufficient to prove the execution of the indenture by the apprentice.

The decision in *North Brunswick v. Franklin* (1838) 16 N. J. L. 535, to the effect that no settlement had been

gained by an unsealed agreement executed by the apprentice alone, proceeded upon the ground that such an agreement was not an "indenture," within the meaning of the statute. The more general question involved in the earlier case was not involved.

The doctrine in the text was also affirmed in *Fisher v. Lunger* (1868) 33 N. J. L. 100.

In *Guthrie v. Murphy* (1835) 4 Watts, 80, 28 Am. Dec. 681, where an indenture executed by a minor without the consent of his guardian was declared void, the court apparently took it for granted that a common-law binding is invalid in any case where the infant has a parent or guardian to supply his wants. Such a position amounts to a qualified acceptance of the doctrine that an infant may bind himself.

In Arkansas it has been held that action lies against an infant for the abandonment of an apprenticeship contract which is for his benefit. *Woodruff v. Logan* (1845) 6 Ark. 276, 42 Am. Dec. 695. This decision, it will be observed, goes even further than any of those rendered by an English court. See § 2177, *post*. So far as it embodies the rule that an infant may be sued on his covenants, it is clearly bad law.

² In *Handy v. Brown* (1810) 1 Cranch, C. C. 610, Fed. Cas. No. 6,019, an apprentice was discharged on habeas corpus, for reason that he had not been bound in the manner prescribed by Md. Stat. 1793, chap. 45.

In *Frazier v. Rowan* (1806) 2 Brev. 47, it was held that an agreement not made in accordance with the provisions of the statutes was voidable.

In *Squire v. Whipple* (1826) 1 Vt. 69, the doctrine was announced by the court, *arguendo*, that an infant cannot,

however, that, whatever may be the views of a court as to the common-law rights of minors in the abstract, they cannot be of any practical importance in jurisdictions in which the binding of apprentices has been regulated by statutes of a general scope. Some of those statutes explicitly declare that no contracts shall be valid, unless made in the manner prescribed. But under a familiar rule of construction, it is apparent that an implied restriction in this regard must be read into those also which do not contain such a declaration.

2080. Doctrine of the civil law.—a. In Scotland.—In an early case it was held that an indenture executed by a minor without the concurrence of his father was invalid.¹ More recently, however, it was intimated by some of the judges in a case which went off on another point, that a deed executed by a minor without his father's consent was not absolutely null and void, but merely voidable upon proof of lesion (*i. e.*, detriment).²

The doctrine has been applied, that a minor's deed of apprenticeship cannot be pronounced null in respect of its having been entered into without the consent of his curator.³

b. In Quebec.—Under the French law, as administered in Quebec,

apart from statutory provisions, make a valid contract of apprenticeship, for the reason that at common law he cannot bind himself by deed, and that at common law the binding of an apprentice can be effected only by deed (citing a case from the Year Books', Temp. Henry VI. which the author has not been able to verify).

In *Harney v. Owen* (1837) 4 Blackf. 337, 30 Am. Dec. 662, it was laid down broadly that an indenture executed by a minor is not binding upon him at common law.

In *Clark v. Goddard* (1863) 39 Ala. 164, 84 Am. Dec. 777, the court, proceeding upon the ground that, independently of some statutory provision, an infant's contract of apprenticeship under seal may be avoided by him at any time during his minority, held that neither the conduct of the infant's mother in inducing another person to enter into a contract with him, nor the act of her agent in drawing the deed, could estop the infant from avoiding his indenture of apprenticeship.

In *Walker v. Chambers* (1850) 5 Harr. (Del.) 311, a binding by a minor was said, *arguendo*, to be invalid.

In *Haugh, K. & Co. Iron Works v.*

Duncan (1891) 2 Ind. App. 264, 28 N. E. 334, an action for work and labor by an emancipated minor apprentice, a plea averring that the work in question was done under a special contract made by the plaintiff and his father, by which the plaintiff was to learn the art of molding iron, and was not to receive his full wages till the end of the term, was held to be bad, for the reason that such a contract as that pleaded was voidable by the infant party.

¹ *Low v. Henry* (1797) Hume, 422.

² *Stevenson v. Adair* (1872) 10 Sc. Sess. Cas. 3d series, 893 (cautioner, *i. e.*, surety, was held liable for the minor's desertion).

³ *Hawie v. McIntyre* (1829) 7 Sc. Sess. Cas. 1st series, 561. There a minor who had entered into an indenture with the consent of his elder brother, whom he held out as his curator, was held to be bound by the contract, for the reason that the actual curator had not interfered for a whole year, nor stated that he was curator. The minor was therefore ordered to return to service. But the judgment reserved to him the privilege of "restitution," as upon a deed made during minority.

a minor may bind himself as an apprentice without the assistance of his legal guardian. If detrimental, his contract is not void, but merely voidable. *Minor restituitur non tanquam minor, sed tanquam læsus.*⁴

2081. Indenture void, where its object is the evasion of a statute.—A contract of apprenticeship which constitutes, either as a whole or in respect of one of its provisions, an evasion of a prohibitory enactment, is clearly invalid.¹

2082. Authenticating of the contract by writing.—In one case we find it stated that, at common law, a valid contract of apprenticeship can be created only by a written instrument,¹ and in other cases that a deed is requisite.² But these expressions of opinion possess merely an academic interest, the matter being regulated in every jurisdiction by the specific language of the enactments referred to in the following subtitle.

C. BINDING OF APPRENTICES UNDER ENACTMENTS OF GENERAL APPLICATION.

2083. Generally.—Broadly speaking, the enactments with regard to the binding of minors who do not belong to one or another of the classes to which the statutes reviewed in subtitle D have reference, may be divided into the four categories specified in §§ 2084, 2086, *post*. Some of them are by their terms applicable to servants as well as apprentices.¹ Others have reference only to the binding of apprentices. Under an enactment of this class it is manifest that a father cannot bind a child as a servant.²

2084. English enactments.—The essence of one description of enactment is a declaration that certain classes of persons shall be entitled to take minors as apprentices, and that these apprentices, although under age when bound, may be compelled to serve. Of this

⁴ *Major and Labelle* (1889) 12 Legal News (L. C.) 399.

¹ *Reg. v. Barmston* (1838) 3 Nev. & P. 167, 7 Ad. & El. 858, 7 L. J. Mag. Cas. N. S. 31, 2 Jur. 537 (indenture antedated two years for the fraudulent purpose of enabling apprentice to gain by five years' service the benefit of the seven years' service which was obligatory under 5 Eliz. chap. 4); *Dubois v. Allen* (1809) Anthon, N. P. 128 (indenture contravened statute forbidding importation of slaves).

¹ *Peters v. Lord* (1847) 18 Conn. 337.

² *Squire v. Whipple* (1826) 1 Vt. 69; *Beach v. Bryan* (1911) 155 Mo. App. 33, 133 S. W. 635.

¹ See, for example, the Massachusetts act of 1794, § 1 (Rev. Laws, 1902, chap. 155, § 1).

² *Respublica v. Keppeler* (1793) 2 Dall. 197, 1 L. ed. 347 (decided with reference to the Pennsylvania act of 1770).

tenor were the apprenticeship clauses of 5 Eliz. chap. 4. This statute has apparently never been in force in any of the American states;¹ nor in any of the British colonies.² But a brief summary of its more important provisions will be necessary in order to enable the reader to understand the older cases which are reviewed in the following sections.³

Sec. 25. It was enacted that householders having and using "half a plough-land" might receive as apprentice any person between ten and eighteen years of age, to serve in husbandry until he reached the age of twenty-one at least, or the age of twenty-four, as the parties could agree; the retainer to be by indenture.

Sec. 26. It was enacted that a householder, being twenty-four years old at least, dwelling in any city or town corporate, and exercising any "art, mystery, or manual occupation there," might retain the son of any freeman living in the same or any other city or town corporate, to serve and be bound as an apprentice after the custom of the City of London "for seven years at the least, so as the term and years of such apprentice do not expire or determine afore such apprentice should be of the age of four and twenty years at least."

Sec. 27. Householders in market towns were authorized to have as apprentices the children of artificers.

Sec. 29. Merchants and certain other tradesmen were forbidden to take any apprentices except their sons, unless the parents of the minors had an estate of freehold worth forty shillings per annum.

Sec. 30. Smiths and certain other tradesmen were permitted to have as apprentices children whose parents had no lands.

Sec. 36. It was enacted that no persons should by force of the statute be bounden to enter into an apprenticeship other than such as were under twenty-one years.

Sec. 42. It was declared that apprentices under the act might be compelled to serve, although they were less than twenty-one years when bound.

Sec. 43. It was enacted that every person that should be bounden by indenture to serve as an apprentice in any art, science, occupation, or labor, according to the term of the statute, and in the manner and form aforesaid, albeit he should be less than twenty-one years of age at the time of the making of the indenture, should be bounden to serve for the stipulated term, as amply and largely as if he were of full age at the time of making of the indenture.

By 54 Geo. III. chap. 96, § 2, it was declared lawful for any person to take or retain or become an apprentice, though not according to the provision of the act of 5 Eliz.⁴ That act was entirely repealed by 38 & 39 Vict. chap. 86 (conspiracy and protection of property act).

¹ It has never been adopted in Alabama (*Clark v. Goddard* [1863] 39 Ala. 164, 84 Am. Dec. 777); nor in Tennessee (*Springfield v. Heiskell* [1831] 2 Yerg. 546; *Stewart v. Rickets* [1840] 2 Humph. 151).

² That the statute was never in force in upper Canada was either strongly intimated or categorically affirmed in *Fish v. Doyle* (1831) Draper (U. C. K. B.) 328; *Dillingham v. Wilson* (1840) 6 U. C. Q. B. O. S. 85; *Shea v. Choat* (1846) 2 U. C. Q. B. 211.

³ The principal provisions are quoted at length in Bacon's Abr. title, Master & Servant.

⁴ It is a significant fact that this amending statute was passed against the

2085. Prerequisites to a valid binding under these statutes.—The only necessary parties to an indenture executed with reference to the English enactments are the master and the apprentice,—a fact which should be borne in mind by a practitioner who desires to gauge the precise significance of the English decisions as precedents in cases which depend upon the effect of the American and colonial statutes.¹ But “it is usual, in indenture of apprenticeship, to find some third party who receives covenants for the benefit of the apprentice, and makes covenants for him.”²

2086. Enactments in the United States and the British possessions.—The essential difference between these enactments and the Elizabethan statute is that they require the participation of some third person or of a court in the execution of any contract by which a minor is bound out. They may be conveniently arranged in three classes, defined with reference to the footing upon which that participation is provided for. In some jurisdictions, it may be observed, legislation representing more than one of those classes is in force.

(1) Enactments authorizing minors to bind themselves with the consent of their fathers or other persons designated. The following provisions will serve as example of this type of legislation:

Maryland.—See under class 2, *infra*.

New Jersey.—Gen. Stat. 1895, “Apprentices,” § 1. If any male person within the age of twenty-one years, or any female within the age of eighteen years, shall be bound by indenture of his or her own free will and accord, and by and with the consent of his or her father, or in case of the death of his or her father, by the consent of his or her mother or guardian, to be expressed in such indenture, and signified by such parent or guardian sealing or signing the same indenture, and not otherwise, to serve as a clerk, apprentice, or servant, in any art, craft, mystery, profession, trade, employment, manual occupation, or labor, until, if a male, he arrives at the age of twenty-one years, and if a female, until she arrives at the age of eighteen years, or for any shorter time, then the said clerk, apprentice, or servant, bound as aforesaid, shall serve accordingly.

New York.—The earlier provisions with reference to which most of the cases cited in this chapter were decided were as follows: 2 Rev. Stat. 154, § 1, Rev. Stat. Banks’s 7th ed. p. 2348. Art. Master and Servant, sec. 1. Every male infant, and every unmarried female under the age of eighteen years, with the

strongly expressed wishes of the operatives in the various trades. Webb, History of Trade Unionism, p. 54.

¹ The difference in this respect was adverted to in *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61.

² Bayley, J., in *Hughes v. Humphrey’s* (827) 9 Dowl. & R. 715,

A collection of the various forms of indentures will be found in the Encyclopedia of Forms and Precedents, 1902, pp. 25, *et seq.* and in the Encyclopedia of the laws of England, sub voc. “Apprentices.”

consent of the persons or officers afterwards mentioned, may, of his or her own free will, bind himself or herself in writing to serve as clerk, apprentice, or servant, in any profession or employment; if a male until the age of twenty-one years, and if a female, until the age of eighteen years, or for any shorter time. Such binding shall be as valid and effectual as if such infant were of full age at the time of making such engagement. 1 Rev. Laws 135, §§ 2, 4, 14.

Sec. 2. Such consent shall be given (1) By the father of the infant. If he be dead, or be not in a legal capacity to give his consent, or if he have abandoned and neglected to provide for his family, then —

(2) By the mother. If the mother be dead, or be not in a legal capacity to give such consent, or refuse, then—

(3) By the guardian of such infant duly appointed. If such infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then—

(4) By the overseers of the poor, or any two justices of the peace of the town, or any judge of the county courts of the county where such infant shall reside. Rev. Laws 135, §§ 2, 4, 14.

Sec 3. Such consent shall be signified in writing by a certificate at the end of, or indorsed upon, the indentures. Rev. Laws 135, §§ 2, 4, 14.

The following provisions were enacted in a statute which did not repeal the whole of the earlier one, but was inconsistent with it in some particulars.

Laws 1871, chap. 934, sec. 1 (Rev. Stat. Banks's 7th ed. p. 2350). It shall not be lawful to take as an apprentice any minor to learn the art or mystery of any trade or craft without having obtained the consent of his legal guardian; nor shall any minor be taken as an apprentice, unless an agreement or indenture be drawn up in writing in accordance with the provisions of the act, and duly executed under seal by the employer, and also by the parents or parent, if any living, or by the guardian, and likewise by the minor himself.

Sec. 2. The agreement or indenture shall contain the following covenants:

(1) That said minor shall be bound to serve for a term of not less than three, nor more than five, years.

(2) That the minor shall not leave his employer during the term stipulated, and if he does, the employer may compel his return under the penalties of the act.

(3) That the employer shall provide during the term suitable board, lodging, and medical attendance for the apprentice [or wages sufficient to provide such board, etc.] and teach or cause to be carefully and skilfully taught to him every branch of the business to which he is indentured, and at the expiration of the term give him a written certificate stating that he had served a full term of not less than three, nor more than five, years at the specified trade or craft.

The principal provisions of the existing domestic relations law, § 122 (Laws 1896, chap. 272, Laws 1909, chap. 20; Consol. Laws 1909, p. 1083), by which the earlier statutes are wholly superseded, are as follows:

Any minor may bind himself to learn the art or mystery of any trade or craft for a term of not less than three, nor more than five, years.

An indenture must be signed (1) by the minor; (2) by the father, unless he is legally incapable of giving consent, or has abandoned his family; (3) by the

mother of the minor, unless she is legally incapable of giving consent; (4) by the guardian of the minor (if any); (5) if there be neither parents nor guardian of the minor legally capable of giving consent, by the county judge, or a justice of the supreme court.

Penal law (Consol Law, chap. 40) § 493. A person who takes an apprentice without having first obtained the consent of his legal guardian, or unless a written agreement has been entered into, as prescribed by law, is guilty of a misdemeanor.

Pennsylvania.—Act of Sept. 29, 1770, § 1, Brightly's Purdon's Dig. Apprentices, § 4. All and every person or persons that shall be bound by indenture to serve as an apprentice in any art, mystery, occupation, or labor with the assent of his or her parent, guardian, or next friend, although such persons, or any of them, were or shall be within the age of twenty-one years at the time of making their several indentures, shall be bound to spend the time in the indentures contained, so as such time of such apprentices, if a female, do expire at or before the age of eighteen years, and if a male, at or before the age of twenty-one years, as fully, to all intents and purposes, as if the same apprentice were of full age at the time of making the indentures.

South Carolina.—Gen. Stat. 1882, § 2072; Rev. Stat. 1893, § 2206. It shall be lawful for any person to take an indented apprentice, and teach him, and retain and keep him in his service until expiration of time limited, or until lawfully discharged.

Gen. Stat. 1882, § 2073; Rev. Stat. 1893, § 2206. It shall be the duty of any trial justice (magistrate) to whom application is made by a person desiring to become the master or mistress of any infant to be bound to service by indenture according to law, to certify under his hand and seal upon such indenture the presence and approbation of the father, mother, or guardian of such infant at the time it was executed. And in case he shall have no father, etc., then the presence of his grandfather or the approval of the justice is to be certified, which indenture or indentures, so executed and certified as aforesaid, shall be good and effectual, to all intents and purposes, as if such apprentice had been of full age and by indenture of covenant had bound him or herself; or otherwise shall be void and of none effect.

Gen. Stat. 1882, § 2077, Rev. Stat. 1893, § 2212. Any person that shall be bound by indenture to serve as an apprentice, although he shall be within the age of twenty-one years at the time of making such indenture, shall be bound to serve for the number of years in such indenture contained, as fully and effectually to every intent as if he had been of full age at the time of making such indenture.

Wisconsin.—Laws 1911, chap. 347, § 2. repeals, §§ 2377-2394 of Sanb. & B. Anno. Stat. By the substituted § 2378 it is provided that any minor may bind himself by indenture for not less than one year, and if the minor is less than eighteen years of age, the indenture shall in no case be for a period of less than two years. By § 2381, the parties by whose signatures, in addition to his own, are necessary to validate the agreement are specified. By § 2379, a penalty is imposed for apprenticing a minor otherwise than as provided by the statutes.

The provisions enacted in the following states are modeled, with some variations, on the lines of those of the New York law.

Iowa.—Code 1907, §§ 3229, 3230.

Kansas.—Gen. Stat. 1899, § 295.

Michigan.—How. Anno. Stat. 1882, § 6352.

Comp. Laws 1897, § 5561. The several methods by which alone children can be apprenticed are enumerated in a general statute relating to the protection of children.

Montana.—Rev. Code 1907, §§ 3795 (360), 3796 (361).

Ohio.—Bates's Anno. Stat. 1902, §§ 3118-3120.

South Dakota.—Civil Code 1903, §§ 163, 164.

Wisconsin.—The provision now repealed, in §§ 2377, 2378 of Sanb. & B. Anno. Stat. with reference to which the Wisconsin cases cited in this chapter were decided, resembled the foregoing enactments for the existing provisions, see *supra*.

The general effect of enactments of this type has been thus stated: "The disability of infancy is removed as to all infants, and the protection of the infant is cast upon the persons or officers whose consent is required by the act and the courts, whose duty it might be to release infants from apprenticeship ill advised and injudicious and which would be pernicious to their interests."¹ Most of the statutes contain express provisions regarding the course to be followed when the persons who would otherwise be the proper parties to join in the indenture are incompetent to do so. But it is clear that, even in jurisdictions where such provisions have not been enacted, those persons "may forfeit their right by abandonment, or by a condition, such as confirmed drunkenness, which unfits them to exercise the care and discretion the law requires."²

(2) Enactments authorizing fathers of minors and other persons designated to bind them out. The following provisions will sufficiently illustrate the different forms in which enactments of this description have been framed:

Alabama.—Code 1907, § 2907 (1485) (1743) (1462). Any parent having a minor child may bind it out as provided in the preceding sections of the chapter relating to apprentices. (See § 2108, *post*.)

Arkansas.—Kirby's Dig. 1904, § 270. (Rev. Stat. chap. 8, § 5.) The father, or, if he is dead, the mother, may bind minors in like manner as guardians. (See § 2108, *post*.)

¹ *People ex rel. Barbour v. Gates* (1870) 43 N. Y. 40, reversing (1869) 375. 57 Barb. 291, 39 How. Pr. 74. ² *Com. v. Atkinson* (1871) 8 Phila.

Sec. 272. Indentures made by parents not obligatory until approved by the probate judge.³

California.—Civil Code 1909, § 264. Every minor of the age of fourteen years or upwards may be bound by indenture as an apprentice to any mechanical trade or art or the occupation of farming, to the age of eighteen years if a female, or to the age of twenty years if a male.

Sec. 265. A minor, with his consent, may be bound by his father, or in case of his death or incompetency, or where he has wilfully abandoned his family for one year without making suitable provision for their support, or is habitually intemperate in the use of intoxicants, then by his mother or legal guardian. If a child is illegitimate, the mother alone has power to bind him. If a minor has no parent or guardian competent to act for him, he may bind himself, with the approval of the superior court. If the mother of a minor, whether legitimate or illegitimate, marries, she cannot bind him without the approval of the superior court.

Colorado.—Rev. Laws 1908, §§ 134, 135. Similar to Massachusetts statute.

Connecticut.—Gen. Stat. 1902, § 4684. Parents and guardians of minors may indenture them, if males till twenty-one, if females till eighteen years of age, or to the time of marriage, provided the minors assent to and subscribe the indentures. (Act of 1821.)

Sec. 4685. Minors of the age of fourteen years, and having no parent or guardians within the state, may indenture themselves, with the approbation of the selectmen.

Delaware.—Rev. Code 1893, chap. 79, § 3. Similar to the Massachusetts statute, except that it is provided that two justices of the peace are to officiate, where a minor over fourteen has no father, guardian, or mother in the state.

Florida.—Rev. Stat. 1892, § 2116. Any parent or guardian having the control of a minor may bind him out with the approval of the courts or judge; but when the child is over sixteen years its assent must be evidenced by its signature to the indenture.

Georgia.—Georgia Code 1895, § 2604 (1875). All minors may, by whichever parent has the legal control of them, be bound out as apprentices to any respectable person until they attain the age of twenty-one years, or for a shorter period.

Illinois.—Starr & C. Anno. Stat. 1896, chap. 9, p. 423, ¶ 1. Children under the age of sixteen years may be bound as apprentices, clerks, and servants, until they reach that age, with or without their consent.

2. A minor may be bound as aforesaid by the father with the consent of the mother, or in case of her death, habitual drunkenness, prostitution, imprisonment, or incapacity, without her consent, or in case of the death, habitual drunkenness, imprisonment, or incapacity of the father, or his desertion of his family for six months, by the mother. An illegitimate minor may be bound by his mother during the lifetime of the putative father, as well as after his decease. In case neither father, nor mother are living and free from such objections, by the guardian, or, if the minor has no guardian, by the county court.

³ In *Morrill v. Kennedy* (1860) 22 not those mentioned in § 271, which re-Ark. 324, the provision was held to refer later to poor children. to the "parents" mentioned in § 270,

Indiana.—Burns's Anno. Stat. 1908, § 8382 (7300). Children may be bound by the father; or if there be no father, or if he be incompetent, then by the mother; if there be neither father nor mother, then by the guardian. Any minor over the age of fourteen, having neither father, mother, nor guardian, may bind himself, with the consent of the probate judge. (Acts of 1852, p. 363.)

Kentucky.—Stat. 1908, § 2593. Any orphan minor may be bound by its guardian, or if it has no guardian, by its mother, with the consent, entered of record, of the county court. (Rev. Stat. chap. 64, § 3.)

Maine.—Rev. Stat. 1903, chap. 64, §§ 1, 2 (Laws 1821, chap. 122; Rev. Stat. 1840, chap. 32; Rev. Stat. chap. 90). A minor under fourteen may be bound without his consent, by his father and mother, if living; by the survivor if either is deceased; by their legal guardians, with the approval of the probate judge, if both parents are deceased; if he has no parents and no legal guardian, he may bind himself, with the approval of the municipal officers of the town in which he resides.

Sec. 2. A minor above fourteen years of age may be bound in like manner, with his consent.

Maryland.—Pub. Gen. Laws 1904, art. 6, § 20. Any father may bind out his child, a male, till twenty-one years of age, and a female till eighteen years of age; provided that the terms of apprenticeship shall be contained in the indenture under the hand and seal of the master and father, and the indenture is lodged with the register of wills.

Pub. Gen. Laws 1904, art. 6, § 21 (Act of 1793, chap. 45, § 6). It shall and may be lawful for any manufacturer or mechanic to take, as an apprentice, any male child until he shall arrive at the age of twenty-one years; provided, always, that the contract so made shall specify the age of the child at the time of making the said contract, and that the parent or parents of such child, if living, or, if an orphan, the orphans' court of such county as the child shall reside in, shall see the contract within two months after its execution, and notify their approbation thereof by indorsement on the same; and that the said contract shall be recorded among the records of the orphans' court, and the sum of three shillings shall be paid by the master of the said apprentice therefor; and when so recorded, the said contract shall be of the same validity as if the same had been originally made with the parents of the said child, or with the orphans' court.

Massachusetts.—Rev. Laws 1902, chap. 155 (embodying, with some slight changes of phraseology, the original act of 1794, which was also inserted in the earlier compilations; Rev. Stat. 1836, chap. 80, § 1; Gen. Stat. 1860, chap. 111, § 1; Pub. Stat. 1882, chap. 149, § 1). Sec. 1. A child under the age of fourteen years may be bound as an apprentice until that age; and a minor above said age may be bound as an apprentice or servant, a female to the age of eighteen years or the time of her marriage, and a male to the age of twenty-one years.

Sec. 2. A child under the age of fourteen years may be bound by the father, or in case of his death or incompetency, by the mother or legal guardian. If the minors have no parent competent to act, and no guardian, they may, with the approval of the selectmen of the town in which they reside, bind themselves. If illegitimate, he or she may be bound by the mother during the lifetime of the putative father, as well as after his decease. The power of a mother to bind her children shall cease upon her subsequent marriage, and shall not be

exercised by herself or by her husband during the continuance of such marriage.

Sec. 3. A minor above the age of fourteen years may be bound in the same manner, but if bound by his parent or guardian the indenture shall recite his consent, and shall be signed by him.

Sec. 5. If a minor is bound with approval of the selectmen, they shall certify such approval in writing upon each part of the indenture.

Missouri.—Rev. Stat. 1899, § 4794 (Rev. Stat. 1889, § 369). Similar to § 1 of Massachusetts statute.

Sec. 4795 (370). Minors under the age of fourteen years may be bound by their father, or in case of his death, incompetency, or when he shall have wilfully abandoned his family for six months without making suitable provision for their support, or has become an habitual drunkard, by their mother, or by their legal guardian, or, if illegitimate, they may be bound by their mother. The power of the mother to bind her children, whether legitimate or illegitimate, shall cease upon her subsequent marriage.

Sec. 4796 (370). Minors who have no parent competent to act, and no guardian, may bind themselves, with the approbation of the probate court.

Sec. 4796 (371). Minors above the age of fourteen years may be bound in the same manner, provided that, when they are bound by their parent or guardian, the consent of the minor shall be expressed in the indenture, and testified by his signing his name.

New Hampshire.—Pub. Stat. 1901, chap. 180, §§ 1, 2 (Rev. Stat. chap. 151). Similar to the Massachusetts statute, except that the binding, where the child has no parent or guardian, is to be by selectmen or overseers.

North Carolina.—Laws 1889, chap. 169, § 17, Revisal 1905, § 201. Similar to the Missouri statute.

Oregon.—Hill's Anno. Laws 1892, §§ 2912–2914. Similar to California statute.

Rhode Island.—Gen. Stat. 1896, chap. 198, § 1 (Pub. Stat. chap. 169). Every minor may be bound by deed as a servant and apprentice by his father, and in case of his decease, by his mother, or, being under the age of fourteen years, by his guardian.

Gen. Stat. 1896, chap. 198, § 2. A minor, if fourteen years of age, and having no parent, may, of his or her voluntary accord, with the approbation of his or her guardian, or, in case there is no such guardian, with the approbation of the town council of the town where he resides, bind himself or herself, if a male to the age of twenty-one, if a female to the age of eighteen or marriage.

Vermont.—Pub. Stat. 1906, §§ 3238–3240. Similar to Massachusetts statute.

Virginia.—Code 1887 and 1904, § 2581. Any minor may be bound as apprentice by his guardian, or, if none, by his father, or, if neither father nor guardian, by his mother, with the consent, entered of record, of the court of the county or corporation in which the minor resides; or without such consent, if the minor, being fourteen years of age, agrees in writing to be so bound. Code 1849, chap. 126, § 1.

West Virginia.—Code 1899, chap. 81, § 1. This provision is the same as that in the Virginia Code.

Ontario.—Rev. Stat. 1897, chap. 161, § 6. A parent, guardian, or other person having the care or charge of a male minor not under fourteen years of

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age, or any authorized charitable society having charge of such a minor, may, with the minor's consent, apprentice him, for a term not to extend beyond his minority, to a person carrying on any trade or calling; in the case of a female if she is twelve years old. (For the earlier enactment see apprentices act 1851, chap. 11.)

Sec. 7. A mother, if abandoned by her husband, may, with the approbation of two justices, bind her child.

Sec. 8. In a city or town, the mayor, judge of the county court, or police magistrate, and in a county the judge of the county court, may bind out any of the persons mentioned in the act, with their consent.

Manitoba.—Rev. Stat. 1902, chap. 79, § 21. Same provision as Ontario statute, § 6.

Sec. 22. Same provision as Ontario statute, § 7.

Sec. 23. Same provision as Ontario statute, § 8.

British Columbia.—Rev. Stat. 1897, chap. 8, §§ 7, 8. Same provisions as §§ 6, 7, of the Ontario act.

New Brunswick.—Consol. Stat. 1903, chap. 83, §§ 1, 2. Similar to the Massachusetts statute, except that it is provided that, if the minor has no parent or guardian competent to act, he may bind himself, with the consent of two justices.

Sec. 7. Before any indenture is finally concluded, the parties shall go before a justice of the peace, who shall examine whether the apprentice has any objection to such indenture, and, if he has not, shall give a certificate accordingly.

Nova Scotia.—Rev. Stat. 1900, chap. 117, §§ 1, 2, 3. Similar to New Brunswick statute, §§ 1, 2.

New South Wales.—Apprentices act, 8 Vict. No. 2, § 1. Any householder, or any tradesman, or other person exercising any art, mystery, or manual occupation, may take by indenture in writing any apprentice above the age of twelve years, for a term of not more than seven years.

Sec. 2. All persons legally bound by written indenture, by their parents or guardians, or other persons (as afterwards provided), are forbidden to leave the master until they have served out their term or reached the age of twenty-one years.

Sec. 3. Whenever the child has no parent and no guardian, the indenture may be executed by two magistrates.

Apprentices act 1901, § 9. Any father resident in the state, or if the father is dead or the inmate of any prison, lunatic asylum, or benevolent institution of any kind, then the mother, if resident and not under any such disability, or if the child has no such parent, but has a guardian, then such guardian, and if there is no such guardian, any two justices, may by indenture bind, or cause to be bound, any such child to any master, to be instructed in his trade, art, business, or manual occupation.

Sec. 10. Any person resident in the state and exercising any trade, art, business, or manual occupation upon his own account, may take an apprentice.

Victoria.—Master and apprentice act, 1864 and 1890, No. 1117, § 9. Same as § 1 of the original New South Wales statute.

Sec. 10. The indenture shall be executed by the parent or guardian of the apprentice, or, if he has no parent or guardian, by two justices of the one part, and by the master of the other part.

(3) Enactments which authorize the binding of minors by or with the approval of courts or public officers. The enactments belonging to this class are of three descriptions:

(1) Provisions which invest courts with a general jurisdiction in respect of the binding of minors.

Kentucky.—Stats. 1903 & 1909, §§ 2591, 2422 (Gen. Stat. chap. 74, § 1). The county court has jurisdiction to bind out minor children. (For the remainder of the section see § 2108, *post*.)

Pennsylvania.—Brightly's Purdon's Dig. "Apprentices," § 1. The justices of the ophans' court shall have power, at the request of executors, administrators, guardians, or tutors, to order the binding out of minors. (Act of March 27, 1713, § 7; Act of Sept. 29, 1770, § 5.)

Texas.—Rev. Stat. 1895, "Apprentices," art. 23. The county court may apprentice a minor where his parents, not being a charge on the county, shall consent in writing to the apprenticeship, such writing to be signed by them and recorded.

(2) Those which provide that minors who have no parents competent to act and no guardian may be bound by or with the approbation of some designated court or public officer. This method of binding is one of those specified in most of the statutes tabulated in class (1), *supra*.

(3) Provisions under which an official approbation is obligatory, even where the minor is bound by a parent or guardian. Some of the provisions of this type are of general application. See under the heads of Arkansas, Florida, Virginia, West Virginia, and New Brunswick, *ante*. Others, as in Kentucky, Ontario, and British Columbia, have relation only to cases of a binding by a mother.

2087. Powers and functions vested by these statutes in fathers.—Under this head it will be sufficient to observe that, as the father is the party who is designated in all the American and colonial enactments as the party who is, in the first place, either to consent to the binding of a minor child, or to bind it out, an indenture made during his lifetime is not valid unless he executes it in one or other of these capacities, or the circumstances bring the case within one or other of the exceptions specified in the given statute.

2088. —in mothers.—*a. During the father's lifetime.*—Under the explicit terms of nearly all the American statutes, as long as the father of a minor is alive the mother is not competent either to assent

to his binding,¹ or to bind him out,² except in cases where the father is legally incapable of acting, or, as is enacted in some jurisdictions, in cases where he has abandoned or neglected to provide for his family.³

¹ *Hudson v. Taghkanac* (1816) 13 Johns. 245 (contract made by mother, while father was alive, held to voidable either by father or minor child); *Owasco v. Oswegatchie* (1826) 5 Cow. 527 (similar decision).

² In *Owens v. Frager* (1889) 119 Ind. 532, 21 N. E. 1115, it was held that as the father is prima facie the proper party to bring an action to annul an indenture, the mother cannot maintain such an action, unless she avers and proves facts which show her to be entitled to maintain it.

In *Mitchell v. McElvin* (1872) 45 Ga. 558, the court, holding that a colored child who was born before March 9, 1866, within what was regarded as a state of wedlock between its parents while slaves, and who was acknowledged by its father, was the legitimate child of both parents, thus stated its conclusions with regard to the rights of the parties concerned: "If the parents separated before that date, and the child remained with the mother, she is entitled to the control of it during minority. But if she voluntarily yield the control to the father and he takes the child away with him, she cannot afterwards resume the control without the assent of the father; no reason being shown why the father should not retain the custody of the child. If, under such circumstances, the mother is induced to sign articles apprenticing the child to a third person, under representations made to her by that person that if she did not do so he would send the child off to another state, out of her reach, the articles are void as against the rights of the father and any master to whom he may have apprenticed the child; and on a writ of habeas corpus sued out at the instance of the person holding the articles from the mother against the father and the master to whom he has apprenticed the child, the child should be remanded to the custody of the respondents."

In *Wigley v. Mobley* (1897) 101 Ga. 124, 28 S. E. 640, the headnote, written by the court, is as follows: "Even though during the period of a temporary

separation between a husband and his wife and children he may have failed to provide necessities for them, yet where, after the parents had become reconciled and the father had resumed his parental control of his children, the mother without his knowledge or consent executed an indenture of apprenticeship binding one of her children to another, this instrument was, as to the father, a mere nullity, and in a controversy for the custody of such child, between the persons to whom it was thus bound and the father, afforded no reason for depriving the latter of such custody. This being so, and the evidence in the present case not showing that the father was an unfit or improper person to have the custody of the child, or that its interest and welfare required that its custody should be given to another, the ordinary erred in not awarding the possession of the child to the father, and the superior court erred in not sustaining his certiorari sued out to reverse the ordinary's judgment."

³ In *People ex rel. Barbour v. Gates* (1870) 43 N. Y. 40 (1869) 57 Barb. 291, the court considered the effect of 2 Rev. Stat. 154, § 2, which provides that a mother may bind a child, "if he (the father) be dead, or be not in a legal capacity to give his consent, or if he shall have abandoned and neglected to provide for his family, and such fact be certified" by a justice of the peace. It was held that a certificate was required only in cases of abandonment, or neglect, and that, where the father was dead, no such certificate was necessary to render valid the mother's consent. Remarking that, under 1 Rev. Laws, 135, §§ 2 and 3, a mother was empowered to give the required consent, if the father was dead or was not in legal capacity to give such consent, and that no certificate or preliminary evidence of such death or incapacity was required, the court proceeded thus: "The legislature, upon the revision of the statutes, extended to the mother the guardianship of her children so as to authorize her to consent to the binding of them as clerks, apprentices, or serv-

With reference to the Pennsylvania statute, which provides for a binding with the assent of a "parent," it has been held that a contract assented to by the mother of the apprentice is not valid if his father was alive and competent to act.⁴

b. After the father's death.—Nearly all the statutes expressly confer upon mothers the power of binding out minor children after the death of their fathers; and if this power is exercised with a due observance of the formalities prescribed, a contract in all respects valid is created.⁵ In some jurisdictions it is enacted that the power shall cease upon her second marriage.⁶ But such a marriage does not affect her competency unless the legislature has so declared.⁷

Whether in the absence of an express statutory authorization a binding by a widowed mother is valid is a point which perhaps can scarcely be regarded as finally settled. See § 2075 *b*, *ante*. With reference to the Maryland statute, which deals only with a binding by the father, it has been held that a contract executed by the mother is void.⁸ But it seems to be at least open to discussion, whether a

ants, in the case of an abandonment or neglect to provide for his family by the father, and, either because such fact was not likely to be equally notorious and publicly known as the other facts upon the existence of which the authority of the mother depended, or because there might be greater danger of a fraud upon the right of the father, or for some other or better reasons satisfactory to the legislature, the certificate of a justice of the peace of the town to the fact was required. There was no intention to embarrass the mother in the exercise of the power which she had before then exercised, or limit its exercise by imposing new forms and requirement, and hence the provision was so framed that the requirement of the magisterial certificate should attach only to the last of the conditions precedent upon the authority conferred, to wit, 'the abandonment by the father of his family, and neglect to provide for them.'"

⁴ *Com. v. Crommie* (1845) 8 Watts & S. 339 (habeas corpus); *Com. ex rel. Sheesley v. Martin* (1852) 1 Pearson (Pa.) 30 (habeas corpus).

A mother may bind out her minor child, where the father is an habitual drunkard whose estate has been committed by judicial process to the management of guardians. *Com. ex rel. Entriken v. Coxe*, 1 Ashm. (Pa.) 71

(habeas corpus not maintainable by father).

⁵ In *Tague v. Hayward* (1865) 25 Ind. 427, it was held that the widowed mother of a child who had no guardian was entitled to his wages, and could make a valid contract for his services, but that, unless the contract conformed to the statute regulating the relation of master and apprentice, it would not confer on the employer any right to control the person of the infant.

In *Baker v. Winfrey* (1854) 15 B. Mon. 499, the provision in Ky. Stat. 1888, chap. 74, § 3 (Stat. 1908, § 2593)—see § 2086, *ante*—was held to be applicable to free mothers of color as well as to white mothers, and to an illegitimate as well as a legitimate child.

⁶ See, for example, Mass. Rev. Laws 1902, chap. 155, § 2.

⁷ In *Com. ex rel. Supplee v. Eglee* (1821) 6 Serg. & R. 340, it was held that a mother, although married to a second husband, was a "parent" within the meaning of the Pennsylvania act of 1770, and as such was competent to give assent to an indenture, independently of her husband.

⁸ *Ballard v. Edmonston* (1823) 2 Cranch, C. C. 419, Fed. Cas. No. 817; *Baker v. Lauterbach* (1887) 68 Md. 64, 11 Atl. 703.

mother should not, as the natural guardian of her children (sec. 2075 *b*, *ante*), be deemed capable of exercising any power with which a guardian is *eo nomine* invested by a statute.

By a few of the statutes the right to bind a child is conferred upon the mother only in respect of cases where there is no guardian.⁹

c. Rights of mother of illegitimate child.—Many of the statutes specify the mother of an illegitimate child as being the proper party to assent to its binding, or to bind it out. From the very few cases that bear upon the subject it would seem to be a permissible conclusion that this rule holds, even in the absence of an express provision of this tenor, and that her wishes in regard to the disposition of the child will prevail over those of the father.¹⁰

2089. —in guardians.—The effect of nearly all the American statutes is to designate a guardian as the party who is to execute the indenture, either as the assenting or as the principal binding party, in cases where the parents of the child apprenticed are dead or legally incompetent to act.¹ Under such circumstances, an indenture in which he does not join is entirely void for all purposes.²

⁹ See, for example, Del. Rev. Code 1893, p. 608, chap. 89, § 3; Kentucky Stat. 1908, § 2593.

¹⁰ In *Austin v. M'Cluney* (1850) 5 Strobh. L. 104, an indenture was declared to be void under the act of 1740, so far as the child was concerned, because he was not a party to it. But the court held that the mother could maintain an action at law to enforce its covenants for the benefit of the son.

In *Timmings v. Lacy* (1867) 30 Tex. 115, where the father had been living separately from the mother for several years, it was held that the county court should not have entertained, in opposition to her wishes, an application by him to apprentice their child. In this case the determinative element was the fact of the prolonged separation, as it was remarked that a similar conclusion would have been indicated if the child had been legitimate and the father had abandoned his family. But it is apprehended that the binding should have been treated as unauthorized, even if the parents had not been separated.

¹ Some statutes postpone the rights of a widowed mother to those of the guardian. See § 2088, note 9, *ante*.

² In *Guthrie v. Murphy* (1835) 4 Watts, 80, 28 Am. Dec. 681, it was held that for money expended by the master,

in excess of the value of the minor's services, upon boarding and clothing him, neither assumpsit nor any other form of action could be maintained by the master against the minor, after he had been obliged to quit the service on account of ill health. The court said: "Though an infant may, in some cases, bind himself for necessities, yet he cannot do even that where he has a guardian or parent who supplies his wants. *Bainbridge v. Pickering* (1779) 2 W. Bl. 1325; *Wailing v. Toil* (1812) 9 Johns. 141. The profession or trade which he should learn, the person most competent to teach him, the terms on which the contract ought to be made,—are all matters of great moment to the welfare of the infant, and may affect the course of his whole life. If there is anything in which the counsel and assistance of a parent or guardian are material to his interests, it is this. Our acts of assembly recognize an indenture of apprenticeship as valid, where there is a guardian, only when executed by him, without his approbation, the infant's execution of it is null and void. In the case before us, the plaintiff procured the defendant, a boy of sixteen, to enter into his service as an apprentice till twenty-one, to learn the trade of a tailor, without the knowl-

2090. —in next friends.—Under the terms of the Pennsylvania statute, which is apparently the only one which designates a next friend as a necessary party to an indenture, he is entitled to act only in a case where the parents of the minor are both dead and he has no guardian.¹ He may be constituted without any formal appointment. But he must be a person who has “evinced by his regard for the minor a more than ordinary care and interest in his welfare, and by his age, condition, and conduct, given evidence of a proper discretion.”² The office cannot be discharged by a minor sister of the child in question,³ nor by a person to whom the child had previously been bound by justices.⁴ On the other hand, a sister of full age is competent to act.⁵ If she is married, she may assent even to binding him

edge of his guardian who, when applied to by the defendant, expressed his disapprobation of the trade as unsuited to his health. The guardian lived in the same town, and was ready and able to supply the wants of the defendant. The plaintiff, however, took him into his service, and some time after applied to the guardian to bind him. He refused, saying the defendant had gone against his consent; but if he would serve the plaintiff according to the terms they had agreed on, it was well, or words to that effect; but he would not interfere further in it. The plaintiff therefore took and retained him without the contract of the guardian, and at his own risk. . . . It is manifest, on the principles already stated, that the plaintiff has no cause of action whatever. If he has chosen to disregard the rules of law which forbid such dealing with the infant, he must take the consequences. It is impossible to separate the articles furnished in pursuance of the contract of apprenticeship from the contract of apprenticeship itself. They constitute a part of it; and every part was against the policy of the law, and void. It is vain to argue that the mere contract of apprenticeship may be bad, and yet that a responsibility may arise from delivering articles or disbursing moneys under it; or to say that the plaintiff took the defendant away from the care and protection of his guardian; and therefore the latter would be liable for necessities. The very taking him away from that care and superintendence was an illegal act.”

¹In *Com. v. Atkinson* (1871) 8 Phila. 375, the binding was held to be

invalid, as the father of the apprentice was residing in the city where the indenture was executed by the next friend, was not incapable of exercising his trade, and had not abandoned his son.

²*Com. v. Atkinson* (1871) 8 Phila. 375, where the court refused to treat as a next friend a man who was only a mere acquaintance of the minor, and a son of and copartner with the master, and had covenanted for the minor to live at “home” for three months in the year. Such a covenant was regarded as a concession, either that the minor had parents or guardian, or that he had other friends more nearly related or connected with him, to stand as his next friend. It was observed: “The interest of the apprentice is of paramount importance, and the indenture itself may, without more, be evidence sufficient that the person assenting and signing as ‘next friend’ has no right to be so regarded, and show that the apprentice should be relieved from an improvident or oppressive binding. The next friend must have no interest against the interest of the apprentice, and certainly none in the business or enterprise in which he is employed by the master. Being *in loco parentis*, he must, by the contract which he is making for his ward, exhibit all a parent’s anxiety and vigilance for his present and future welfare; short of this, he cannot be ‘next friend.’”

³*Com. ex rel. Irvin v. Penott* (1849) Brightly (Pa.) 189.

⁴*Com. v. Kendig* (1815) 1 Serg. & R. 366.

⁵*Com. v. Roach*, 1 Ashm. (Pa.) 27.

to her husband. But such a transaction will be more strictly scanned than where the binding is to a stranger; and if the contract be tainted with fraud or collusion, the apprentice will be discharged. He will not, however, be discharged of course, where the covenants appear to be reasonable and proper on the face of the indenture,—especially where the application is not made till the apprentice has ceased to be a burden.⁶

2091. —in executors.—The following provision in Montana Rev. Code 1907, § 3797 (362), seems to be the only example of its kind:

Executors directed by the will of their testator to bring up his or her child to some trade may bind the child to service in like manner as the father might have done, if living. If there is a surviving mother, her consent also is necessary.

The Pennsylvania provision with regard to the binding of minors by a court, at the request of executors or administrators, belongs to the third class of enactments tabulated in § 2086, *ante*.

2092. —in courts or public officials.—Unless the legislature has expressly declared that the indenture shall, under the circumstances in question, be executed by or with the approval of a judge or other public officer, his participation in the contract is clearly not a condition precedent to its validity.¹ The effect of the three different de-

⁶ *Com. ex rel. Taylor v. Leeds* (1829) 1 Rawle, 191. The court said: "There must undoubtedly be an actual, and not merely a formal, next friend. His office, however, is not to bind the apprentice, but to allow the apprentice to bind himself. The covenants of the apprentice, although executed under the supervision of those whom the law has set over him, are exclusively his own. Such are the provisions of the act of assembly, and such was the construction of it in *Com. ex rel. Supplee v. Eglee* (1821) 6 Serg. & R. 340. The practice has, for the most part, been for the *prochein amy* to express his assent by sealing the indenture; but no one ever thought of having recourse to him on the contract; at least no instance of the sort has fallen under my notice. The reason is that the legislature has not said that he shall become a party. The assent is sometimes expressed by subscribing as a witness; but neither in the one case nor in the other has the *prochein amy* considered that he was contracting any responsibility for the apprentice. His covenant, if any existed, would be joint.

But that would be inconsistent with his power, which is not to subject, by any act of his, the person of the apprentice to the dominion of the master; that can be done only by the apprentice himself. The *prochein amy* can join in the act only so far as the law gives him authority; and, by the terms of the act of assembly, his agency is not to be active, but passive. This point was expressly ruled in *Com. ex rel. Supplee v. Eglee*, where the coverture of the *prochein amy* would have afforded a decisive objection, if she had been considered a party to the deed. That case establishes, also, that the subjection of a *feme covert prochein amy* to her husband's will is not, in contemplation of law, inconsistent with the free exercise of her will in the execution of her trust; and this, in analogy to the common law, which permits a wife to act in a representative capacity and independent of her husband, wherever the subject-matter is unconnected with his interest or marital rights."

¹ In *Reg. v. Epsom* (1855) 4 El. & Bl. 1003 (settlement case), it was held that the requisites prescribed in §§ 1, 2,

scriptions of enactments by which this rule is modified has been stated under § 2086, *ante*. Unless the indenture is executed with a due observance of the formalities which they prescribe, it will be treated either as absolutely void, or voidable in respect of the parties alone, according to the phraseology which may have been used by the legislature to characterize the juristic consequences of noncompliance with the statutory requirements.²

2093. Authentication of the contract by writing.—*a. Statutes prescribing that contract shall be authenticated by indenture.*—Subject to the exceptions adverted to in the next subsection, it seems to be a universal requirement of the enactments relating to apprentices that the contract shall be authenticated by an indenture. In some jurisdictions the execution of an indenture is merely prescribed in general terms.¹ In others the execution of an indenture in two parts

3 of Stat. 28 Geo. III. chap. 48, to be observed in binding a boy apprentice to a chimney sweeper, with respect to the approbation of justices, the form of the indenture, and the insertion therein of the apprentice's age, applied only to the case of binding by parish officers. Lord Campbell observed: "Perhaps the legislature found that the children were treated like slaves and bound in a cruel manner by parish officers, but were of opinion that parents might be trusted, and therefore did not extend all the requisites to cases other than that of binding by parish officers."

² In *Luby v. Cox* (1837) 2 Harr. (Del.) 184, where the requirement of the Delaware statute, that the presence and approbation of the justice must appear by a certificate or note under his own hand, had not been complied with, the contract was held to be merely "voidable," as it was considered that another provision of the act showed that the word "void" was to be construed in that sense. See § 2133, note 2, *post*.

In *State ex rel. Neider v. Reuff* (1887) 29 W. Va. 751, 6 Am. St. Rep. 676, 2 S. E. 801, the right of a widowed mother to reclaim a child apprenticed during her husband's lifetime was affirmed on the ground that the county court had not assented to the binding.

In *Morrill v. Kennedy* (1860) 22 Ark. 324, where an apprentice bound by his parents had absconded, it was held that the parents who had bound could not be sued for a breach of covenant, for the reason that the probate court had not

assented to the indenture. Counsel argued that the defendants were bound at common law (see § 2075, *ante*); but the court did not advert to this point.

In *Charles v. Matlock* (1827) 3 Cranch, C. C. 230, Fed. Cas. No. 2,615 (petition for discharge of apprentice disallowed), decided with reference to the Maryland act of 1793, chap. 45, § 6, an indenture, made by one justice of the peace only, for five years' service of a boy, was, under § 7 of the act, enforced by the court, after the boy had been some time with the master, and was able to earn \$8 or \$9 a week by working at the trade, although one justice of the peace had no authority so to bind him, and the age of the boy was not specified in the indenture, and although the indenture was not seen by the orphans' court, nor recorded, nor signed by the boy or his mother, his only living parent, neither was her approbation thereof notified by an indorsement on the same. But Cranch, Ch. J., dissented from the decision, and, in the opinion of the present writer, very properly. Any single one of the informalities enumerated would seem to have been sufficient to invalidate the contract, and *a fortiori* the whole of them in combination.

¹ For a case in which the contract was declared invalid on the ground of noncompliance with a provision of this tenor, see *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61.

The following definition clause is inserted in the New York domestic re-

is expressly declared to be obligatory.² Provisions of the latter description constitute a legislative affirmation of the doctrine laid down with reference to the statute of 5 Eliz. chap. 4, that a valid contract could not be created by deed poll.³

In the absence of some special reason for a different construction, the term "indenture" is taken to mean a sealed instrument.⁴ By

lations law, § 120 (Consol. Laws 1909, p. 1082): The instrument whereby a minor is bound out to serve as a clerk or servant in any trade, profession, or employment, or is apprenticed to learn the art and mystery of any trade or craft, is an indenture.

² Provisions of this tenor are in force in the following states:

California. Civil Code 1909, § 266.

Colorado. Rev. Laws 1908, § 140.

Illinois. Starr & C. Anno. Stat. 1896, chap. 9, ¶ 8.

Maine. Rev. Stat. 1903, chap. 64, § 3.

Massachusetts. Rev. Laws 1902, chap. 155, § 5.

Michigan. How. Anno. Stat. 1882, § 6355, Comp. Laws 1897, § 8752.

Missouri. Rev. Stat. 1899, § 4801; Rev. Stat. 1909, § 1686 (applied in *Beach v. Bryan* (1911) 155 Mo. App. 33, 133 S. W. 635).

New Hampshire. Pub. Stat. 1901, chap. 180, § 3 (Rev. Stat. chap. 151, § 3).

Oregon. Hill's Anno. Laws 1892, § 2915.

Vermont. Pub. Stat. 1906, § 3245.

Wisconsin. Sanborn & B. Anno. Stat. 1898, § 2379.

New Brunswick. Consol. Stat. 1903, chap. 83, § 3.

Nova Scotia. Rev. Stat. 1900, chap. 117, § 4.

For cases in which agreements were held to be void for noncompliance with such a provision, see *Campbell v. Cooper* (1856) 34 N. H. 49; *Brown v. Whittemore* (1862) 44 N. H. 369; *Davies v. Turton* (1860) 13 Wis. 186.

³ *Smith v. Birch* (1727) 1 Sess. Cas. 222, 1 Bott, Poor Law, 528.

⁴ An allegation that a party covenanted by "indenture" imports that the covenant was under seal. *Phillips v. Clift* (1859) 4 Hurlst. & N. 168, 28 L. J. Exch. N. S. 153, 5 Jur. N. S. 74, 7 Week. Rep. 295.

In *Com. ex rel. Ruggles v. Wilbanks* (1823) 10 Serg. & R. 416, the court,

referring to the expressions in the enacting clause of the Pennsylvania act of 1770, said: "I will not say that the word 'indenture,' in its largest sense, might not comprehend a writing indented, though not under seal. But certain it is, that when an indenture is spoken of, and particularly an indenture of apprenticeship, an instrument under seal is generally understood. It was said by Holt, Ch. J., in the case of *Reg. v. Callingwood* (1705) 2 Ld. Raym. 1117, that an apprentice cannot be bound without deed; and the law is so laid down in 1 Burn's J. P. title *Apprentice*, p. 37, and *Castor and Aicles* (1701) 1 Salk. 68. It might be fairly inferred, therefore, that our act of assembly required a deed, from the sense in which the word 'indenture' was usually taken. But we are not left without explanation from other parts of the act, in which the covenants both of the master and the apprentice are several times spoken of, which could not be without deed. The binding of apprentices is a matter of importance, and the forms prescribed by law should be preserved, as they give solemnity to the transaction. It is the opinion of the court that a writing without seal is not an indenture within the meaning of the act of assembly."

See also *North Brunswick v. Franklin* (1838) 16 N. J. L. 535 (no settlement gained by service under an unsealed instrument); *Hopewell Twp. v. Amwell Twp.* (1822) 6 N. J. L. 169 (scroll or scribble, not a sufficient sealing to enable apprentice to gain a settlement); *Phelps v. Pittsburgh, C. & St. L. R. Co.* (1881) 99 Pa. 108 (action for breach of indenture not maintainable against the master); *Martinsen v. Allen* (1889) 8 New Zealand L. R. 471 (indenture executed by the minor himself held not to be admissible, in an action for wrongful dismissal, as evidence of the contract, for the reason that it had not been attested as a deed).

By N. J. Gen. Stat. 1895, title *Ap-*

some of the statutes provision is specifically made for the sealing of the indenture which is prescribed.⁵

b. Statutes prescribing that the contract shall be authenticated by writing.—The original English rule, under which it was obligatory that a binding should be made by indenture, was abrogated by the general provision in 54 Geo. III, chap. 96, § 2, which provides that contracts of apprenticeship may be created by “indentures, deeds, or agreements in writing.”⁶ That rule had previously been changed, so far as settlement cases were concerned, by the following provision in 31 Geo. II. chap. 11, § 1:

No person who shall be bound an apprentice, by any “deed, writing, or contract, not indented,” being first legally stamped, shall be liable to be removed from the town, parish, or place where he or she shall have been so bound, and resident forty days, by reason of such deed, writing, or contract not being indented only. The effect of this provision is that a settlement may be acquired by serving under a written contract duly stamped, although it is not under seal.⁷

In a few jurisdictions it is enacted simply that the contract shall be in writing.⁸

prentices, § 4, it is provided that the contract shall not be deemed to be void by reason of its not being indented. But presumably it was not indented to dispense with the necessity for a seal.

Lord Coke lays it down that a deed cannot be an indenture unless actually indented, even though it describe itself as “This indenture” (Co. Litt, 229a). This rule is abrogated by § 5 of the English real property act 1845, and had, independently of statute, become obsolete in the United States.

The expression “indenture of apprenticeship,” in the Victoria factories and shops act 1903 (No. 1857), § 7, has been held to have no specific legal significance, and to include a writing not under seal. *Hines v. Phillips* (1906) Vict. L. R. 417. But in the Australian Province an unusually lax construction has been placed upon the term “indenture” even as used in the apprentice act (see note 8, *infra*), and the above decision would, it is apprehended, not be approved in other jurisdictions.

⁵ *Colorado*. Rev. Laws 1908, § 140.
Illinois. Starr & C. Anno. Stat. 1896, chap. 9, ¶ 8.

⁶ for cases in which this statute was applied, see *Woodstock Union v. Shipston-on-Stour-Union* (1892) 62 L. J. Mag. Cas. N. S. 43, 5 Reports, 67, 68

L. T. N. S. 449, 57 J. P. 167 (binding by an instrument duly stamped, but not sealed, held valid); *Grant v. Ramage* (1897) 25 Sc. Sess. Cas. 4th series, 35, 35 Scot. L. R. 48, 5 Scot. L. T. 161 (contract can be constituted and proved only by written instrument): *Murray v. —* (1863) 4 Irv. 466 (similar decision).

On the ground that, after this statute came into force, noncompliance with the act of 5 Eliz. was not fatal to the validity of contract, it was held in *Rex v. Clotsworth* (1837) 6 Ad. & El. 286, 6 L. J. Mag. Cas. N. S. 71, 1 Nev. & P. 437, that an adult bound in Newfoundland to an employer having an establishment both there and in England had gained a settlement by residence in an English parish, although no proof was given with regard to the law of Newfoundland.

⁷ *Woodstock Union v. Shipston-on-Stour-Union* (1892) 57 J. P. 167, 62 L. J. Mag. Cas. N. S. 43, 5 Reports, 67, 68 L. T. N. S. 449. Mathew, J., observed that the statements of a contrary tenor in *Rex v. Ditchingham* (1792) 4 T. R. 769, were merely *obiter*.

⁸ *Texas*. Rev. Stat. Apprentices, arts. 23, 28.

Virginia. Code 1904, § 2585.

Victoria. Act of 1864, No. 193, §§ 9,

c. Statute of frauds, operation of.—If a parol binding purports to be for a longer period than a year, its invalidity may be predicated on the ground that it comes within the scope of the statute of frauds.⁹ Neither party can maintain an action for a breach of it, even though it may have been partly performed on both sides.¹⁰ But it is not void, and if the apprentice abandons it without cause, his master may maintain assumpsit to recover a reasonable compensation for the teaching and advances made.¹¹

2094. Stamping as a prerequisite to the validity of the contract. Provisions of English acts.—The reported cases in which the effect of provisions requiring indentures of apprenticeship to be stamped has been discussed were decided with reference to a statute no longer in force, *viz.*, the act of 8 Anne, chap. 9. But it has been deemed advisable, in a treatise of this comprehensive scope, to insert them all, without undertaking the difficult task of distinguishing between those which are wholly obsolete as precedents, and those which are either useful by way of analogy, or directly relevant, for the purpose of construing the later enactments upon the subject. A brief summary of the clauses in the statute specified above, so far as they relate to apprenticeships, is subjoined.

Sec. 32. It was enacted that certain duties should be paid on every sum exceeding a specified amount, which should be "given, paid, contracted, or agreed for, with, or in relation to every apprentice," and that their duties should be paid by the master.

Sec. 35. It was enacted that the full sum or sums of money received, or in any wise directly or indirectly given, paid, or agreed, or contracted for, in relation to every apprentice, should be truly inserted and written at length in the indenture.

Sec. 38. It was enacted that the indenture was to be stamped within three months of the making thereof.

10. In *Welshman v. Robertson* (1875) 1 Vict. L. R. (L.) 124, where an action for not instructing the apprentice, as agreed under a contract not in writing, was held to be maintainable by the father, the court took the position that these provisions were controlling only for the purposes of the summary jurisdiction of the justice, as conferred by the act. This decision seems to be irreconcilable with an earlier one by the same court,—*Stead v. Gould* (1873) 4 Australian Jur. 115,—where it was held that an instrument signed, but not sealed, was not valid, and consequently that the master could not be held liable for failing to instruct the apprentice.

This case, which, strange to say, was not noticed in the later one, embodies, in the opinion of the present writer, the correct doctrine. The other view finds no support in the English authorities.

⁹ *Tague v. Hayward* (1865) 25 Ind. 427 (parol contract held not to preclude the maintenance of an action for work and labor).

¹⁰ *Hall v. Rowley* (1794) 2 Root, 161 (master cannot sue father of minor, where the latter absents himself); § 1018 *Squire v. Whipple* (1826) 1 Vt. 69.

¹¹ *Hambell v. Hamilton* (1835) 3 Dana, 501.

Sec. 39. It was enacted that any indenture or writing wherein should not be asserted the full sum and sums of money received, etc. (as in § 35), or whereupon the duties payable by the act should not be duly paid or lawfully tendered, or which should not be stamped or lawfully tendered to be stamped, according to the tenor of the act, should be void and not available in any court or place, or to any purpose whatsoever.

Sec. 40. It was declared that the act was not to be construed as charging a master with payment of the duties in respect of money received with any apprentice who should be placed out at the public charge of any parish, or by or out of any public charity. (A similar clause was inserted in 55 Geo. III., chap. 184, schedule, pt. 1, title *Apprenticeship*.)

Sec. 45. It was enacted that where any thing or things not being lawful money should be directly or indirectly given, assigned, etc., to the use or benefit of a master in respect of an apprentice, the duties provided for should be paid in full for the value of such thing or things. (A similar provision was enacted in 55 Geo. III., chap. 184, schedule, pt. 1, title *Apprenticeship*.)

By the act of 5 Geo. III., chap. 46, § 19, it was provided that the indenture, covenant, article, or contract must be dated on the day when it was executed, and that the money or other thing given or contracted for with the clerk or apprentice should be asserted in words at length, and the duty paid within the period prescribed; otherwise the indenture should be void.

In the schedule of that statute title *Apprentices*, it was provided that no stamp should be required in the indentures of parish apprentices.

All the above statutes were repealed by the stamp act 1870, in which there were three provisions relating to apprentices.

By Sec. 39 it was enacted that every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to attorneys and others thereby specifically charged with duty), is to be deemed an instrument of apprenticeship.

By Sec. 40 it was enacted that the full sum of money and the value of any other matter or thing, paid, given, or assigned, or secured to be paid, given, or assigned to or for the benefit of the master, with or in respect of any apprentice, clerk, or servant (not being a person bound to serve in order to admission in any court), was to be fully and truly set forth in an instrument of apprenticeship.

The act of 1870 was repealed as a whole by the act of 1891. The only provision in it which relates to apprentices is § 25, which thus defines the instruments to which the scale of fees in the schedule is to be applicable.

Sec. 25. Every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to a solicitor, or law agent, or writer to the signet), is to be deemed an instrument of apprenticeship.

2095. Effect of these acts.—a. Generally.—Broadly speaking, the effect of the general clause which prescribes the payment of the stamp

duties, and declares the indenture to be invalid in default of such payment, is, on the one hand, that where no consideration money is given with an apprentice the indenture does not require a stamp,¹ and, on the other hand, that where such money is given an unstamped indenture is (subject to the exceptions noticed in subsec. *c*, *infra*) void for every purpose.² But in cases where the existence of an indenture is permitted to be established by secondary evidence after the lapse of a long period, it will be presumed to have been duly stamped, unless the contrary appears.³

An agreement which purports to assign the apprentice to another master is void unless an assignment stamp is affixed to it.⁴ A common assignment stamp is sufficient where the original agreement contains a stipulation for an additional year's service with a new master.⁵

b. Premium paid upon void indenture, not recoverable.—Where the indenture is void on account of the failure to insert in it the amount of the premium, the money paid to the master cannot be recovered back by the parent of the apprentice, although the penalty

¹ *Rex v. St. Peter's, Chester* (1741) 1 Bott, Poor Law, 548.

² For cases in which it was held that no settlement can be gained by service under unstamped indentures, see *Cuerden v. Leland* (1718) 1 Bott, Poor Law, 545; *Anonymous* (1731) Gibb. 167, cited in Viner's Abr. "Apprentice" K. 23; *Salford v. Storeford* (1732) 2 Bott, Poor Law, 363; *Rex v. Holbeck Twp.* (1743) Burr. Sett. Cas. 198; *Rex v. Llanvair* (1745) Burr. Sett. Cas. 236; *Rex v. Edgeworth* (1789) 3 T. R. 353; *Rex v. Ditchingham* (1792) 4 T. R. 769; *Rex v. Chipping-Norton* (1822) 5 Barn. & Ald. 412.

Where a surgeon agreed with the defendant to take his son an apprentice in consideration of a premium, and after the son had served a short time the agreement was broken off on account of the refusal to pay the expense of the stamp for the indenture (§ 32 of the act of 8 Anne), held, that the surgeon could not recover damages for a breach of the agreement, nor for the board and lodging of the son during the time he remained with him. *Keene v. Parsons* (1819) 2 Starkie, 506.

An apprenticeship to two masters, to serve them consecutively in distinct trades, is valid, and requires only a single stamp. *Rex v. Louth* (1828) 2 Mann. & R. 273, 8 Barn. & C. 247.

The language of the statute imports that the duty is not payable for any consideration money, unless such as is given to the master. *Rex v. St. Petrox, Dartmouth* (1791) 4 T. R. 196 (money here was given to the apprentice's mother by the parish officers).

On the ground that no coin is small enough to pay the duty at the specified rate upon sixpence, it was held that the indenture was not void for the purposes of gaining a settlement, where only that sum had been paid. *De minimis non curat lex*. *Baxter v. Faulam* (1746) 1 Wils. 129, 1 Bott, Poor Law, 549; *Rex v. Yarmouth* (1755) Burr. Sett. Cas. 379.

³ *Rex v. East Knoyle* (1740) Burr. Sett. Cas. 151, 1 Bott, Poor Law, 547; *Rex v. Badby* (1772) 1 Bott, Poor Law, 549; *Rex v. Long Buckby* (1805) 7 East, 45, 8 Revised Rep. 595.

⁴ *Rex v. St. Paul's, Bedford* (1795) 6 T. R. 452. The court rejected the contention that the instrument came within the scope of the clause excepting from the operation of the statute contracts for the employment of "servants."

⁵ *Morris v. Cox* (1841) 3 Scott, N. R. 116, 2 Mann. & G. 659, 9 Dowl. P. C. 661, 5 Jur. 367.

declared by the provisions relative to the duties payable is imposed upon the master alone. The parent, having executed the instrument, is presumed to be aware of its illegality, and is consequently *in pari delicto* with the master.⁶

c. Action upon note given or bill accepted, by father of apprentice, how far maintainable in cases where the statute is not complied with.—In one case the fact that the premium had not been inserted in the indenture was held to preclude the master from maintaining an action upon a note given for the amount by the father of the apprentice, even though the apprentice had been received and for some time maintained by the master. The court proceeded upon the ground that, as the indenture was void, there was a failure of consideration.⁷ But, having regard to two later decisions, it seems likely that the reason thus assigned would not now be deemed applicable under the same or similar circumstances.⁸

⁶ *Stokes v. Twitchem* (1818) 2 J. B. Moore, 538. The court said: "In support of her [the mother's] claim, it has been contended that no misconduct whatever can be imputed to her, as it was the duty of the defendant, as the master of the apprentice, to insert the premium paid with him, in the body of the indenture; and that the legislature have imposed a penalty on him alone, in case such premium be not stated therein. If this case rested here, the plaintiff might be entitled, but other circumstances tend to involve her in a very material degree. She executed the indenture, at the foot of which it was expressed that the premium or sum contracted to be given with the apprentice must be inserted therein, in words at length. By executing it, therefore, she gave effect to the indenture, which had this apparent illegality on the face of it at the time. The reason that the legislature directed the premium to be inserted in the body of the indenture was that they had no other means of ascertaining the amount of duty to be paid on such an instrument. It therefore became most material that the premium should have been duly inserted. It is true the master of the apprentice alone is liable to a penalty if it be omitted. But here, both the parent and master endeavored to shut the eyes of the public from seeing what premium had actually been paid, and the plaintiff herself concealed from a

public officer, namely, the distributor of stamps, or his substitute, the sum he was entitled to receive, and also sheltered the defendant from the payment of the duty he was by law required to make."

⁷ *Jackson v. Warwick* (1797) 7 T. R. 121. A similar doctrine had previously been applied in the Scotch case, *Donaldson v. Fulton* (1754) Morr. Dec. 587, where a father had not inserted any sum in the indenture as apprentice fee, but, in lieu thereof, had accepted a bill drawn by the master. It was held that the indenture was null, and the bill not actionable.

⁸ In *Mann v. Lent* (1830) 10 Barn. & C. 877, 5 Mann. & R. 660, Moody & M. 240, 8 L. J. K. B. 269, an action by the indorsee of a bill of exchange against the acceptor, the latter proved that his son had been bound apprentice to the drawer by indenture, and that a premium of £30 was agreed to be paid, for which the bill in question was given. The indenture had a £1 stamp impressed upon it. After the apprentice had served his master for five months, a difference arose between the master and father, and it was discovered that the stamp was insufficient. Thereupon the apprentice left his master's service. Held, that, as the apprentice was maintained and instructed by his master for five months, and might have compelled him to continue that maintenance and instruction by causing the indenture

d. Other points determined in construing the statutes.—For the purposes of the present treatise it will be sufficient to state in a note the effect of the decisions regarding the particular clauses of the statutes.⁹

to be properly stamped, pursuant to the statute 20 Geo. II. chap. 45, § 5, there was not a total failure of consideration for the bill, and therefore that the circumstances would not be an answer to an action by the payee against the acceptor. It was questioned whether, even if the acceptor had proved a total failure of consideration as between him and the drawer, it would have been incumbent on the plaintiff, the indorsee, even after notice, to prove that he gave consideration for it.

In *Westlake v. Adams* (1858) 5 C. B. N. S. 248, a father, upon the apprenticing of his son to the plaintiff by a charitable society, agreed to give the plaintiff, in addition to a premium of £20 to be paid by the society, four I. O. U. s for £5 each, payable at intervals of a year. The boy was apprenticed and served the full term,—the indenture stating the consideration to be £20 paid by the society. After the expiration of the term the plaintiff sued the defendant upon his I. O. U. Held, that the transaction was not a fraud upon the society. Held, also, by Willes, J., and Byles, J.,—*dissentiente* Williams, J., that the circumstance of the indenture being void by the 39th section of 8 Anne, chap. 9, for not truly setting forth the consideration, did not prevent the plaintiff from suing the defendant upon the I. O. U., the execution of the indenture (though void) being a sufficient consideration for the defendant's promise to pay the additional £20. Byles, J., said: "The only difficulty I feel is in distinguishing this case from the case of *Jackson v. Warwick* (1797) 7 T. R. 121. But that was an action on a promissory note. The defendant had there certainly received some consideration; and the law was not at the time so well settled as it has since been, that an action to recover the full amount due on a bill or note can be sustained unless the consideration fails entirely, or fails to an ascertained and liquidated amount. Moreover, the language of Lord Tenterden, in *Mann v. Lent* (1830) 10 Barn. & C. 884, 5 Mann.

& R. 660, Moody & M. 240, 8 L. J. K. B. 269 [see above], seems to import some doubt in the mind of the court of King's bench as to the correctness of Lord Kenyon's decision. And Lord Tenterden in *Mann v. Lent* proposes as the test this inquiry, whether, if the father, instead of having given the bill, had actually paid the money, he could have recovered the money back. Surely in this case he could not have done so; for it would have been money paid by him with full knowledge of the facts. But the distinction between *Jackson v. Warwick* and the present case is this, that there Lord Kenyon says it was the master's duty to get the consideration properly inserted and the instrument properly stamped; whereas here the master had done, as the jury have found, all he engaged to do."

⁹ (a) *Insertion in the indenture of the full sum paid to the master* (§§ 35, 39, of the act of 8 Anne).—The indenture was held not to be void, where the premium actually paid was inserted, although it was a smaller sum than that originally stipulated, and the reduction was made to diminish the amount of the stamp duty. *King v. Low* (1829) 3 Car. & P. 620; *Shepherd v. Hall* (1812) 3 Campb. 180.

Nor was the indenture void, where the duty had been paid on the sum inserted, although in point of fact less was paid to the master. *Rex v. Keynsham* (1804) 5 East, 309.

Nor is an indenture void because a present was given to the master several months after the date of the indenture. *MacLeod v. Sinclair* (1738) (Morr. Dec. Sc.) 585.

For a case in which an action for the enticement of an apprentice was held to be void, simply on the ground that the consideration had not been truly set forth, see *Cow v. Muncey* (1859) 6 C. B. N. S. 375.

In *Rex v. Quinton* (1814) 2 Maule & S. 338 (settlement case), the objection that the consideration had not been fully stated was held to be untenable, where it was specified as £20, although

only £16 had been actually paid to the master.

In *Rex v. Amersham* (1836) 6 Nev. & M. 12, 4 Ad. & El. 508, 1 H. & W. 694, 5 L. J. Mag. Cas. N. S. 49, the failure to insert in the indenture a sum contracted to be paid by a third person in addition to the specified premium actually paid by the party binding out the apprentice was held to render the instrument void. The same rule was taken for granted in *Westlake v. Adams* (1858) 5 C. B. N. S. 248, 4 Jur. N. S. 1021, 27 L. J. C. P. N. S. 271. Yet in *Hankins v. Clutterbuck* (1848) 2 Car. & K. 811, a nisi prius case tried between the date of the above decisions the master was held entitled to maintain an action on an indenture in which a certain fee was stated as the consideration, although a contemporaneous contract, not mentioned in the instrument, had been made, by virtue of which a relative of the apprentice became obligated to pay a certain sum for his board. *Quære* as to the correctness of the ruling.

In a Scotch case the indenture was annulled on the ground that, before tendering the duty, a present had been given to the master's wife, with his knowledge. *Horseburgh v. Hyslop* (1727) Morr. Dec. 585.

In a penal action for the violation of these provisions, it was held that an averment that A., the apprentice, by an indenture executed, put himself apprentice to the defendant, might be proved by the production of that part of the indenture executed by the defendant, in which it was recited that A. had put himself apprentice. *Burleigh v. Stibbs* (1793) 5 T. R. 465.

In *Rex v. North Ovrarn* (1740) Burr. Sett. Cas. 145, 2 Strange, 1132, it was held that no stamp was required in respect of an agreement, made before the binding, to pay the master to clothe the apprentice.

The fact that a third person agreed to pay the master a sum of money in addition to the premium which was inserted in the indenture was held not to render it void, if that person was not legally competent to make a binding contract, and the arrangement was not known to the party who paid the premium. *Rex v. Burton-on-Dunsmore* (1829) 3 Mann. & R. 631, 9 Barn. & C. 872, 8 L. J. Mag. Cas. 29 (promise made M. & S. Vol. VI.—404.

by *feme covert* without her husband's knowledge).

(b) *Limitation of time for stamping* (§ 38).—For a case in which the contract was treated as void for the reason that the stamp had not been affixed within the time prescribed, see *Rex v. Church Hulme* (1831) 5 Barn. & Ad. 1029, holding that the provision in the act of 8 Anne had not been repealed by 55 Geo. III. chap. 184.

That the provision on this subject was not applicable to an indenture in which no consideration was expressed was held in *Smith v. Agett* (1840) 8 Dowl. P. C. 411.

(c) *Exceptions in respect of premium paid out of public or charitable funds* (§ 40).—With reference to the provision by which the obligation of paying the duty was dispensed with in cases where the apprentice was bound at the public charge or by a public charity, it was held that the insertion of the amount of a premium wholly derived from either of the sources thus indicated was not obligatory. *Rex v. Oadby* (1818) 1 Barn. & Ald. 477; *Rex v. Ide* (1831) 2 Barn. & Ad. 866, 1 L. J. Mag. Cas. N. S. 9.

It was also held that the limitation of time prescribed in respect of stamping was not applicable in respect of such a premium. *Rex v. Ide* (1831) 2 Barn. & Ad. 866, 1 L. J. Mag. Cas. N. S. 9 (parish apprentice.)

On the other hand, it was laid down that, if a third person contracted to pay to the master a sum of money in addition to a premium of this character, the omission to insert it rendered the indenture void. *Rex v. Baildon* (1832) 3 Barn. & Ad. 427, 1 L. J. Mag. Cas. N. S. 34 (no settlement gained by service).

Money voluntarily contributed by the residents of a parish for the purpose of binding out the boys of the parish was deemed to be a charitable fund. *Rex v. St. Matthew's Bethnal Green* (1767) Burr. Sett. Cas. 574.

So also was money bequeathed for the purpose of binding out children belonging to a certain category. *Rex v. Clifton* (1772) Burr. Sett. Cas. 697; *Rex v. Quainton* (1814) 2 Maule & S. 338. See, however, *Rex v. Fakenham*, *infra*.

A recital in an indenture that the premium had been paid out of such a fund was held not to be conclusive evi-

dence of that fact. *Rex v. Skeffington* (1820) 3 Barn. & Ald. 382.

Parol evidence was held to be admissible to show that the money paid on an assignment was parish money. *Rex v. Llangunnor* (1831) 2 Barn. & Ad. 616.

The exemption allowed was held to attach only to such money as is paid at the time when the apprentice is first bound. When a portion of it was transferred by the original master to an assignee, in consideration of his assuming the obligations of the contract, the general clauses of the statute were treated as controlling. In *Rex v. Fakenham* (1835) 2 Ad. & El. 528, 4 Nev. & M. 553, 1 H. & W. 222, 4 L. J. Mag. Cas. N. S. 77, a boy was apprenticed as above to a tinman for seven years, the master binding himself to teach the apprentice, and to pay his father a weekly sum during the term. At the end of three years the master, at the boy's desire, consented that he should serve the rest of his time with his own brother, a plumber and glazier, and agreed to give the brother £6 as part of the premium on the binding of the apprentice, for taking him. There was no contract in writing, and the trustees under the will were not parties to the agreement. The £6 were paid, and the boy went to and served his brother. It was questioned whether a devise of property to trustees, who were to apprentice a certain number of boys belonging to the family of the testator's wife, and, failing these, to make a selection from among the inhabitants of designated parishes, created a charitable fund in such a sense that the indentures of persons coming within the preferred class must be stamped. But it was held that, in any event, the money given to the second master was not money derived from the charity, that the new arrangement had taken away whatever exemption the statute may have imparted to the indenture.

(d) *Payment of duty on consideration of other things than lawful money* (§ 45).—In one case the clear meaning of the provision on this subject was said to be this: "That where money or money's worth is given to the master by the friends of the apprentice by way of premium, a duty ought to be paid for it; but that where meat, clothes, etc., are to be provided for the apprentice, no duty is payable, because

there is not anything given to the master." *Rex v. Leighton* (1792) 4 T. R. 732, Nolan, 100 (contract to maintain apprentice and provide him with clothes, not a "benefit" to the master within the meaning of the statute).

In *Rex v. Aylesbury* (1832) 3 Barn. & Ad. 569, 1 L. J. Mag. Cas. N. S. 38, a pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, etc. Before the execution of the indenture the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement. Held, that the indenture did not require to be stamped; because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within 55 Geo. III. chap. 184, schedule pt. I. title, *Apprenticeship* [which was similar to § 45 of the act of Anne], or, assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. Lord Tenterden, Ch. J., remarked that the decision in *Rex v. Leighton*, *infra*, "proceeded on the ground that there was no obligation on the part of the master, in the absence of express stipulation, to provide clothes or substance for an apprentice, and therefore that the agreement so to do by the father could not be considered a benefit to the master."

In *Rex v. Walton-in-le-Dale* (1790) 3 T. R. 515, the apprentice covenanted to provide for himself meat, drink, and lodging, and physic in sickness, during the term, for which benefit to the master no additional duty was paid. The indentures were held to be admissible evidence, it not appearing that weekly payments which the master covenanted to make to the apprentice during the term were not an equivalent. The court was of the opinion that there was no benefit to the master for which an additional duty ought to be paid, that the agreement was only one to the effect that the master should not pay, not one to the effect that he should receive anything.

In *Rex v. Wantage* (1801) 1 East, 601, the decision proceeded on the ground that "it was impossible to argue

2096. Stamping as a prerequisite to validity in the United States.—

The act of Congress, known as the internal revenue act, so far as it prescribes a rule of evidence as to documents wanting a proper revenue stamp, is operative only in the Federal courts. Accordingly, the state courts do not treat an indenture as being invalid merely because it has not been duly stamped.¹

2097. Execution of the indenture by the apprentice.—a. Doctrine apart from express statutory provisions.—The common-law doctrine is that, except in the case of a parish apprentice (see § 2104, *b, post*), a contract apprenticing a minor is invalid unless it is not only assented to, but also executed by him.¹ This condition is satisfied if some third person duly authorized signs the instrument in his behalf.²

An indenture which is made by a third person in behalf of an

that a part of the apprentice's earnings reserved to the master was a benefit to him within the meaning of the statute, when by law he was entitled to the whole, and might rather be considered to have given up that part which he did not reserve than to have acquired anything."

In *Rex v. Bradford Twp.* (1813) 1 Maule & S. 151, with reference to 44 Geo. III. chap. 98, which required an additional stamp upon an indenture where a certain sum of money was contracted for with the apprentice, it was held that no such stamp was necessary in respect of a covenant by the apprentice to allow his master 2s. a week, and to have wages and provide for himself.

In *Rex v. Portsea* (1776) Burr. Sett. Cas. 834, an agreement by the apprentice's father to provide necessaries for him in consideration of a weekly sum to be paid him by the master was held not to be within the statute.

(e) *Dating of indenture.*—On the ground that neither in the act of 8 Anne, chap. 9, nor in that of 5 Geo. III. chap. 46, was there any declaration that an indenture should be void if not properly dated, it was held that a printed indenture antedated two years before it was executed was not void. *Rex v. Harrington* (1836) 4 Ad. & El. 618, 6 Nev. & M. 165, 1 H. & W. 747, 5 L. J. Mag. Cas. N. S. 83 (settlement gained). But if the two statutes were to be construed together, as was assumed by the court, it would seem that the fact of a penalty's having been im-

posed by the earlier one was indicative of a conclusion different from that arrived at.

¹*People ex rel. Barbour v. Gates* (1870) 43 N. Y. 40 (apprenticeship case); *Carpenter v. Snelling* (1867) 97 Mass. 452 (document involved was a lease).

²*Rex v. Aresby* (1820) 3 Barn. & Ald. 584; *St. Nicholas, Rochester v. St. Botolph, Bishopsgate* (1862) 12 C. B. N. S. 645, 31 L. J. Mag. Cas. N. S. 258, 6 L. T. N. S. 495, 9 Jur. N. S. 101; *Stewart v. Rickets* (1840) 2 Humph. 151; *Ex parte Byrne* (1849; New So. Wales, Sup. Ct.) cited in *Ex parte Erwin* (1854) Legges Rep. 810.

"The case of parish apprentices is the only one where an apprentice can be put out *volens*; all the others depend on the express stipulation of the parties themselves." Lord Kenyon, in *Rex v. Leighton* (1792) 4 T. R. 732.

²In *Rex v. Longnor* (1833) 1 Nev. & M. 576, 4 Barn. & Ad. 647, 2 L. J. Mag. Cas. N. S. 62, an indenture having been prepared for binding a boy apprentice, he and his father, being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master, and left it with him, and afterwards stated that when he did so he considered himself bound; and he went into the service under the indenture. Held, that the indenture was sufficiently executed and delivered.

adult, but in which he does not join, does not impose any legal obligation upon him, even though he consents to the binding.³

b. Effect of statutory provisions.—In some jurisdictions, minors below a certain age may be bound without their consent. See § 2086, (2), *ante*. In others it is specially provided that the minor need not sign the indenture.⁴ In others it is provided that the minor need not be a party to the indenture, except in a case where he is binding himself.⁵ But, speaking generally, the rule applicable under the statutes is the same as that of the common law, *viz.*, that the consent of the minor to the binding, and his attestation of that consent by executing the indenture, are conditions precedent to the validity of the contract.

By the explicit terms of many enactments the apprentice is required to execute the indenture.⁶ But the common-law rule has also been applied with reference to enactments which simply provide for the binding of minors by certain designated persons,⁷ or with the

³ *Reu v. Ripon* (1808) 9 East, 295. This decision, it is apprehended, embodies the correct rule. But it has been laid down in Ohio that a female, even where she joins in an indenture, cannot be bound as an apprentice after the age—*viz.*, eighteen years—at which, under the law of that state, she attains her majority. *M'Clintock v. Chamberlin* (1834) Wright (Ohio) 547.

⁴ Georgia Code 1895, § 2599 (1879).

⁵ See Delaware Rev. Code 1893, chap. 79, § 5.

⁶ In *Welborn v. Little* (1818) 1 Nott & M'C. 263, and *Austin v. M'Cluney* (1850) 5 Strobb. L. 104; the omission to comply with such a requirement was held fatal to the validity of the indenture.

In *Anderson v. Young* (1898) 54 S. C. 388, 44 L.R.A. 277, 32 S. E. 448, the court, after having stated the effect of the provision in the act of 1740, which had formed the *ratio decidendi* in the two cases cited above, adverted to the changes made by the General and Revised Statutes, and proceeded thus: "Notwithstanding the absence of the language quoted from the act of 1740, we hold that by necessary implication the apprentice must execute the instrument, otherwise it will be void as to such apprentice as an indenture of apprenticeship under the statute, however unreasonable this may appear when applied to infants which have not at-

tained years of discretion. There is no doubt that the rule generally held is that the apprentice, to be bound, must execute the indenture, unless the statute expressly provide a different mode of execution in behalf of the infant."

⁷ In *Pierce v. Massenburg* (1833) 4 Leigh, 493, 26 Am. Dec. 333, the right to maintain an action for enticement depended upon the question whether an indenture to which the apprentice had not assented was valid under 1 Va. Rev. Code, chap. 108, § 27 (corresponding to, but not identical in terms with, Code 1849, chap. 126, § 1; Code 1887 and 1904, § 2581), by which it is provided that any apprentice bound by his father may, with the approbation of the court, after he shall be sixteen years of age, agree to serve till he shall be twenty-four, or any shorter time. After referring to the common-law doctrine as one which must be presumed to have been known to the law makers, the court proceeded thus: "When they speak of an apprentice bound by his father, they mean, I conclude, bound in that way in which a father may bind his son; that is, with his assent, shown by his joining in the deed. If the statute had intended to abrogate the common law, and to confer on the father a new power, it would have used words expressive of such intent; but those employed clearly speak of an existing power, without meaning to add to or

assent of such persons,⁸ and also with reference to enactments which expressly import that the binding shall be with the consent of the minors.^{9a} The intention of the legislature that the apprentice should be an actual party to the indenture was deemed to be inferable even in a case where a clause in an earlier enactment which rendered his participation obligatory had been omitted from the enactment under review.⁹

In some jurisdictions the minor's subscription of the indenture constitutes a legal attestation of his consent.¹⁰ In others his consent must be expressed in the body of the deed, and also attested by his signature.¹¹ In the absence of an express requirement to this effect, it is not necessary to insert in the body of the indenture a statement

detract from it. As to the common law on the point, the authorities cited for the appellant are decisive."

In *Studer v. Glenn* (1829) 3 Cranch, C. C. 650, Fed. Cas. No. 13,558 (also decided with reference to the repealed Virginia Statute) it was held that signing and sealing were sufficient evidence of the minor's consent, and that he was bound by the indenture although it contained no covenant on his part.

⁸ *Com. ex rel. Murray v. Moore* (1822; C. P.) 1 Ashm. (Pa.) 123; *Com. v. Atkinson* (1871) 8 Phila. 375.

^{9a} See the following cases, which were decided in states where it is provided that minors may be bound "of their own free will." *Lyon v. Whitmore* (1811) 3 N. J. L. 845 (action not maintainable for enticement of apprentice); *Ivins v. Norcross* (1812) 3 N. J. L. 977 (action for enticement not maintainable); *Fisher v. Lunger* (1868) 33 N. J. L. 100 (action for harboring apprentice). *Re M'Dowle* (1811) 8 Johns. 328; *People ex rel. Barbour v. Gates* (1870) 43 N. Y. 40. See also *Balch v. Smith* (1841) 12 N. H. 437, a decision under a statute which requires the "consent" of the minor.

An indenture binding a German "redemptioner," signed by his father only, and stating the year, but not the day or month, of his birth, was held good in *State v. Taylor* (1808) 3 N. J. L. 467. But this decision was based mainly upon the statement in Comyns's Dig. 579, to the effect that a father is entitled to bind out a minor child without his consent, and that statement is discredited by the preponderance of authority. See

§ 2075, note 1, *ante*, and note 1 to the present section.

⁹ See *Pierce v. Massenburg* note 7, *supra*.

¹⁰ *Connecticut*. Gen Stat. 1902, § 4684. Minors must "assent to and subscribe" the indenture.

Florida. Rev. Stat. 1892, § 2116. When a child is over sixteen its assent must be evidenced by its signature.

¹¹ With reference to one of the provisions to this effect, Mass. Rev. Stat. 1836, chap. 80, § 3, it has been held that the insertion of the name of a minor above the age of fourteen years, in the attestation clause of an instrument purporting to be an indenture of apprenticeship, and the execution of the instrument by such minor, are not a sufficient expression of the consent of the minor to make the instrument a valid indenture of apprenticeship. *Harper v. Gilbert* (1850) 5 Cush. 417.

In *Dodge v. Hills* (1836) 13 Me. 151, where indentures of apprenticeship concluded: "To the true performance of the foregoing agreement, we have hereunto signed and sealed the same," and were signed by the father, minor son, and master, there was held to be a sufficient consent by the minor under a statute similar to that of Massachusetts.

See also *Balch v. Smith* (1841) 12 N. H. 442, where it was held, with reference to another enactment of this type, that an indenture in which the "apprentice's consent is not expressed, gave the master no authority over him." (Pub. Stat. 1901, chap. 180, § 2).

Similar clauses are also in force in other jurisdictions.

Indiana. By Burns's Anno. Stat.

to the effect that the apprentice consented to the binding. His consent is sufficiently shown by proof of his having voluntarily executed and delivered the deed.¹²

The effect of some statutes is that minors may be bound without their consent until they attain a specified age, but not afterwards.¹³ In a case which involved a statute of this character, the court proceeded upon the ground that an indenture executed without the minor's consent while he was still under the age limited, and purporting to bind him until his majority, became, in any view of his rights and liabilities, voidable at his election when he passed the age limited. As the evidence showed that he had in point of fact avoided it after he had reached that age, his rights in the premises were determined with relation to that circumstance, and it was deemed to be unnecessary to discuss the contention put forward on behalf of the other party, *viz.*, that the indenture was null and void *ab initio*, or at all events became so when that age was reached.¹⁴ A statute of this tenor has also been held to import that a contract made after the age limited must be executed by the specified persons as principal parties with the consent of the minors, and not by the minors with the consent of those persons.¹⁵

2098. —by the master.—The accepted doctrine, both in England and in the United States, is that service under an indenture which purports to bind the apprentice will confer a right to a settlement, although it was not signed by the master.¹

It has been held that an indenture signed by one of two partners, and sealed by both, is valid.²

2099. —by other parties.—Under an enactment which merely declares in general terms that a minor may bind himself with the assent of certain persons, "the form of the assent is immaterial; but it must

1908, § 8382 (7300), it is provided that, if the child be over fourteen, his assent to the indenture must be expressed thereon, and attested by his signature.

North Carolina. Revisal 1905, § 202; Laws 1889, chap. 169, § 17.

Nova Scotia. Rev. Stat. 1900, chap. 117, § 3 (2).

¹² *Fisher v. Lunger* (1868) 33 N. J. L. 100.

¹³ See the Massachusetts act, and the others modeled upon it.

¹⁴ *Hudson v. Worden* (1867) 39 Vt. 382, holding that a minor who had enlisted in the Army as a substitute was

entitled to recover from his former master the sum of money which was promised in consideration of his serving in place of the promisor.

¹⁵ *Whitmore v. Whitcomb* (1857) 43 Me. 458 (indenture held void, in an action for the apprentice's services and maintenance by the master).

¹ *Rex v. St. Peter's-on-the-Hill* (1741) 2 Bott, Poor Law, 367; *Rex v. St. Peter's, Chester* (1741) 1 Bott, Poor Law, 548; *Rex v. Fleet* (1777) Cald. 31, 1 Bott, Poor Law, 611; *Kingwood v. Bethlehem* (1832) 13 N. J. L. 222.

² *Judge v. Thomson* (1870) 29 U. C. Q. B. 523.

be expressed before the magistrate at the time of the binding, which is the time material to the validity of the act; and it must be a written accompaniment of the indenture."¹ Similarly, it is held that enactments which provide for the binding of minors by their parents or guardians, etc., import a requirement that those persons shall execute the indenture.² In some statutes the precise manner in which the assent shall be signified is specified.³

Whether an indenture signed by an agent of the person having the right to bind out a minor is to be treated as the deed of that person, or of the agent, is a question determinable with reference to the criterion ordinarily applied in cases where an agent undertakes to act in behalf of a principal.⁴

In England it has been held that, although the apprentice is a pauper in the parish workhouse at the time of the binding, and the parish officers pay the premium, it is not necessary that they should sign the indentures, or that the justices should assent thereto, unless he is a parish apprentice, within the meaning of the enactments relating to such apprentices. See § 2102, *post*.⁵

Where an apprentice was bound out, with the consent of the trustees of a fund bequeathed for the purpose of binding minors of the class

¹ *Com. v. Crommie* (1845) 8 Watts & S. 339. As the mother of the minor was not the parent indicated by the statute and in the given instance the father was not present, and did not attest the paper, or give any other written expression of his assent to it, the binding was held to be void.

² For cases in which the failure to comply with this formality was held to be fatal to the validity of the indenture, see *Ex parte Erwin* (1854) Legges Rep. (New South Wales) 816, *Reg v. Templeton* (1872; Victoria) 3 Australian J. R. 106.

In other cases it was held that the provisions in §§ 2, 3, of the New South Wales statute must be construed, when read together, as contemplating two methods of binding infants, *i. e.*, (1) by parents or guardians, and (2) by magistrates; and that, if the second method was adopted, it was not necessary that the parent or guardian should execute the indenture. *Ex parte Byrne* (1849) N. S. W. cited in *Ex parte Erwin* (1854) Legges's Rep. 810; *Ex parte Paynter* (1863) 2 New South Wales S. C. R. 189.

³ By 2 N. Y. Rev. Stat. 1829, p. 154, § 3, it was provided that a party consenting to the binding of an apprentice must do so by certificates indorsed upon the indentures, or at the end of the indentures; a mere signature will not answer. With reference to this provision it was held in *People ex rel. North v. First Judge* (1842) 2 Hill, 596, that where, in the body of an indenture, it was stated that the father of the minor had consented, etc., who, together with the son and master, joined in executing the same, and this statement was followed by an agreement subscribed by the father, that his son should in all things well and truly observe and keep the indentures, there was a sufficient compliance with the statute.

⁴ An indenture stipulating that "A. by his attorney B. had put his negro slave C. as an apprentice to D.," and signed "B. (L. S.), agent of A.," was held to be the deed of A., not B. *Rontin v. Robertson* (1847) 2 Strobb. L. 366.

⁵ *Rex v. Arundel* (1816) 5 Maule & S. 257.

to which he belonged, and the indenture was executed by the apprentice and the master, and recited the trustees to be parties, he was held to have acquired a settlement, although the deed was not executed by the trustees.⁶

2100. Other formalities.—*a. Delivery.*—Some of the statutes provide specifically that the binding shall be by indenture delivered. In the absence of such a provision the common-law rule, that a deed does not become obligatory until it has been duly delivered, is controlling.¹

b. Acknowledgment.—A formality required by some of the statutes is acknowledgment by the parties.²

c. Judicial certification.—Some of the enactments of which the purport is that a minor cannot be bound out in the manner or by the person specified, unless certain stated circumstances exist at the time of the binding also provide that the existence of those circumstances shall be judicially certified.⁴

The effect of other statutes is that, where the minor is bound with the approbation or under the direction of a court, its approval must be certified under its seal.⁵

d. Recording.—In some jurisdictions an apprenticeship is not valid, at least for some purposes, unless it is registered in the manner prescribed.⁶

⁶ *Rex v. Quainton* (1814) 2 Maule & S. 338.

¹ In *Millership v. Brookes* (1860) 5 Hurlst. & N. 797, 29 L. J. Exch. N. S. 369, it was held that an indenture sealed and delivered to an attorney who was acting for all the parties to it, with directions that it was not to take effect until something else was done, operated merely as an escrow. The only reasonable inference from the testimony was declared to be that the defendant (the minor's father) executed the deed with the understanding that, before it was completed, an arrangement should be made as to traveling expenses.

² *Indiana*.—Burns's Anno. Stat. 1908, § 8386 (7304).

Tennessee.—Code 1884, § 3431.

⁴ In *Potter v. Greene* (1886) 39 Hun, 72, an indenture binding out a minor with the consent of his mother was held to be voidable by the minor for the reason that there was no certificate indorsed thereon by a justice of the peace to the effect that his father had aban-

doned and neglected to support his family.

In *Welborn v. Little* (1818) 1 Nott & M'C. 263, the fact that the provision in the South Carolina statute which requires that the presence and approbation of the father, mother, or guardian of a minor who is binding himself out must be certified by the county justice had not been complied with was held to invalidate the indenture.

⁵ *Colorado*.—Rev. Laws 1908, § 140. *Illinois*.—Starr & C. Anno. Stat. 1896, chap. 9, ¶ 8.

⁶ In London and some other English cities, it is necessary that the deed should be enrolled within a given period. Bacon, Abr. title, *Master & Servant*, p. 335.

In the following American states, among others, it is provided that the indenture shall be recorded:

Indiana.—Anno. Stat. 1908, § 8387 (7305).

Maryland.—Pub. Gen. Laws 1888, art. 6, § 21.

2101. Obligatory provisions of the indenture.—*a. Generally.*—By many of the statutes the obligatory provisions of an indenture are specified.¹ The omission of any of those provisions will render the

New York.—Domestic relations law, § 121 (Consol. Laws 1909, p. 1082).

Tennessee.—Code 1884, § 3431.

Virginia.—Code 1904, § 2587.

West Virginia.—Code 1899, chap. 81, § 6.

For cases in which the failure to comply with such provisions was held to be fatal to the validity of the contract, see *Bolton v. Miller* (1855) 6 Ind. 262; *Brown v. Whittemore* (1862) 44 N. H. 369; *State ex rel. Neider v. Reuff* (1887) 29 W. Va. 751, 6 Am. St. Rep. 676, 2 S. E. 801.

¹The following comprehensive provision in § 121 of the New York domestic relations law will serve as an example of this type of enactment.

Every indenture must contain:

1. The names of the parties;
2. The age of the minor as nearly as can be ascertained, which age, on the filing of the indenture, shall be taken *prima facie* to be the true age;

3. A statement of the nature of the service or employment to which the minor is bound or apprenticed;

4. The term of service or apprenticeship, stating the beginning and end thereof;

5. An agreement that the minor will not leave his master or employer during the term for which he is indentured;

[Subdivision] 6. An agreement that suitable and proper board, lodging, and medical attendance for the minor during the continuance of the term shall be provided, either by the master or employer, or by the parent or guardian of the apprentice;

7. A statement of every sum of money paid or agreed to be paid in relation to the service;

8. If such minor is bound as an apprentice to learn the art or mystery of any trade or craft, an agreement on the part of the employer to teach, or cause to be carefully and skilfully taught, to such apprentice, every branch of the business to which such apprentice is indentured, and that at the expiration of such apprenticeship he will give to such apprentice a certificate, in writing,

that such apprentice has served at such trade or craft a full term of apprenticeship specified in such indenture;

9. If a minor is indentured by the poor officers of a county, city, or town, or by the authorities of an orphan asylum, penal, or charitable institution, an agreement that the master or employer will cause such child to be instructed in reading, writing, and the general rules of arithmetic, and that at the expiration of the term of service he will give to such minor a new Bible.

Every such indenture shall be filed in the office of the county clerk of the county where the master or employer resides."

The following provisions in § 2382 of Wisconsin Anno. Stat. as amended by Sess. Laws 1911, chap. 347, are noteworthy; for they enjoin the making of certain stipulations of a novel description.

Subd. 4. An agreement stating the number of hours to be spent in work and in instruction.

Subd. 5. An agreement that the whole trade, as carried on by the employer, shall be taught, and an agreement as to the time to be spent at each process or machine.

Subd. 6. An agreement that not less than five hours per week shall be devoted to instruction. Such instruction shall include.

(a) Two hours a week instruction in English, in citizenship, business practice, physiology, hygiene, and the use of safety devices.

(b) Such other branches as may be approved by the state board of industrial education.

Subd. 7. A statement of the compensation to be paid to the apprentice.

By § 2383, it is provided that the instruction specified in § 2382 may be given in a public school, or in such manner as may be approved by the local board of industrial education.

By the Victoria master and apprentice acts 1864 and 1890, No. 1117, § 10, it is simply prescribed that the indenture shall contain such covenants as are usually inserted in the indenture of apprentices in England. Those cove-

contract invalid.² On the other hand, the insertion of provisions not so specified does not necessarily render the indenture void.³

b. Words expressive of the fact of binding.—As stated in § 2060, *ante*, there has been a conflict of opinion with respect to the question whether the use of the word “apprentice” is requisite to create a contract of apprenticeship. Whatever may be the true doctrine in this regard, it seems to be at least certain that, to constitute such a contract, the indenture must embody express words declaratory of the fact of binding.⁴

c. Names of parties.—Some of the statutes specifically require that the names of the parties shall be inserted in the indenture.⁵ Such a provision, it is clear, is merely declaratory of the common law.

d. Nature of service.—In some jurisdictions a statement of the nature of the service or employment is obligatory.⁶ This requirement also is merely declaratory of the common law.

e. Term of service.—By some of the statutes it is expressly required that the length of the term for which the apprentice is bound

nants, as will be seen by referring to any collection of forms, are these: (1) That the apprentice will serve the master during the stipulated term; (2) that he will diligently attend to business; (3) that he will obey lawful commands, and (4) that he will not absent himself. A covenant not to marry is also frequently inserted.

² *Hazzard v. Cashall* (1867) 4 Del. Ch. 30; *Bolton v. Miller* (1855) 6 Ind. 262; *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61; *Harris v. Roulston* (1872) 14 N. B. 171.

In *Barton v. Ford* (1885) 35 Hun, 32, the court, after stating that, as “the mode provided by the Revised Statutes (2 Rev. Stat. 154) for the apprenticeship of minors was inconsistent with the provisions contained in chapter 934 of 1871, the validity of articles of apprenticeship must be determined by the latter act,” held that, under § 2 of that act, articles which did not contain provisions and a covenant to the effect that the apprentice should not leave during the term, and might be compelled to return if he did, were invalid by virtue of the general nullifying clause in § 6.

In *Re Turner* (1867) 1 Abb. (U. S.) 84, Fed. Cas. No. 14,247, an indenture which purported to have been executed under the Maryland act relating to

negro apprentices, and which did not contain the provisions for the security and benefit of the apprentice which were prescribed by the general laws of the state in indentures of white apprentices, was held to be void under § 1 of the civil rights bill of 1866 (14 Stat. at L. 27, chap. 3 “equality clause”). The court manifestly assumed that a similar indenture would have been invalid even if the constitutional point had not been involved.

See also the decisions cited in §§ 2127 *et seq.*, *post*, with reference to the consequences of omitting particular covenants.

³ *Cochran v. Davis* (1824) 5 Litt. (Ky.) 118 (covenants on the part of the master were here involved).

⁴ In *Respublica v. Keeper of Prison* (1797) 2 Yeates, 257, it was so laid down with regard to a “redemptor,”—a description of bound servant formerly provided for by a Pennsylvania statute; but the same rule is clearly applicable in the case of an apprentice also.

⁵ For example, New York domestic relations law, § 121, (1)

Wisconsin Anno. Stat. 2382, as amended by Sess. Laws 1911, chap. 347, § 2.

⁶ For example, New York domestic relations law, § 121, (3).

shall be specified in the indenture.⁷ To such a requirement the same remark is applicable as to those mentioned in the two preceding subsections.

f. Age of apprentice.—In the absence of an explicit statutory requirement that the age of the apprentice shall be stated in the indenture, the failure to insert it does not invalidate the indenture.⁸ But under many of the enactments this detail is an obligatory part of the instrument.⁹

With regard to the evidential significance of recitals of age, see § 2116, *post*.

g. Obligations to be assumed by the master.—Many of the statutes provide that the indenture shall contain specific stipulations regarding the performance of certain duties by the master or the apprentice.¹⁰

D. BINDING OF POOR CHILDREN BY PERSONS CLOTHED WITH PUBLIC AUTHORITY.

2102. Enactments relative to the binding of poor children in England.—In order that the effect of the decisions reviewed in the following section may be clearly understood, it will be necessary to

- ⁷ *Maryland.* Pub. Gen. Laws 1888, art. 6, § 20.
New York. Domestic relations law, § 121, (4).
Ohio. Bates's Anno. Stat. 1900, § 3121.
Wisconsin. Anno. Stat. § 2382, as amended by Sess. Laws 1911, chap. 347, § 2.
⁸ *Reg. v. Epsom* (1855) 4 El. & Bl. 1003, 24 L. J. Mag. Cas. N. S. 119, 1 Jur. N. S. 474, 3 C. L. R. 858, 3 Week. Rep. 410.
⁹ *California.* Civil Code 1909, § 266.
Colorado. Rev. Laws 1908, § 142 (applicable to apprentices generally); § 158 (applicable to poor apprentices).
Delaware. Rev. Code 1893, chap. 79, § 5.
Iowa. Code 1907, § 3229.
Illinois. Starr & C. Anno. Stat. 1896, chap. 9, ¶ 9.
Maryland. Pub. Gen. Laws 1888, art. 6, § 21 (act of 1793, chap. 45, § 6).
Michigan. How. Anno. Stat. 1882, § 6357, Comp. Laws 1897, § 8754.
Missouri. Rev. Stat. 1899, § 4803 (376).
New York. Rev. Stat. Banks' 7th ed. p. 2349, art. *Masters and Servants*, § 8, Domestic relations laws § 121, (2) (Consol. Laws 1909, p. 1083), (applicable to apprentices generally); Laws 1875, chap. 522, § 3 (applicable to children bound out by charitable association).
North Carolina. Revisal 1905, § 202 (Laws 1889, chap. 169, § 17) (applicable to apprentices generally); Revisal 1905, § 198 (Laws 1889, chap. 169, § 3) (applicable to poor children).
Ohio. Bates's Anno. Stat. 1900, § 3121.
South Dakota. Code 1908, § 168.
Virginia. Code 1887, 1904, § 2585.
West Virginia. Code 1899, chap. 81, § 3.
Wisconsin. Anno. Stat. § 2382, as amended by Sess. Laws 1911, chap. 347, § 2.
¹⁰ For the provisions of two typical enactments, see note 1, *supra*.

insert a brief summary of the principal clauses in the English enactments.

43 Eliz. chap. 2, § 5. It was declared to be lawful for the churchwardens and overseers of a parish, or the greater part of them, by the assent of two justices of the peace, to bind the children of all such as whose parents shall not be thought able to maintain their children, to be apprentices, a man child till he come to the age of twenty-four years and a woman child to the age of twenty-one years or the time of her marriage; the same to be effectual for all purposes as if such child were of full age, and by indenture of covenant bound him or herself.

8 & 9 Will. III., chap. 30, § 5. It was enacted that the masters should "receive" parish apprentices according to the indenture signed and confirmed by two justices of the peace. But this provision was repealed by 7 & 8 Vict. chap. 101, § 13.

By 18 Geo. III. chap. 47, the act of 43 Eliz. was amended so as to provide that male children should be bound only to their twenty-first year.

51 Geo. III. chap. 80, § 1. Indentures executed and signed by two persons only, acting in the capacity of churchwardens as well as overseers of the poor, were declared to be valid as if executed by distinct persons as churchwardens and distinct persons as overseers.

54 Geo. III. chap. 107, § 2. Indentures by the major part of the overseers and persons acting as churchwardens of a township were declared to be as valid as indentures by the major part of the overseers and churchwardens of a parish.

56 Geo. II. chap. 139, § 1. It was enacted that before any child was bound by the overseers of the poor, he was to be carried before two justices of the peace, who were to make inquiries as to the propriety of binding the child to the master selected; that after due inquiry they were to make an order that the overseers should be at liberty to bind the child apprentice; that the order should be referred to by the date thereof and the names of the justices in the indenture, and that after the order was made the justices should sign their allowance of the indenture, before it was executed by any of the parties thereof.

Sec. 2. It was enacted that the indenture of an apprentice bound to a resident of another county should be approved by the justices of that county also, and that, before the indenture was allowed, notice should be given to the overseers of the parish where the child was to serve.

Sec. 5. No settlement gained, unless indenture allowed by justices in the manner prescribed.

Sec. 11. It was provided that no indenture by reason of which expense should be incurred by the parochial funds should be valid and effectual, unless approved by two justices of the peace under their hands and seals.

3 & 4 Will. IV. chap. 63, § 1. Indentures allowed by justices acting for two counties were declared to be as valid as if granted by justices acting for different counties.

4 & 5 Will. IV. chap. 76, § 61. It was provided that justices were to certify that rules made by commissioners of the poor for the binding of poor children had been complied with. But under 7 & 8 Vict. chap. 101, § 12, this requirement is not applicable in cases where the indenture is executed by the guardians of the poor. See next paragraph.

7 & 8 Vict. chap. 101, § 12. The power of binding out poor children in any parish included in a union or subject to a board of guardians constituted under 4 & 5 Will. IV. chap. 76, was vested in that board, instead of in the overseers.

The general consolidated orders of July 24, 1847, contain elaborate regulations regarding the binding of poor children. These are set out at length in Archbold, Poor Laws, 15th ed. pp. 350-361, and in Austin, Apprentices, pp. 129 *et seq.* Here it will be unnecessary to do more than summarize a few more of the important ones.

Art. 52. No child under the age of nine years, and no child (other than a deaf and dumb child) who cannot read and write his own name, shall be bound by the guardians.

Art. 56. No apprentice shall be bound for more than eight years.

Art. 57. No person above fourteen years of age shall be bound without his consent, and no child under the age of sixteen shall be bound without the consent of his father, or, if his father is dead, or disqualified for certain specified reasons, to consent, or if the child be a bastard, without the mother's consent, if living. In the case of the mother being disqualified for any of the reasons specified, no consent is required.

Art. 67. The indenture shall be executed in duplicate by the master and guardians (or person authorized to do so), and shall not be valid unless signed by the apprentice, without aid, in the presence of the guardians; and the consent of the parent, where requisite, shall be testified by the parent's signature or mark, and where such consent is dispensed with (as before provided), the cause shall be stated at the foot of the indenture.

In article 29 of the earlier rules issued in 1845 by the poor law commissioners, it was provided that any justice ordering or allowing the binding should certify at the foot of the indenture that he had ascertained that the rules had been complied with.¹

By a general order of February 15th, 1898, the local government board is empowered to assent to a departure from any of these regulations. The rules of the local government board as to the apprenticeship of pauper children are set out in Austin on Apprentices, pp. 129 *et seq.*

Besides these general enactments, others of a similar tenor, relating to certain localities only, have also been passed from time to time. Some of these are referred to in the following section.

2103. Construction and effect of these enactments. Generally.—

a. Not applicable to adults.—A person over twenty-one is not a "poor child" within the meaning of these enactments.¹

b. Discretionary power of public officials as to selection of children.—In one case it was held to be in the discretion of the overseers of the poor to select such children as they might think proper to be bound out as apprentices.²

¹ See *Reg. v. St. Mary Magdalen, Bermondsey* (1853) 2 El. & Bl. 809, 2 C. L. R. 223, 23 L. J. Mag. Cas. N. S. 1, 17 Jur. 1075, 2 Week. Rep. 35, § 2104, note 10, *post*.
² *Reg. v. St. John Bedwarden* (1833) 5 Barn. & Ad. 169 (said with reference to 56 Geo. III. chap. 139).
² *Rex v. Crosse* (1695) Comb. 289, 1 Bott, Poor Law, 604.

c. Compulsory powers of officials in respect of the reception of apprentices by the masters selected.—During the first century after the passage of the act of 43 Eliz. it was a matter of dispute whether the persons selected by the parish authorities as the masters of apprentices could be compelled to receive them.³ To settle the doubts entertained upon the subject, it was declared by the act of 8 & 9 Will. III, chap. 30, § 5, that persons who refused to receive the apprentices should be liable to a penalty.⁴ While this statute was in force it was held to be within the discretion of the justices, subject to the control of the quarter sessions, to force an apprentice upon a designated master;⁵ and that a person occupying land in a given parish might be compelled to receive an apprentice, though he lived in another parish.⁶

d. Binding of children to inhabitants of another parish.—Previous to the enactment of 56 Geo. III. chap. 139, the officers of one parish were entitled to bind out a poor child to an inhabitant of another parish without notifying the officers of that parish.⁷ After the passage of that statute the giving of the notice which it prescribes became a condition precedent to the acquisition of any rights which depended upon the validity of the binding.⁸ But under the principle that a

³ For other cases in which it was held that they might be compelled, see *Rex v. Gillifer* (1663) 1 Lev. 84; *Rex v. Fairfax* (1689) 3 Mod. 270; *Rex v. Crosse* (1695) Comb. 289, 1 Bott, Poor Law, 604 (indictment for refusing to take an apprentice was sustained); *Rex v. Pine* (1676) 3 Keble, 516, 628, 636, 686, 854; *Rex v. Clerke* (1683) 2 Shower, K. B. 193.

⁴ That an indictment lay for a breach of the provision was held in *Reg v. Gould* (1705) 1 Salk. 381.

⁵ *Anonymous* (1700) 1 Salk. 67.

In a later case it was held that the sessions had properly discharged an order apprenticing a poor boy to a merchant. *Minchamp's Case* (1702) 2 Salk. 491.

⁶ *Rex v. Clapp* (1789) 3 T. R. 107; *Rex v. Tunstead* (1790) 3 T. R. 523; *Rex v. Barwick* (1796) 7 T. R. 33 (non-resident members of partnership holding land in a parish, held to be subject to the coercive power).

⁷ *Rex v. St. Margaret's, Lincoln* (1773) Burr. Sett. Cas. 728.

⁸ *Rex v. Whiston* (1836) 4 Ad. & Bl. 607, 6 Nev. & M. 65, 5 L. J. Mag. Cas.

N. S. 67; *Rex v. Threlkeld* (1832) 4 Barn. & Ad. 229, 1 Nev. & M. 14, 2 L. J. Mag. Cas. N. S. 20; *Reg. v. Holne* (1846) 9 Q. B. 71, 2 New Sess. Cas. 364, 15 L. J. Mag. Cas. N. S. 125, 10 Jur. 737 (notice sufficient if served on one overseer).

That no notice was requisite where the apprentice was bound into another parish by assignment of the indenture was held in *Rex v. Exminster* (1837) 6 Ad. & El. 598, 1 Nev. & P. 603, 6 L. J. Mag. Cas. N. S. 82, W. W. & D. 244.

In *Rex v. Witney* (1836) 5 Ad. & El. 191, it was held, with reference to 56 Geo. III. chap. 139, § 2, and 3 & 4 Wm. IV. chap. 63, § 1, that, where a district had justices of its own, not exercising jurisdiction in the rest of the county, and the county justices had a concurrent jurisdiction with them within the district, an indenture binding a parish apprentice by the officers of the district, to serve in the county, without the district, might be allowed, and the order made, by two of the county justices.

duty performed by a public officer is presumed to have been rightly performed, the party who alleged that the notice was properly given was not required to prove affirmatively that it had been given.⁹

e. Age within which poor children may be bound.—See §§ 2114, 2115, *post*.

2104. Formal requisites of a valid contract.—*Execution by the officials authorized to bind out minors.*—With reference to the words in the original statute of 43 Eliz., “churchwardens and overseers of the poor, or the greater part of them,” it was held that in a parish where by custom only one churchwarden was appointed, the powers conferred might be lawfully exercised by the majority of a body composed of himself and the overseers.¹ After the passage of the remedial statute, 51 Geo. III. chap. 80, § 1, a binding by the majority of a body in which one of the members was a person acting both as churchwarden and overseer, was held to be valid.² Where several parishes had been united for the support of the poor, and a guardian appointed, a binding by the churchwardens and overseers was deemed to be good without the signature of the guardian.³ The omission from the indenture of the date of the order of the justices who had authorized the binding was treated as an informality fatal to its validity.⁴

With respect to cases where directors of the poor, guardians, or acting guardians were incorporated by statute, and empowered to bind out children, the doctrine at first applied was that an indenture was not valid unless it was executed in such a manner as to make it the deed of the corporation. In one instance the fact that the indentures did not describe the binding parties by their true corporate name was deemed fatal to the validity of the contract.⁵ But this doctrine was abrogated by § 2 of 3 & 4 Will. IV. chap. 63, which provided in substance that any indenture to which such corporations

⁹ *Rea v. Whiston* (1836) 4 Ad. & El. 607, 6 Nev. & M. 65, 5 L. J. Mag. Cas. N. S. 67.

¹ *Rea v. Shilton* (1818) 1 Barn. & Ald. 275; *Reg. v. Stainforth* (1845) 11 Q. B. 66, 3 New Sess. Cas. 53, 17 L. J. Mag. Cas. N. S. 25, 12 Jur. 95.

² *Rea v. St. Margaret's, Leicester* (1818) 2 Barn. & Ald. 200.

In *Rea v. Hinckley* (1810) 12 East, 361, an indenture executed by W. S., churchwarden, and J. G., overseer, was not impeached by evidence negating its execution by a majority of the churchwardens and overseers of the

hamlet. Held, that its validity might be supported by intending that there were two overseers, and only one churchwarden by custom.

³ *Rea v. Lutterworth* (1824) 3 Barn. & C. 487, 5 Dowl. & R. 343.

⁴ *Rea v. Bawbergh* (1823) 3 Dowl. & R. 338, 2 Barn. & C. 222.

⁵ *Rea v. Haughley* (1833) 4 Barn. & Ad. 650, where the words, “the directors and acting guardians of the poor,” were held not to be in substance the same name as “the guardians of the poor.”

were parties should be taken to be valid, if the corporate seal was affixed to it.⁶

b. Consent of minor to the binding.—The recognized doctrine with reference to the general statute of 43 Eliz. and its amendments was that a poor child might be bound without his consent.⁷ In this point of view the indenture was not invalidated by the fact of his not having signed it.⁸ But the compulsory power of the parish officers could be exercised only in the manner prescribed by the legislature. On this ground it was held in one case that no settlement was gained by a poor boy who had been sent out of the house of industry, at fourteen years of age, to the parish officers, and by them allotted to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with him a year, and should have clothes, etc., but who made no agreement with him with regard to wages, or the nature or duration of his service, nor was he consulted upon the subject. The decision was put upon the general ground that “the adoption of a contract must be the act of a free agent.”⁹

The compulsory powers of the parish officers were to some extent taken away by art. 57 of the general consolidated orders referred to in the preceding section. With reference to these provisions it was held in a settlement case (1) That, excepting the one which related to the signature of the apprentice, they are directory only, and noncompliance with them does not make the indenture void; (2) that the apprentice’s consent, though he be above the age of fourteen,

⁶ *Reg. v. Isle of Wight* (1864) 10 L. T. N. S. 370, 12 Week. Rep. 744.

⁷ Lord Kenyon in *Reg. v. Leighton* (1792) 4 T. R. 732, Nolan, 100.

⁸ *Reg. v. Woolstanton* (1772) 1 Bott, Poor Law, 606 (settlement gained by service under apprenticeship); *Reg. v. St. Nicholas, Nottingham* (1788) 2 T. R. 726 (same facts); *St. Nicholas, Rochester v. St. Botolph, Bishopsgate* (1862) 31 L. J. Mag. Cas. N. S. 258, 12 C. B. N. S. 645, 9 Jur. N. S. 101, 6 L. T. N. S. 495 (rule recognized).

⁹ *Reg. v. Stowmarket* (1808) 9 East, 211, per Lord Ellenborough, Ch. J. The following passage from his judgment may also be quoted: “All parties seem to have acted under the idea that the boy was a parish slave, who might be handed over from one to another, and disposed of as they pleased. But there was no agreement by him to either of the services in which he was engaged; he submitted to them be-

cause he thought himself obliged to do whatever they bid him. If we were to hold this sufficient to give a settlement, we would establish a new head of settlement by allotment. The law gave these directors of the house of industry a certain power to apprentice out poor children; and instead of executing that power in a proper manner as the act directs, they assume to themselves a power to hand these children over to the officers of their respective parishes; who again hand them over to others; and so they are shifted from one to another. . . . Can a person who is considered a slave, and conceives himself to be such, be considered as having adopted the acts of his masters? It is against common sense so to construe his involuntary acquiescence.” The case throws an interesting sidelight upon the social condition of some parts of England a century ago.

need not appear on the face of the indenture otherwise than by his signing; (3) that the fact of such consent will be inferred in default of proof of nonconsent, both on the ground of the ordinary presumption that all things were duly performed, and on the ground of the presumption arising from the justice's certificate at the foot of the indenture; (4) that, in default of proof to the contrary, the execution of the indenture in duplicate will be inferred on the ground of the same presumptions; (5) that if no consent of the parents, or ground of dispensation, appears on the indenture, it will also be inferred, on the ground of those presumptions that both were dead, and consequently that no consent or dispensation was requisite.¹⁰

With respect to local statutes which provide for the binding of poor children, the accepted doctrine seems to be that they are to be construed upon the same footing as those which relate to ordinary apprentices, who, as has been shown in § 2097, *ante*, are not bound by indentures which they have not executed.¹¹

¹⁰ *Reg. v. St. Mary Magdalen, Bermondsey* (1853) 2 El. & Bl. 809, 23 L. J. Mag. Cas. N. S. 1, 2 C. L. R. 223, 17 Jur. 1075, 2 Week. Rep. 35.

¹¹ *St. Nicholas, Rochester v. St. Botolph, Bishopsgate* (1863) 31 L. J. Mag. Cas. N. S. 258. By the local act under review in this case, certain revenues were vested in the guardians of the poor of Canterbury in trust for the maintenance and employment of the poor of that city; and the guardians were required to give bond, under their common seal, for themselves and their successors, forever thereafter to provide for, clothe, and maintain sixteen poor boys of the said city, and cause the said sixteen boys to be instructed, etc., and put them and every of them respectively out apprentices, after they and every of them respectively should have attained their respective ages of thirteen years, and before said ages of fifteen years, etc. Held, that this gave the guardians no authority to apprentice one of the boys against his will, or after the age of fifteen, and consequently, that where the boy never executed the indenture of apprenticeship, and was seventeen when the guardians apprenticed him, the indenture of apprenticeship was invalid, and the boy did not acquire a settlement under it. "The statute in question enacts that such guardians are to give a bond to provide for and maintain such boys,

and to put them out apprentices. That appears to me to create a duty which would authorize the guardians to apply the funds to the binding out of any such boy as an apprentice, if the object of the bounty chose to take it; but the guardians have no more power under that act to bind any boy an apprentice against his will than they have to take any boy into their house and maintain him there against his will. There is, however, another objection which I think is fatal, even if the guardians had the power contended for. The power is only with respect to boys between the ages of thirteen and fifteen, and this boy was beyond the age of fifteen when he was apprenticed." Williams, J., said: "I am of the same opinion. Generally no settlement could be gained by apprenticeship, unless the indenture of apprenticeship was executed by the boy. No doubt certain acts of parliament have authorized proper persons in a parish to bind poor boys apprentices without their assent; and of course in those cases, where the boy has no power to withhold his assent, it is immaterial whether he has executed the deed or not. The question here is, whether this local statute has given such power to these guardians, and I am of opinion that it has not, and that therefore our judgment should be for the appellants."

c. Execution of indenture by the master.—It has been held that a poor apprentice may acquire a settlement by service under an indenture not executed by the master.¹²

d. Judicial sanction of the binding.—In construing § 5 of Stat. 43 Eliz. chap. 2, the courts held that the prescribed assent of justices to the binding of a poor apprentice was a judicial act, and that it was therefore necessary that the indenture should show on its face that their assent was given within their jurisdiction,¹³ and also that they gave it at the same time, and in one another's presence.¹⁴

The corresponding requirements in Stat. 56 Geo. III. chap. 139, were construed upon a similar footing. Thus, we find decisions to the effect that the act of the justices in determining, under § 1, whether an order should be made for the binding of an apprentice, must purport, upon the face of the indenture, to have been performed within their jurisdiction;¹⁵ that their allowance under the same section, in pursuance of the order previously made, was not a judicial act;¹⁶ and that, where the justices who made the order were not the same as those who allowed the indenture,—the situation contemplated in § 2 of the statute,—the act of the latter justices involved a decision with regard to circumstances which were first submitted

¹² *Rea v. St. Peter's, Chester* (1741) 1 Bott, Poor Law, 548; *Rea v. Fleet* (1777) Cald. 31, 2 Bott, Poor Law, 435.

¹³ *Staverton v. Ashburton* (1855) 4 El. & Bl. 526, 24 L. J. Mag. Cas. N. S. 53, 1 Jur. N. S. 233, 3 Week. Rep. 173 (no settlement gained where this fact did not appear.) This decision, in spite of its recent date, had reference to an indenture made before the enactment of 56 Geo. III. chap. 139.

¹⁴ *Rea v. Hamstall Ridware* (1789) 3 T. R. 380; *Rea v. Winwick* (1800) 8 T. R. 454 (assent held to be sufficiently signified where one justice had signed the indenture, when alone, and was afterward present when the other signed it).

¹⁵ *Reg. v. Totness* (1849) 11 Q. B. 80. See Lord Campbell's comments on this case in *Staverton v. Ashburton*, *ubi supra*, note 13.

In *Reg. v. St. George, Bloomsbury* (1855) 4 El. & Bl. 520, 24 L. J. Mag. Cas. N. S. 49, 3 C. L. R. 550, 1 Jur. N. S. 231, 3 Week. Rep. 170 (settlement case), it was held that where the fact of jurisdiction did not appear, the defect was not cured by a clause in the

indenture which stated that it was made in pursuance of an order of justices in and for the county, and added the date of the actual order, even though the order was written on the margin of the indenture.

¹⁶ *Reg. v. Stainforth* (1845) 11 Q. B. 66. One of the objections urged against the validity of the binding, *viz.*, that the allowance by the justices was void because it was not stated to be by the "justices in" a certain riding of a county, but only by "justices for it," was declared to be untenable. Lord Denman, Ch. J., said: "A rule has been often recognized in respect of proceedings by magistrates, requiring all the facts to be stated which are necessary to show that a tribunal has been lawfully constituted and has jurisdiction. There is good reason for the rule where a special authority is exercised which is out of the ordinary course of common law, and is confined to a limited locality, as in case either of warrants for arrest, commitment, or distress, or of convictions, or orders by local magistrates. Where the duty of promptly enforcing the instrument is cast on officers of the law, and the duty of un-

to their consideration at the time of the allowance, and was therefore judicial.¹⁷

The provisions in § 1 of the later of these acts, which prescribed that the order of justices for binding out a poor child must be referred to in the indenture by the date thereof, were construed as compulsory, the consequence being that the omission of such a reference was fatal to the validity of the binding.¹⁸

Under the express terms of the provision (§ 11) regarding indentures by public parochial funds a binding was not valid unless the

hesitating submission on those who are to obey it, it is requisite that the instrument so to be enforced and obeyed should show on inspection all the essentials from which such duties arise. But a certificate that an indenture is in pursuance of an order for binding has none of those incidents: effect is given to it without resort to the powers and duties above described: and the reason for an exact statement of all particulars on the instrument itself ceases. In respect of such an instrument the ordinary maxim for construing in favor of validity may well be applied; the ordinary power of proving by extrinsic evidence essential facts not expressed in the writing may be exercised; and, as the act of approval is personal to the magistrates who made the order for binding, the place where the approval is signed appears to be immaterial." Commenting on this case in *Reg. v. Totness* (1849) 11 Q. B. 80, Patteson, J., observed: "I do not say whether, at the time of allowance, it was competent for them to reconsider their decision. That may or may not be; but, in ninety-nine cases out of a hundred, the justices who have made the order would, at the time of allowance, inquire only whether the indenture was regular in point of form and in pursuance of their order, and so would, by allowance, complete in form then what they had already decided upon in substance."

¹⁷ *Reg. v. Totness* (1849) 11 Q. B. 80.

¹⁸ *Rex v. Bawbergh* (1823) 2 Barn. & C. 222, where the date was not referred to at all.

That case was distinguished in *Reg. v. Aldbrough* (1849) 13 Q. B. 190, where it was held that an allowance by justices, which was written at the

foot of the indenture, and subscribed by the justice before execution of the indenture by the parties to the binding, formed part of the indenture; and therefore that a reference in the allowance to the order for binding was a reference thereto in the indenture, satisfying the requirements of the statute. Denman, Ch. J., said: "If the allowance is in the indenture, the reference to the date, which is in the allowance, is also in the indenture. For a reference to the date of an order being equally effectual on whatever part it may be written, and not being the act of any one in particular, the place where it may be found within the four corners of the instrument ought not to affect its validity. If the parties procured it to be written before they executed the deed, whether the writing was above or below the seal, whether on the side or the back, and whether the language of the reference purported to be that of all who seal, or of one only, or of another person, and to be adopted by them, the statute would be complied with. . . . This alone would suffice; but, supposing this to leave the matter at all doubtful, the reference to the allowance in, and the adoption of it thereby into, the operative part of the deed, would remove such doubt; and, further, the language of the statute confirms this view; for, after making certain provisions in respect of the indenture, it goes on to require that the justices 'shall sign their allowance of such indenture' 'before the same shall be executed by any of the other parties thereto.' The justices are thus to be, by the statute, parties to the indenture; and that which they sign is a part of the indenture, seeing that it is an indispensable part, and must precede in execution all other parts."

prescribed approval of the two justices was attested by their seals as well as their signatures.¹⁹ But this provision was not applicable in cases where the expenses incident to the binding were paid out of the income of a trust fund administered by the parish officials, but entirely segregated from the poor rates;²⁰ nor in cases where a contribution was made out of parish moneys towards the cost of the binding of poor children by trustees of charities established by private persons for the purpose of placing such children as apprentices.²¹

In order to prove a lawful binding in a case where the right to a settlement depends upon its validity, it is not sufficient to put in the indenture itself, and verify the attestation; the order for binding and the allowance of the indenture by the justices must also severally be proved.²²

The mere fact that the assent of the justices to the binding was obtained by means of a fraudulent representation on the part of the proposed master and the apprentice's parent will not prevent him from gaining a settlement by service under the indenture.²³

2105. American and colonial enactments relative to the binding of poor children by state, county, and municipal officers.—The enactments which most nearly resemble the provisions reviewed in the preceding

¹⁹ *Rex v. Damorel* (1827) 7 Barn. & C. 563 (no settlement gained).

²⁰ *Rex v. Halesworth* (1832) 3 Barn. & Ad. 717. Lord Tenterden, Ch. J., said: "I think a public parochial fund must be one so contributed, or which is applicable to the general purposes of the relief of the poor. Estates devised for the relief of the poor generally would come under this description; but in each of these cases there is a fund left by the bounty of an individual for a certain specified purpose, that is, for the benefit of a particular class of persons. It is not meant to go in relief of the general parish fund, or if so, only to a moderate extent. It does not appear that the intention was to relieve persons actually burdensome to the parish; there might be persons unable to bind out their own children, and therefore objects of this charity, who yet did not require parochial support; and in such cases the fund would be no relief to the parish. It appears to me also that the donors in these cases never intended the objects of their bounty to be under the control of the justices of peace; but that the charity should be, in the one case at the dis-

posal of the churchwardens, in the other (as respects apprentices) at that of the parish officers and principal inhabitants."

²¹ *Rex v. Quainton* (1834) 1 Ad. & El. 133, 3 Nev. & M. 289.

²² *Reg. v. Chiswick* (1844) 10 Q. B. 241, note; *Reg. v. East Stonehouse* (1847) 10 Q. B. 238.

That the recital in the indenture of an order is sufficient primary evidence that such order was made was laid down in *Reg. v. Stainforth* (1845) 11 Q. B. 66, 3 New Sess. Cas. 53, 17 L. J. Mag. Cas. N. S. 25, 12 Jur. 95.

²³ *Rex v. Great Sheepy* (1828) 8 Barn. & C. 74. Lord Tenterden, Ch. J., said: "The law, by requiring in the case of a parish apprentice that the master shall be approved of by two justices, has endeavored to provide that there shall be a proper master, and that everything shall be done correctly; and where the justices have sanctioned a binding, and there has been no fraud in the parish officers, the safest course for us is to say that service under such a binding confers a settlement, although the master may have imposed upon the justices."

sections are those by which the power to bind out poor children is vested in the state, municipal, or county officials, whose special function it is to take charge of indigent persons. The following provisions will suffice as examples of the various forms in which enactments of this type have been cast.

Arkansas.—Dig. 1904, § 267, county court may direct guardians to bind out wards who have not a sufficient estate to support them.

§ 269. Children of parents who are living, but have not the means of maintaining them, or who wilfully neglect to support and educate them are to be bound out by the county court.

Colorado.—Rev. Laws 1908, § 138. The superintendent of the poor may bind out any child who is chargeable to the county, or who is begging alms, or whose parents are poor and father an habitual drunkard, or who has no father living, and whose mother is of bad character or suffers her children to grow up in idleness. See also § 157.

Connecticut.—Gen. Stat. 1902, § 4686. If any person who has had relief from any town shall suffer his children to misspend their time, and shall neglect to employ them in any honest calling, or if any person does not provide competently for his children, whereby they are exposed to want, or if any poor children in any town live idly or exposed to want, and there are none to take care of them, the selectment of such town, with the assent of a justice of the peace, may indenture such children to some proper trade, males till twenty-one, and females till eighteen years of age. The overseers are also empowered to bind such children to any society organized for the purpose of educating and relieving children.

Delaware.—Rev. Code 1893, chap. 79, § 2. Any two justices of the peace, acting together, have power to bind any minor who has no parent residing in the state, and who has not property sufficient for his maintenance, and also any minor who has not parents able to maintain and bring him up to industry and suitable employment. Any two trustees of the poor shall have power to bind any minor in the almshouse.

Florida.—Rev. Stat. 1892, § 2115. County judges may bind out minor children as follows:

(1) Every poor orphan who has not estate sufficient for his maintenance out of its profits; (2) every minor whose father has died insolvent, and whose mother is unable to provide properly for it; (3) every child who has been in charge of a father adjudged a vagrant; (4) every minor who has been adjudged a vagrant; (5) every child under the age of sixteen years whom his father has abandoned and for whom he fails to provide support; but no such child shall be bound out without the consent of the mother, unless she be unable or neglects to provide for its support.

Illinois.—Starr & C. Anno. Stat. chap. 9, ¶ 6. The county board or overseers may, with the approval of the county court, bind out any child under sixteen years of age, who habitually begs for alms, and who is, or either of whose parents is, chargeable to the county.

Indiana.—Burns's Anno. Stat. 1908, § 8383 (7301). The overseers of the poor may bind children under the age of sixteen in the following cases: (1)

The child of any pauper; (2) any child whose parents abandon or neglect it, or are unable to support it; (3) any child having neither father, mother, nor guardian, and having no sufficient means of support; (4) any white child taken from any asylum in any other state, and brought into Indiana to be bound.

Sec. 9776 (81651). It is declared to be the duty of the overseers of the poor and the superintendents of the county asylum to bind out such children as fall under their charge.

Iowa.—Code 1907, § 3234. Any child confined in a poorhouse or house of refuge, who is under sixteen years of age, may be bound until he attains the age of eighteen or marries. (Code 1873, §§ 539–541, 1378; Rev. Code 1860, §§ 1112, 1113, 1115, 1407).

Massachusetts.—Rev. Laws 1902, chap. 155, § 4.—A minor child who is, or either of whose parents is, chargeable to a town, as having a lawful settlement therein, or supported there at the expense of the commonwealth, may, whether under or above the age of fourteen years, be bound by the overseers of the poor, a female to the age of eighteen years, or to the time of her marriage within that age, and a male to the age of twenty-one years.

[The original provision in Acts 1793, chap. 59, § 4, which was substantially similar to the above, was repealed and replaced by Rev. Stat. chap. 80, § 4. See *Reidell v. Morse* (1837) 19 Pick. 358. For earlier collections of laws in which this substituted provision is contained, see Gen. Stat. 1860, chap. 111, § 4; Pub. Stat. 1882, chap. 149, § 4.]

Rev. Laws 1902, chap. 85, § 29. It is provided that the inspectors of state almshouses shall have the same power to bind as apprentices minors who are inmates of the institution under their charge as is vested in overseers of the poor. (Stat. 1852, chap. 275, § 7; Gen. Stat. 1860, chap. 71, § 33.)

New Hampshire.—Pub. Stat. 1901, chap. 84, § 5. The overseers shall set to work in the workhouse or elsewhere, or bind as apprentices all children residing in their respective towns who are not employed in some lawful business, and whose parents are unable to maintain them.

New York.—Rev. Stat. Banks' 7th ed. p. 2349 Art. *Master and Servant*, § 5. The county superintendent of the poor may bind out any child under the ages of twenty-one or eighteen years, according as it is a male or female, who shall be sent to any county poorhouse, or who shall become chargeable, or whose parent or parents are or shall become, chargeable to such county, to be clerks, apprentices, or servants, until such child, if a male, shall be twenty-one years old, or if a female, shall be eighteen years old. (Laws 1826, chap. 290; Rev. Laws 1813, chap. 11, 138, 139; 2 Rev. Stat. 1829, 154, § 5.)

Sec. 6. The overseers of the poor of any town or city may in like manner bind out any such child who, or whose parent or parents, shall become chargeable to such town or city, or who shall have been sent to any poorhouse, other than a county poorhouse, with the consent in writing of any two justices of the peace, or of the mayor, recorder and alderman of any city, or of any two of them. (1 Rev. Laws 1813, chap. 11, p. 135, §§ 2, 4, 14.)

The above provisions are now partly superseded by § 123 of the domestic relations law (Consol. Laws, p. 561), which authorizes the poor officers of a municipal corporation to bind out any minor whose support shall become chargeable to such corporation.

Laws 1860, chap. 510, § 18. The board of commissioners of the poor in the

city of New York, or any one commissioner, shall have power to indenture and bind out, as apprentices during their minority, any minor children who may be under their care and control by reason of the provision of this act, or of any other act of this state, in the forms and with the provisions now prescribed by law; and the board, or any commissioner, shall have power, in their discretion, to cancel such indentures; and they may bind out such children for the employment of farming, or any useful art or trade, to citizens of the adjoining states. The authority thus conferred was a continuation of that which was vested in the almshouse commissioners by the act of February 20, Laws 1801, chap. 11, relative to the binding out of children chargeable to towns.

Pennsylvania.—Brightly's Purdon's Dig. *Apprentices*, § 3. It shall be lawful for the overseers of every district, with the approbation of two or more magistrates of the same county, to put out as apprentices all poor children whose parents are dead or unable to maintain them; males until they are twenty-one years old, females until they are eighteen years old. (Act of June 13, 1836, § 8.)

Virginia.—Code 1887 and 1904, § 2583. Any overseer of the poor of a county or corporation, if allowed by an order of the court thereof, may bind out any minor found begging in such county or corporation, or likely to become chargeable. (Code 1849, chap. 122, § 3.)

Other provisions of a similar character have been enacted in the following states. The officials by whom the binding is to be effected are specified in each instance.

Kansas.—Comp. Laws 1879, chap. 79, § 28, Gen. Stat. 1899, § 4222. Overseers of the poor and superintendents of the county asylums.

Maine.—Stat. 1821, chap. 122, § 6; Rev. Stat. 1840, chap. 32, § 13; Rev. Stat. 1903, chap. 27, § 22; Similar to § 4 of the Massachusetts enactment.

Michigan.—Comp. Laws, 1871, chap. 173, § 6; How. Anno. Stat. § 6356. Superintendents of poor.

Mississippi.—Anno. Code 1892, § 3159 (637). Every member of the board of supervisors in each county is required to report the names of poor children in their districts, or other children whose parents are unable to support them, and the board is authorized to bind them out.

Sec. 3161 (639). Children in poorhouses must be apprenticed after they reach ten years of age.

Ohio.—Bates's Anno. Stat. § 3119. The trustees of townships.

Rhode Island.—Gen. Stat. 1896, chap. 198, § 5. Overseers of the poor.

South Carolina.—Rev. Stat. 1814, § 670. (Acts of Assembly 1712, P. L. 106, 1 Brev. Dig. 25, *Apprentice*, § 1.)

South Dakota.—Code 1908, § 166. Proper officer of the poor.

Vermont.—Pub. Stat. 1906, § 3242 (act of March 3, 1797). Overseers of the poor.

Wisconsin.—Sanborn & B. Anno. Stat. § 1511. Board of supervisors.

2106. Construction and effect of these statutes. Generally.—*a. Conditions precedent to a valid exercise of the statutory powers.*—The

binding of a child is clearly invalid unless it appears that the circumstances specified by the legislature as being prerequisite to the exercise of the official authority existed at the time when the indenture was executed.¹ That "authority, being in derogation of natural right, must be strictly construed, and exercised in exact conformity to the powers given and the rules prescribed. . . . The power of taking children from their parents and families and homes, and binding them to strangers, as servants, which is here conferred upon overseers, is a high and arbitrary, if not a dangerous, power; and one which should only be exercised in cases of clear necessity, and where all the circumstances concur which justify and require so extraordinary an interposition in the domestic relations of private families. Nothing is to be presumed in aid of it; but everything which is required for its support must be shown affirmatively."²

b. Officials authorized to bind out children.—With reference to a statute which designates overseers of the poor as the officials who are to bind out poor children, it has been held that, in towns where no overseers have been specially chosen to perform the duties of such functionaries, and the selectmen are, *ex officio*, overseers, an indenture made by the selectmen, in which they designate themselves simply as selectmen is valid, and will sustain an action by subsequent overseers.³

In one jurisdiction the binding is effected by the boards of supervisors in each county, upon the report of the individual members regarding children within their respective districts.⁴

c. No judicial power vested in officials designated.—Enactments which authorize overseers of the poor and other officials of a similar description to bind out poor children do not entitle them to exercise any judicial powers in relation to cases in which the validity of an indenture comes in question.⁵

d. Officials binding out children, not regarded as agents of municipalities.—The relationship between the officials designated by the statutes, and the municipalities or other administrative entities in which their functions are exercised, is not that of agents and principals in such a sense as to affect those municipalities and administrative entities with liability in respect of their acts.⁶

¹ *People ex rel. Bentley v. Hanna* (1847) 3 How. Pr. 39 (decision by court of first instance).

² *Reidell v. Morse* (1837) 19 Pick. 358, quoted with approval in *Bardwell v. Purrington* (1871) 107 Mass. 419.

³ *Powers v. Ware* (1824) 2 Pick. 451.

⁴ See *Lowndes County v. Leigh* (1892) 69 Miss. 754, 13 So. 854.

⁵ *Glidden v. Unity* (1855) 30 N. H. 104.

⁶ In *Baldwin v. Rupert* (1836) 8 Vt.

e. Territorial limits within which the official powers may be exercised.—In the absence of an express provision to that effect, overseers of the poor in one state have, as overseers, no authority to bind out children as apprentices in another state;⁷ but they may, with the consent of the justices, bind children to a master in another town.⁸

The officials designated by the statutes cannot bind out any chil-

256, it was held that a town was not liable for a breach of a covenant made by the overseer that the child bound by him would faithfully serve out his term. The court said: "It is indeed alleged that the overseers made this covenant for the town, by authority; but on trial no authority was shown but such as arose by law out of their holding the office. It is true that the overseers had, by the statute, authority to bind out the apprentice, and undoubtedly such act is binding on all concerned, including the town, so far as to create the relationship of master and apprentice. When the law confers this power on the overseers, it confers with it all the power necessary to carry that into effect, and no more. But it is not necessary or incident to the power of binding an apprentice, that covenants for fidelity in the apprentice must be added. The exercise of such a power without limitation or control would be of dangerous tendency. Hence it was not given by enactment, and should not be by construction."

In *Glidden v. Unity* (1855) 30 N. H. 104, the rule stated in the text was also affirmed in an action brought upon a contract made by the overseers to pay the master of the apprentice for the support of the latter, after he had received an injury which for several months incapacitated him from working. The court held that the overseers had no power to release or discharge any of the stipulations of the indentures. But the verdict in favor of the defendant town was set aside on the ground that, under the express terms of the indenture, the incapacity of the apprentice had released the plaintiff from the obligation to support him.

⁷*Dyer v. Hunt* (1831) 5 N. H. 401. For a provision conferring the power which in that case was denied to exist, see preceding section under the head of New York.

⁸*Franklin v. South Brunswick* (1808) 3 N. J. L. 443. The court said: "It is

objected that the overseers had no authority to bind out of their own township, and therefore that the indentures are void, because the statute gives the overseers and justices binding the pauper a superintendence over the treatment of the infant which they cannot exercise out of their own jurisdiction. If the statute gave the justices and overseers an authority to examine into the conduct of the master, and adjudge between him and the apprentice, I should think this a fatal objection; but I understand the act of assembly in this respect, as only constituting the overseers and justices binding the pauper, guardians to the pauper; in which capacity I cannot perceive any reason why they may not execute the authority given them by the act, out of the township or county, of which they are officers. The authority given by the act to the justices and overseers binding out a pauper, to examine into the treatment such pauper shall receive from its master, and redress the grievances, is to be done in 'such method as the law has provided;' that is, as I apprehend, in such manner as injuries done by masters to other apprentices are by law redressed. It is true that this authority can be more conveniently exercised in the township and county where the justices and overseers reside; but if they choose to take the trouble upon themselves, out of their township and county, I cannot perceive any lawful objection to their doing it; public policy is both ways on this subject. It is true that the justices and overseers of the poor, will be more likely to neglect this branch of their duty; on the other hand, a convenience may arise from being permitted to go out of their own town to put out poor children. In a town purely agricultural it may be difficult to find places; when at the same time, in a neighboring manufacturing town, eligible places may be found in every street, and the pauper more advantageously

dren except those whose legal settlement is in the municipality or other district in which they are authorized to perform their functions.⁹

f. What classes of children may be bound out.—Some of the statutes provide for the binding of children who have no parents, or whose parents are unable to support them. Under such a provision it is clear that a child cannot be bound out while his parents are still alive, unless they are unable to maintain him.¹⁰

By other statutes it is enacted that a child may be bound out where his parents have become "chargeable" to their town or district. An indenture which does not contain a recital showing that the situation thus predicated existed when the child was apprenticed will be treated as invalid for all purposes.¹¹ The statutory condition precedent is deemed to have been satisfied whenever relief has been furnished out of the public funds, either to the father of the child,¹² or to the child himself, with the consent of his father,¹³ or after he has been abandoned by his father.¹⁴

After relief has once been furnished to a family, the power of the

disposed of, both as it respects the infant and the public."

Compare the English doctrine which originally prevailed with regard to the power of overseers to bind out children to an inhabitant of another parish. § 2103, *d. ante*.

⁹ *King v. Brockway* (1794) 2 Root, 86; *Com. v. Jennings* (1810) 1 Browne (Pa.) 197; *Rumney v. Ellsworth* (1827) 4 N. H. 139. In the last cited of these cases the selectmen had covenanted to pay the master a certain amount. Held, that another town in which the child was settled was not liable to refund the money paid under the indenture.

¹⁰ *Demar v. Simonson* (1835) 4 Blackf. 132; *Stanton v. State* (1841) 6 Blackf. 83. In the latter case it was held that the proceedings before the probate court which are authorized by the statutes in cases where parents object to the apprenticing of their children were not permissible in the given instance, for the reason that in the complaint exhibited against the parent there was no allegation that he was not perfectly able to support his family. The court said: "The charge is that he criminally neglected the wants of his children, and that they thereby became sufferers. Of this charge he was found guilty, and of none other. How-

ever reprehensible his conduct may have been, he did not, by mere neglect to perform his duty in providing for his family, subject the disposal of his children to the jurisdiction of the overseer of the poor, nor to that of the probate court. The law points out another mode of proceeding against those who neglect the wants of their families."

The ruling in *Welborn v. Little* (1818) 1 Nott & M'C. 263, to the effect that, under the S. C. act of 1712, the commissioners of the poor had no right to bind an infant if his parents were living, unless he were shown by specific evidence to be "chargeable to the district," seems to have been made with reference to a provision of the type mentioned in the text. But the writer has been unable to obtain access to a copy of the act. The modern statute in South Carolina provides for the binding of poor children by a court. See § 2108, *post*.

¹¹ *Butler v. Hubbard* (1827) 5 Pick. 250.

¹² *Schermerhorn v. Hull* (1816) 13 Johns. 270.

¹³ *Bardwell v. Purrington* (1871) 107 Mass. 419.

¹⁴ In *People ex rel. Wehle v. Weissenbach* (1875) 60 N. Y. 385, it appeared that, in Dec. 1869, the commissioners

officials to bind out the children subsists as long as the parents continue unable to support them, although the town or district may not have incurred any actual expense in supporting the children themselves since the time when relief was first furnished.¹⁵ But the fact that at some previous time pecuniary assistance has been given to both the parents, or to one of them, is not sufficient to justify an exercise of the official power. "A man whose self or wife has once partaken of municipal charity is not forever after liable to have his children bound out to service."¹⁶

The recital in the indenture of facts requisite to invest officials with authority to bind out a child is evidence of those facts;¹⁷ but it is merely presumptive in character, and therefore susceptible of being rebutted by parol testimony.¹⁸ If it appears from such testimony that the recital is erroneous, the validity of the indenture cannot be sustained by the argument that the action of the officials might have been taken upon another of the grounds specified in the statute. The court will not, "contrary to their own express declaration, presume that the ground by them assigned was not the ground that they acted upon."¹⁹

g. Persons to whom children may be bound.—See Subtitle F, *post*.

h. Ages between which children may be bound.—See §§ 2114, 2115, *post*.

of public charities received a child, five years old, from her father, under an agreement that he would pay a stipulated sum per week for her board; he paid for one month only, came to see her but once, and soon left the state. In March, 1872, the commissioners indentured the child to defendants. In proceedings by habeas corpus, instituted by the father, held, that the commissioners had legal authority to bind her out as an apprentice. The court said: "After the father had left her in the care of the commissioners, neglecting after the first month to fulfil his contract with them, or by visiting his child, or by inquiry as to her condition, to take any responsibility for her, or to acknowledge a liability for her support, that she might well be treated as a child chargeable to the city. . . . She was in fact a pauper; who is one so poor that he must be supported at the public expense."

¹⁵ *Warner v. Swett* (1835) 7 Vt. 446, where a widow had gone out to service and her children been bound as appren-

tices after she had been relieved, but, up to the time in question she had never resumed the management of her family.

¹⁶ *Reidell v. Morse* (1837) 19 Pick. 358. See also *People ex rel. Heilbronner v. Hoster* (1873) 14 Abb. Pr. N. S. 414, where it was held that a mother who was merely shown to have received temporary relief was not a "person chargeable to the public" within the meaning of 2 N. Y. Rev. Stat. 1829, 155, § 5.

¹⁷ *Glidden v. Unity* (1855) 30 N. H. 104 (evidence against the master here); *Bardwell v. Purrington* (1871) 107 Mass. 419 (evidence in favor of the master here).

¹⁸ *Reidell v. Morse* (1837) 19 Pick. 358.

¹⁹ *Reidell v. Morse* (1837) 19 Pick. 358, where the contention rejected was that the indenture might be supported as being made under the authority given to overseers to bind out minors when they think the parents unable to maintain the child. The court said: "Had the overseers inquired into the circum-

i. Judicial review of official action.—With reference to the Delaware statute, it has been held that the discretion exercised by justices of the peace or trustees of the poor in binding out poor children may be reviewed on complaint to the court or to a judge in vacation.²⁰

j. Validity of contract as affected by the character of the stipulated work.—In a case where a poor child had been bound by overseers of the poor to do any kind of work in which his master might see fit to employ him, the court held that this stipulation was to be understood as being applicable to lawful work, and that the indenture was consequently valid.²¹

2107. Formal requisites of a valid contract.—*a. Execution of indenture by officials appointed to bind out minors.*—The wording of the statutes necessarily imports that the indenture of apprenticeship must be signed by the officials designated as the parties by whom the binding is to be effected. In some of the provisions there is an explicit requirement of this tenor.¹

With reference to a statute which authorized the binding of infant paupers by the "overseers" of towns, with the assent of two justices, it was held that a binding by one overseer to another belonging to the same town was defective, though it had received the assent of two justices.²

stances of the family, the means and ability of the parents, and adjudicated or formed an opinion that they were unable to support their family, this would have been a cause which would have authorized them to bind out the son. But there is no reason to suppose that they made any such adjudication. Had they, in the indentures, assigned this as the cause of the binding, it would have been taken to be the true cause. And although the event has shown that it would have been erroneous, yet if they had made due inquiry, acted with due caution and in good faith, we presume their judgment would have been conclusive. But now it is not and cannot be known what they would have thought of the subject. In such an inquiry it certainly would be highly proper to notify the parent, and give him an opportunity to be heard on a question of so much interest to him."

²⁰ *Moody v. Benson* (1843) 4 Harr. (Del.) 115.

²¹ *Bowes v. Tibbets* (1831) 7 Me. 457, 459, the court said: "The term 'apprentice' is used, although no trade, art,

or mystery is mentioned therein in which the apprentice was to be instructed by his master; but he was to do any work, by which must be understood lawful work, in which his master might think proper to employ him. Although called an apprentice, he was not one either according to the general meaning of the term, or in the sense in which it is used in the statute. But notwithstanding the unskilful or improper use of this word by the overseers, we are of opinion that the minor was substantially and legally bound as a servant. They had authority thus to bind him. They undertook that he should serve his master; and the covenants on the part of the latter for the benefit of the minor undertake to afford him the education required by the statute, and are in other respects favorable and liberal. The plaintiff thereby became entitled, instead of the father, to the services of the minor until he arrived at the age of twenty-one years."

¹ See, for example, *Bates's Anno. Stat.* (Ohio) § 3120.

² *Hamilton v. Eaton* (1827) 6 Cow. 658. The point really involved was

b. Participation of parents, guardians, etc., in proceedings.—In the absence of some qualifying expression of legislative intent the powers conferred by statutes of the type now under discussion are deemed to be compulsory in respect of the parents of the minor apprentice, and therefore *a fortiori* compulsory in respect of his guardian, next friend, or relatives. It follows that ordinarily the indenture is not invalidated by the fact that these parties did not join in the execution of the indenture.³ There is also authority for the view that the failure of the designated officials to notify them of an intended binding will not vitiate the transaction.⁴ But the soundness of this doctrine in the present connection would seem to be as questionable as the similar doctrine which has been propounded with regard to a judicial binding. See § 2110, *f*, *post*.

c. Consent of minor to binding.—With reference to the Pennsylvania act of 1771 it has been held not to be necessary that the child should join in the indenture.⁵ This is also the rule under the English statutes. See § 2104, *b*, *ante*.

d. Execution of indenture by master.—By one of the inferior courts of New York it has been held to be a prerequisite to the validity of the indenture, that it should be signed by the master.⁶ The rule under the English statute of 5 Eliz. chap. 4, was different. See § 2104, *c*, *ante*.

e. Formal wording of the indenture.—With reference to the Illinois statute it has been held that the person bound out need not be described in the indenture as a poor child.⁷

f. Judicial sanction of binding.—Noncompliance with a requirement that a designated judicial functionary shall assent to the binding is manifestly fatal to its validity.⁸

that the defectiveness of the indenture merely rendered it voidable, so that a settlement might be gained by service under it.

³ This rule was taken for granted as regards the father of the child in *People ex rel. Wehle v. Weissenbach* (1875) 60 N. Y. 385. See § 2106, note 14, *ante*.

⁴ In *Moore v. Allen* (1894) 72 Miss. 273, 16 So. 600, it was held that, in exercising the jurisdiction conferred by § 3169 of the Mississippi Code of 1892 on boards of supervisors, it is not necessary that notice should be served upon the mother or guardian of the minor, or that it should appear that he had no mother or guardian. The only

prerequisite to the validity of the proceedings is that citation be served on the minor in person. Sections 3430, 3501, Code 1892, requiring process for an unmarried minor to be served also on his father, mother, or guardian, applies only to process in courts proper, where property rights are involved.

⁵ *Com. ex rel. Crispin v. Jones* (1817) 3 Serg. & R. 158; *McGunigal v. Mong* (1847) 5 Pa. 269.

⁶ *People ex rel. Heilbronner v. Hoster* (1873) 14 Abb. Pr. N. S. 414 (recorder's court).

⁷ *Hays v. Borders* (1844) 6 Ill. 46.

⁸ *Hunsucker v. Elmore* (1876) 54 Ind. 209.

In New York state a signature by

In one of the states in which there is a general enactment with regard to the binding of children by overseers of the poor, and also a special enactment by which the power of binding is conferred upon the superintendents of county asylums, it has been held that both enactments are to be construed together, and consequently that a binding by a superintendent without the judicial sanction required in the case of a binding by overseers is invalid.⁹

g. Insertion of covenants for the benefit of the apprentice.—See §§ 2157 *et seq.*, *post*.

2108. American and colonial enactments relative to the binding of children by courts or court officials.—The clauses in enactments of this character may be classified under the heads specified below. In a few jurisdictions only a single one of these clauses has been adopted. But in the legislation of the greater part of the states mentioned, two or more of them are represented.

(1) Clauses by which provision is made in general terms for the binding of pauper children and the children of pauper parents.

(2) Clauses by which provision is made for the binding out of children whose parents do not, or are unable to, support them.

(3) Clauses by which provision is made for the binding of children whose parents have abandoned them.

(4) Clauses by which provision is made for binding out the children of parents who, on account of their character or conduct, are deemed unfit persons to have control of them.

(5) Clauses by which provision is made for the binding out of orphan minors who have no estate sufficient for the support.

two aldermen is essential in cities. The signatures of two justices of the peace are sufficient only in towns. *People ex rel. Heilbronner v. Hoster* (1873) 14 Abb. Pr. N. S. 414.

In *Hamilton v. Eaton* (1827) 6 Cow. 658, it was held that an indenture made without the consent of two justices was not absolutely void, but merely voidable by the parties.

In New Jersey, where the consent of two justices is a prerequisite to the validity of the binding, it has been held to be sufficient if the consent is indorsed upon one of the counterparts only. *Franklin v. South Brunswick* (1808) 3 N. J. L. 443. In this case the position was taken that an indenture on which is indorsed the assent of only one of the two justices is merely voidable, not

void. In this point of view the defect cannot be taken advantage of by a third party.

In *Warner v. Swett* (1835) 7 Vt. 446, it was held that an order of a justice of the peace, in pursuance of § 20 of the act of March 3, 1797, relating to legal settlement and the support of the poor, was not an essential prerequisite to the exercise of the power to bind out poor children as apprentices, which was vested in the overseers of the poor by § 18 of said statute.

⁹ *Owens v. Frager* (1889) 119 Ind. 532, 21 N. E. 1115 (decided with reference to §§ 5337 and 6092 of Ind. Rev. Stat. 1881, which correspond to §§ 9789 [8168] and 8386 [7304] of Burns's Anno. Stat.).

Alabama.—Code 1907, § 2896 (1474) (1734) (1450). The judge of probate of each county may bind out as apprentices the children of any person unable to provide for their support.

Secs. 2897 (497) (1475) (1737) (1450). The judge of probate is required to take action, whenever the sheriff, or justice of the peace, or other civil officer of the county reports to him a minor under the age of eighteen years who is an orphan without visible means of support, or whose parents have not the means, or who refuse, to provide for the support of such minor. He is also required to apprentice all other such minors as may otherwise come to his knowledge.

Secs. 2898 (498) (1476) (1745). Notice of proceedings must be given to parent or person having control of child.

Arkansas.—Kirby's Dig. 1904, § 267. In cases of minors or orphans having no estate for their maintenance and education, the county court shall direct guardians to bind their wards apprentices until the age of twenty-one years if males, if females until the age of eighteen years.

California.—Civil Code 1909, § 268. When a minor is poor, homeless, chargeable to the county or state, or an outcast who has no visible means of support, the superior court may, with his consent, bind him as an apprentice during his minority.

Colorado.—Rev. Laws 1908, § 137. Every orphan whose estate is not sufficient for his maintenance may be bound by his guardians under the direction of the county court.

Georgia.—Code 1895, § 2605 (1876). It shall be the duty of the county court or the ordinary to bind out all minors whose parents are dead or reside out of the county, or the annual profits of whose estates are insufficient for their support and maintenance; also all minors whose parents, from age, infirmity, or poverty, are unable to support them. (The portion of this provision which relates to the binding of children whose estates are insufficient is similar to § 4 of the act of 1799 regarding the protection of orphans and their estates. The remainder is taken from the act of March 17, 1766.)

Before binding out orphans, etc., judge or ordinary is to give fifteen days entire to all parties in interest, to show cause why the minor should not be bound out.

Iowa.—Code 1907, § 3246. Upon a verified complaint that the father or mother of a child is, from habitual intemperance or vicious and brutal conduct, an unsuitable person to retain control of the child, or where minor children are abandoned by the parents, the court may direct the child to be bound out till its majority. (Code 1873, §§ 2301, 2302, Rev. Code, 1860, §§ 2594, 2595.)

Sec. 3231. The court of the district court may bind minors who are paupers until they have attained their majority, without their consent. (Code 1873, §§ 2283, 2284; Rev. Code, 1860, §§ 2576, 2577.)

Kansas.—Gen. Stat. 1899, § 300. When any poor child is or may be chargeable to the county, or shall beg for alms, or the parents are poor, or the father an habitual drunkard, or, if there be no father, when the mother is of bad character, or suffers her children to grow up in idleness, it shall be lawful for the probate court to bind out such poor children as come under their charge from time to time. (Gen. Stat. 1868, chap. 5, § 5; Comp. Laws 1879, chap. 5, § 6).

Sec. 301. Every orphan or minor who has not an estate sufficient for his

maintenance may be bound by his guardian under the order and direction of the probate court.

Kentucky.—Stats. 1903, § 2591; 1909, § 2422. It shall be the duty of the court to inquire after and put in apprenticeship such poor orphans and others within its knowledge, whose relatives or parents the court may judge will not bring them up in moral courses. The court may in its discretion bind out the children of a man condemned to confinement in the penitentiary. (Act of 1793; 2 S. L. 1161, 2 Rev. Stat. 1860, chap. 64, p. 136, Gen. Stat. 1888, chap. 74, § 1.)

Sec. 2592. Before an order shall be made, binding out any such child, the person with whom it shall reside shall be summoned to show cause to the contrary.¹

Maryland.—Pub. Gen. Laws 1904, art. 6, § 10. The orphan courts may bind out any orphan child the increase or profits of whose estates is not sufficient for his or her maintenance, support, or education.

Sec. 11. The orphan courts may bind out as apprentices such children as are suffering through the extreme indigence or poverty of their parents, the children of beggars, illegitimate children, and the children of persons out of the state to whom sufficient sustenance is not afforded.

Sec. 12. Where the child is about to be bound out, the parent or parents of such child (if living in the county) shall be summoned to appear before the court, and their inclination, so far as is reasonable, shall be consulted in the choice of the person to whom the child is to be bound.

Sec. 16. Any two justices of the peace in a county may bind out as apprentice any child which the orphans' court may bind, upon the terms and for the time and subject to the restrictions before mentioned; provided that the contract shall within two months be approved by the court by an indorsement recorded.

Sec. 19. The trustees of the poor may also, in the recess of the orphans' court, issue a citation to the sheriff or any constable to have brought before them the child of any pauper or vagrant, and bind it out upon the same terms as the court.

Secs. 31–40. Provision was made for the binding of the children of free negroes by the orphans' court in cases where it appeared better for the habits and comfort of such child that it should be bound to some white person. No child to be bound, if his parents were able and willing to support him and teach him habits of industry.²

Missouri.—Rev. Stat. 1899, § 4798 (373). When any poor child is or may be chargeable to the courts, or shall beg for alms, or whose parents are or may be chargeable to the county, or when the parents are poor, and the father an habitual drunkard, or if there be no father, when the mother be of bad

¹The original provision in the act of Dec. 19, 1793, chap. 38, § 3, was held not to have been repealed by the act of March, 1797, concerning guardians, infants, etc. *Curry v. Jenkins* (1808) Hardin (Ky.) 493, 494.

²With reference to these provisions (which are not in the latest revision of the Code) it was held that a contract binding a negro apprentice could not be held void, either on the ground that

he was a "slave" within the meaning of the clauses of the Maryland Constitution by which slavery was abolished, or on the ground that a binding under the circumstances and on the terms specified placed him in a condition of "involuntary servitude" within the meaning of the United States Constitution. *Brown v. State* (1865) 23 Md. 503.

character, or suffer her children to grow up in habits of idleness without any visible means of obtaining an honest livelihood, it shall be lawful for the probate court to bind such child, if a male to the age of twenty-one years, if a female to the age of eighteen years.

New Jersey.—Gen. Stat. 1895, title, *Disorderly Persons*, § 12. Two justices of the peace may, at their discretion, bind out the child of any beggar, vagrant, vagabond, common drunkard, or common prostitute, or of any person who shall not provide for such child.

North Carolina.—Revisal 1905, § 190. The clerk of the superior court is authorized to apprentice (1) all orphans whose estates are of so small value that no person will educate and maintain them for the benefit thereof; (2) all infants whose fathers have deserted their families and been absent six months; (3) any poor child who is or may be chargeable to the county, or who shall beg alms; (4) any child who has no father, and the mother is of bad character, or suffers her children to grow up in habits of idleness without any visible means of obtaining an honest livelihood; (5) all infants whose parents do not habitually employ their time in some honest, industrious occupation. (Laws 1889, chap. 169, § 2; Laws 1901, chap. 628.) The provisions of the original act of 1762, Rev. Code 1855, chap. 5, § 1, differ considerably from those above set out.³

Oregon.—Hill's Anno. Laws 1892, § 2917. The county court may bind out minor children of any poor person who has become actually chargeable to the county, and also all minor children who are themselves chargeable to the county.

Tennessee.—Code 1883, § 3422 (2547). The court may apprentice any orphan whose estate is of so small value that no one will educate and maintain him for the profits thereof. (Stat. 1762, chap. 5.)

Sec. 3423. The court may apprentice every base-born child.

Sec. 3424 (2549). Any child totally abandoned by the father, and for whom he fails to provide support and maintenance, may be bound out by the court as though the father was dead; but not unless the assent of the mother is first given in open court, or she be unable to provide for its maintenance.

Texas.—Rev. Stat. 1895, *Apprentices*, art. 23, subd. (1) and (2). The county court may apprentice a minor when he is an orphan and without sufficient estate for his sustenance or education, or when his parents have suffered him to become a charge on the county.

Virginia.—Code 1887 and 1904, § 2583. Overseers of poor of a county or corporation, if allowed by order of the court thereof, may bind out any minor who is found begging or is likely to become chargeable. (Code 1849, chap. 122, § 3.)

West Virginia.—Code 1899, chap. 81, § 2. The county court may bind out as apprentice any minor who is found begging, or is likely to become chargeable to the county.

Ontario.—Rev. Stat. 1897, chap. 161, § 8. Provision made for judicial binding with their consent (or without it if they are under fourteen, being males, or under twelve, being females) minors who are orphans, or deserted by their

³The effect of the earlier statutes is summarized in *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61.

parents or guardians, or whose parents and guardians have been committed to gaol, or who are themselves dependent upon the public charity for support.

British Columbia.—Rev. Stat. 1897, chap. 8, § 9. Similar to Ontario act.

2109. Construction and effect of these statutes.—The conditions precedent to the validity of a binding under statutes such as those tabulated in the preceding section and under the statutes discussed in §§ 2105–2107, *ante*, are in some respects identical. But the circumstance that the parties by whom the binding is effected are judges or officers attached to courts constitutes a material differentiating element which renders it desirable to segregate the cases decided with reference to each type of enactment. The headings of the subsections are so worded that the practitioner can readily collate the decisions concerning the same subject-matter.

a. Jurisdiction of courts. Generally.—Whether the tribunal by which the minor in question was bound out was authorized to act in the premises must be determined from the specific words of the given enactment.¹ The powers conferred can, of course, be exercised only in respect of children who reside within the judicial district of the tribunal designated.²

b. Duty of court to take action.—The power conferred by an enactment which explicitly declares that it shall be the duty of the court to bind children who belong to a designated class is not one of a merely discretionary character. It must be promptly exercised in respect of any child to whom the court has ascertained the statutory description to be applicable.³

¹ With reference to the provision in the Maryland statute, which vests in two justices powers concurrent with those of the orphans' court, it has been held that they cannot bind out an apprentice while that court is in session. *May v. Bayne* (1828) 3 Cranch, C. C. 335, Fed. Cas. No. 9,331; *Lynch v. Ashton* (1828) 3 Cranch, C. C. 367, Fed. Cas. No. 8,636; *Gody v. Plant* (1836) 4 Cranch, C. C. 670, Fed. Cas. No. 5,499.

The effect of the decision in *Ex parte Emma* (1891) 48 Fed. 211, is thus stated in the headnote: If the power to bind minors as apprentices pertains to probate courts, it should be exercised by the United States commissioner. If it does not, it belongs to "county business," and can only be exercised by the county judge and county commissioners sitting together. There are no counties

nor county commissioners in Alaska. In either case, the district court is without jurisdiction to bind minors as apprentices.

² *Adams v. Adams* (1867) 36 Ga. 236; *Mendall v. Ricketts* (1831) 6 J. J. Marsh. 592.

In *Ferrell v. Boykin* (1866) 61 N. C. (Phill. L.) 9, it was held that an illegitimate free negro child who had not gained a new settlement by a year's residence in some other county was, for the purpose of being apprenticed, subject to the jurisdiction of the court of that county in which its mother was settled at the time of its birth.

³ *Rolfe v. Rolfe* (1854) 15 Ga. 451, decided with reference to the following words in Ga. act of 1799, § 4: "Where it shall appear to said court that the annual profits of the estate of any orphan is not sufficient for the educa-

With reference to an enactment which simply authorizes the court to bind out any child whose property is so small that no one will maintain and educate him for the profits, it has been held to be the duty of the court to bind him out, rather than commit him to a guardian, since the former course will secure him some education.⁴

c. What children may be bound.—Whether the judicial power may properly be exercised in respect of a certain child will depend upon the phraseology of the given statute.⁵ This fact the judges of the designated courts “must determine for themselves, when they assume to act in any particular case; and their judgment in the premises can

tion and maintenance of such orphan, it shall be the duty of such court forthwith to bind out such orphan, for the whole or such part of the time of such orphan's minority as to them shall seem best.” Similar phraseology is found in § 2605 of the Code.

See also *Brinster v. Compton* (1880) 68 Ala. 299, where the court applied the provisions of the Alabama Code under which the probate judge is required to take action either upon the report of the specified officer, or *proprio motu*.

⁴*Spears v. Snell* (1876) 74 N. C. 210.

⁵In *Cockran v. State* (1871) 46 Ala. 714, where a court empowered to bind out the children of “any person unable to support them” had ordered a minor to be bound in pursuance of an application made by his mother, on the ground that she was unable to support him, the contention that the order was void as having been made upon her application was rejected on the ground that it did not appear that the minor had any father.

In *Owen v. State* (1872) 48 Ala. 328, it was held that the jurisdiction of the justices was sufficiently shown if it was stated in the indenture itself that the parents of the child were unable to support it.

In *Ackley v. Tinker* (1881) 26 Kan. 485, with reference to a provision which authorizes the binding of children “chargeable to the county,” it was held that a child whose parents were still alive might properly be bound if he was so chargeable at the time when he was bound, and that the exercise of the judicial power was not dependent upon proof that he would remain chargeable during the whole of his minority unless

he should be bound. Proof that such a child will remain a permanent charge upon the county can, as the court remarked, seldom, if ever, be produced.

The *ratio decidendi* in *Lawson v. Scott* (1825) 1 Yerg. 92, was that in Tennessee the court had no jurisdiction to bind out a fatherless child, unless it was base-born, or its estate was insufficient for its support.

The effect of the Tennessee provision regarding cases in which a child has been abandoned by or is not supported by his father was thus stated in *Norris v. Stephens* (1877) 9 Baxt. 433: “The failure of the mother, upon being subsequently informed of the order of the court, to take action to repudiate the binding, would not necessarily render the action of the court valid, especially as against the minor himself, upon the supposition that he had been abandoned by the mother. If the mother be able to support the child, it cannot be bound without her assent in open court. If the mother be not able, or if she has abandoned him, yet if the child is able to support and take care of himself by his own labor, we think the court has no power to bind him, without he is in some way a party to the proceeding so as to bind or estop him, which we think does not appear in this case.” It was accordingly held that an order of the court binding the minor was not conclusive upon him or his mother, as it had been made upon the court's own motion, without notice to either the minor or the mother, and the court had not determined the existence of any of the facts which were the necessary prerequisites to its action.

With respect to the repealed provision in N. C. Rev. Code 1855, chap. 5, § 1, it was held that the county court had

only be reviewed in a direct proceeding for that purpose, and cannot be impeached in any collateral proceeding."⁶ Nor can it be impugned by parol testimony that it was made without the reception of any evidence.⁷

d. Selection of masters.—In the absence of any explicit provision upon the subject, the court, when selecting a master, is not bound to give the preference to the members of any particular class of persons.⁹

e. Indenture as evidence.—It has been held that an indenture made by a court is not a record which proves itself, and that, if it is offered in evidence, its execution must be proved by direct evidence, as in the case of any other deed.¹⁰

f. Review of proceedings by higher court.—The extent to which the judicial binding of a minor is subject to review by a higher tribunal is a matter determinable with reference either to the language

power to bind out all free base-born children of color, without reference to the occupation or condition of the mother. The provision relating to the occupation or employment of the parents was held to be confined to free negroes and mulattoes, whose children were legitimate, and if they had no honest or industrious occupation their children might be bound out.

For two cases in which the facts shown were held not to be such as would bring the minors in question within the purview of the Georgia enactment, see *Comas v. Reddish* (1866) 35 Ga. 236 (parents neither dead, nor unable to support child); *Adams v. Adams* (1867) 36 Ga. 236 (similar facts).

In *Ashby v. Page* (1889) 106 N. C. 328, 11 S. E. 283, an indenture was held to be invalid on the ground that the only facts found did not bring the mother of the apprentice within any one of the five classes mentioned in § 2 of the North Carolina statute. (Revised 1905, § 184). It was laid down that, if the mother be a suitable person, and the child does not come within any of the clauses mentioned, she is entitled to its custody, even though some other may be "more suitable." At the new trial which was ordered, additional evidence was introduced, showing that the mother was, under cl. (4) of the section, not a fit person to have custody of the child; and on a second appeal—(1890)

108 N. C. 6, 13 S. E. 90,—it was held that the clerk of the court was authorized to bind out the child.

Under the Kentucky statute, there must be some ground of necessity, to authorize the binding out of orphan children by the county court,—as, that the mother is bringing them up in idle and immoral habits, or fails to keep them in reasonable comfort. *Baker v. Winfrey* (1854) 15 B. Mon. 499. See also Kentucky cases cited in note 1 to the following section.

⁶ *Owen v. State* (1872) 48 Ala. 328, followed in *Brinster v. Compton* (1880) 68 Ala. 299.

The judge of the superior court in North Carolina may, on an appeal from the decision of the clerk apprenticing a child, proceed to hear and determine the matters in controversy, instead of sending the case back to the clerk. *Ashby v. Page* (1890) 108 N. C. 6, 13 S. E. 90.

⁷ *Ackley v. Tinker* (1881) 26 Kan. 485 (habeas corpus by apprentice).

⁹ In *Lamb v. Lamb* (1866) 4 Bush, 213, with reference to the Kentucky act of February 16, 1866, Rev. Stat. chap. 64, art. 1 (apparently repealed), it was held that in apprenticing a minor who was a negro or mulatto orphan child it was the duty of the court to give the preference to the former owner of the child, if the owner should request it, provided he was a suitable person.

¹⁰ *Owen v. State* (1872) 48 Ala. 328.

of the enactment concerning apprentices, or to the general rules of procedure which prevail in the given jurisdiction, or to both of these elements.¹¹

In proceedings taken for the purpose of annulling a judicial order, the master is a proper party defendant.¹²

2110. Same subject. Formal requisites of a valid binding.—a. Generally.—The general rule applicable to the apprenticing of children under all statutes of the type now under review is that their provisions must be strictly complied with, and that the fact of such compliance should appear on the face of the proceedings.¹ But it is not

¹¹ In *Cooper v. Saunders* (1807) 1 Hen. & M. 413, on the ground that the language of Va. Rev. Code, p. 174, § 15, showed that the jurisdiction of the lower court was intended to be final, and that the general statute as to the appellate jurisdiction of district courts was not applicable to orders concerning apprentices, it was held that no appeal lay from such an order. The appropriate remedy was declared to be a writ of certiorari.

In *Johnson v. Brannaman* (1857) 10 Md. 495, it was held that an appeal would not lie from a decision of the orphans' court refusing to take a bond, tendered under § 2 of the act of 1793, chap. 45 [Pub. Gen. Laws, art. 6, § 10] to prevent the binding out of an infant. The question whether the party offering the bond for the maintenance and education of the child was a suitable and proper person to perform the duties imposed by its condition was considered to be a matter which should be left to the judgment and sound discretion of the orphans' court.

In *Hatcher v. Cutts* (1870) 42 Ga. 616, two "children were bound as apprentices by the ordinary. . . . The order stated that it was made upon the written consent of the parent. In proceedings on habeas corpus taken by the parent, there was evidence strongly indicating that the parent had been imposed upon, and did not understand the purport of the writing, and the judge awarded the children to the parent. Held, that this was no abuse of the discretion of the court."

¹² *Mendall v. Rickets* (1831) 6 J. J. Marsh. 592.

¹ In *Ballenger v. McLain* (1875) 54 Ga. 159, the petition to the ordinary, asking that a minor child should be

bound as an apprentice to the applicant, did not show the residence of the minor. The order granting the application was passed the same day that the petition was filed. It only recited the facts that the application was made, and that no good cause was shown to the contrary. The only other instrument in the case was a bond of the applicant, which contained no stipulation to teach the apprentice any trade, business, or occupation, as the statute provided. No notice was given to any person, and no one appointed to represent the minor. No indenture of apprenticeship was made in duplicate and recorded, as by statute required. On the hearing of a habeas corpus sued out in behalf of the minor, charging that she was illegally restrained of her liberty by the reputed master, it was held that the production of the record of such proceedings was not sufficient to authorize an order adjudging him the custody and control of the alleged apprentice. The court said: "The purpose of this act is humane, just, and wise. Humane and just towards the unprotected minors, and wise in its intention toward the public, in protecting it against youthful idlers and vagabonds, guarantying that some useful trade or occupation shall be taught the needy young. But its provisions should be strictly complied with. They largely involve the liberty of those who come within their scope, as well as the social and industrial interests of the state. Proceedings founded on them should show that the rights of the minor . . . have been duly regarded and protected. Too much of this is wanting in this case to allow this young girl to be held for years in a state of quasi-bondage. She has not the advantage [*i. e.*, instruction] secured to her

necessary that the order should state the reasons which induced the court to make the order.²

b. Necessity for obtaining a judicial order.—An indenture entered into by the overseers of the poor, without any previous order of court for binding out the apprentice, is not valid.³

c. Necessity for execution of indenture.—The cases under this head are conflicting.⁴ But there would seem to be no sufficient reason why an order of a court should not be sufficient to create an apprenticeship, unless the execution of an indenture is provided for by

which the law says she shall have, nor do the public have the benefit of the guaranty in which it is deeply interested. To dispose of a child without notice to anybody, within a few hours, or, it may be, the same hour that the petition is presented, and then to leave her without the legal assurance, in the deed by which she is conveyed for years, of that which the law guarantees to her, is too severe a proceeding to be upheld."

On the ground that the jurisdiction conferred by the Kentucky enactment is special and limited, it has been held in several cases that a judicial order relative to the binding out of a child is invalid unless it shows the facts upon which the jurisdiction as exercised was based. *Freeman v. Strong* (1838) 6 Dana, 283 (order set aside, as record did not show that the children were orphans, nor that the parent, or next friend, or person with whom they lived, had been summoned to show cause or had appeared in court, or even that they were minors); *Thomas v. Newcom* (1866) 1 Bush, 82 (order set aside for the reason that it did not show that the relative with whom a poor orphan was living was not a suitable person to bring him up); *Small v. Small* (1867) 2 Bush, 45 (similar decision); *Chaudet v. Stone* (1868) 4 Bush, 210 (order set aside for the reason that it did not show either that the child was an orphan, or that he had not parents or relatives who would bring him up in "moral courses").

In *Brock v. Whittaker* (1906) 29 Ky. L. Rep. 477, 93 S. W. 623, an action brought by a master against the mother of his apprentice to compel her to deliver her child to him, the order of the court under the caption, "Application for Apprenticeship of J. J. B., Infant. Notice of Application," recited

that "notice of this application having been executed on the mother of J. J. B., infant son of J. C. B., deceased, and no defense having been made herein, after the hearing of the proof in open court, the court, being fully advised, adjudges that J. J. B. be apprenticed to H. M. B. until he is twenty-one years of age, under all of the conditions of the statute in such cases made and provided." Held, insufficient under §§ 2591, 2592, of Kentucky statutes, to show jurisdiction in the court to bind out the apprentice, and void.

² *Parsons v. Hand* (1816) Litt. Sel. Cas. (Ky.) 220.

³ *Bullock v. Sebrell* (1835) 6 Leigh, 560.

⁴ In *Stewart v. Duffey* (1809) 1 Cranch, C. C. 551, Fed. Cas. No. 13,425; and in *Hines v. Hewitt* (1834) 4 Cranch, C. C. 471, Fed. Cas. No. 6,520, it was held, with reference to the Maryland statute, that an entry in the minutes of a court, to the effect that a child should be bound to a designated person, did not constitute a lawful binding.

In *Bell v. English* (1833) 4 Cranch, C. C. 332, Fed. Cas. No. 1,250, it was held (apparently with reference to the same statute), that the orphans' court had authority to bind out orphan children without indenture.

In *Adams v. Miller* (1801) 1 Cranch, C. C. 5, Fed. Cas. No. 63, where a Virginia court had ordered the overseers of the poor to bind out the child in question, an action for breach of the master's obligation to instruct him in the given trade and teach him reading and writing was held to be maintainable, although no indenture had been executed. The *ratio decidendi* was that the law raised an implied promise on the part of the master to comply with the terms of the order.

the express terms of the statute.⁵ It is clear that, as a juristic instrument, such an order is of a higher grade than an indenture made between two private parties. In this point of view the validity which is predicated in respect of a contract evidenced by an indenture cannot, without an obvious inconsistency, be denied in respect of a contract evidenced by an order.

d. Manner in which indentures are to be executed by officials.—This is a matter which in some jurisdictions has been regulated by a specific provision.⁶ In the absence of such a provision the validity of the contract will be determinable with reference to the general rules which are applicable to the execution of deeds.⁷

e. Notice to minor.—Both on principle and authority it is clearly not competent for a court to bind out as apprentice a person who has no notice of the proceedings.⁸ With regard to the question whether his presence at the time when the order for binding him is made is a prerequisite to its validity the decisions are not entirely harmonious. Some go no further than to declare that, unless there are special reasons to excuse the absence of the child, his personal attendance should be required by the court, although the statute does not so prescribe.⁹ Another view is that his presence is an absolute condition precedent to the validity of the binding.¹⁰ The writer ven-

⁵ The fact that no indenture was made in duplicate and recorded, as by statute required, was one of the grounds upon which the judicial order was held to be invalid, in *Ballenger v. McLain* (1875) 54 Ga. 159.

Under the original North Carolina enactment, an indenture was required. See *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61.

⁶ By N. C. Revisal 1905, § 197, it is provided that indigent children shall be indentured in the name of the clerk of the county where they reside, and of the employer.

⁷ In *Brewer v. Harris* (1848) 5 Gratt. 285, it was held that a binding in pursuance of an order of the court, directing a bastard child to be bound out by the overseers of the poor, could not be pronounced invalid on the ground that the master had covenanted with the overseers of the poor, without naming them; or on the ground that the indenture was in the name of but one, and only he and the master had executed it; or on the ground that the indenture contained covenants by the master in favor of the mother of the

apprentice, and also in favor of the apprentice, but that they were not parties to it.

⁸ *Curry v. Jenkins* (1808) Hardin (Ky.) 493; *Jack v. Thompson* (1866) 41 Miss. 49; *Moore v. Allen* (1894) 72 Miss. 273, 16 So. 600; *Re Ambrose* (1867) 61 N. C. (Phill. L.) 91; *Norris v. Stephens* (1877) 9 Baxt. 433.

In *Cockran v. State* (1871) 46 Ala. 714, where a child had been bound on the application of a mother unable to support him, the order of the court was unsuccessfully attacked on the grounds that no notice had been given to the child, and no guardian *ad litem* appointed to represent him. But this decision can scarcely be correct.

⁹ *Mitchell v. Mitchell* (1872) 67 N. C. 307. In one earlier North Carolina case it was stated to be "usual" to have the child present (*Owens v. Chaplain* [1856] 48 N. C. [3 Jones L.] 323); in another that it was "prudent in the court to require his presence" (*Re Ambrose* [1867] 61 N. C. [Phill. L.] 91).

¹⁰ *Smith v. Elwood* (1836) 4 Cranch, C. C. 670, Fed. Cas. No. 13,042; *Smith v. Elliot* (1836) 4 Cranch, C. C. 710,

tures to express the opinion that the latter of these doctrines is the correct one. Where minors are concerned there are specially cogent grounds for a strict enforcement of the rule under which a person whose rights will be affected by legal proceedings is entitled to his day in court. The failure of an adult to appear after having been notified imports, *prima facie* at least, voluntary action on his part, which may properly be regarded as entailing the same juridical consequences as his actual appearance. But in the case of a child the presumption that his nonattendance was the result of a free exercise of his will cannot, it is submitted, be warrantably entertained.

f. Notice to parents, etc.—Under the explicit terms of some statutes a child cannot be apprenticed unless his parents, guardian, or next of kin, have been notified of the proceedings.¹² There is a conflict of authority with regard to the doctrine which should be applied in jurisdictions in which no provision of this tenor is in force. The better opinion, it is apprehended, is that natural justice requires that a child should not be bound without notice to some person belonging to one or other of the categories specified above.¹³ But in one state the position has been taken that a judicial order apprenticing a poor child is not invalidated by the circumstance that his parents were neither notified of the proceedings nor consented to his being bound.¹⁴ The case cited, in so far as it affirms the doctrine that

Fed. Cas. No. 13,040 (the fact of presence in court need not be stated in indenture; it will be presumed); *Jack v. Thompson* (1866) 41 Miss. 49.

¹² For cases in which the necessity of complying with a requirement of this character was asserted or recognized, see *Brinster v. Compton* (1880) 68 Ala. 299; *Ballenger v. McLain* (1875) 54 Ga. 159; *Curry v. Jenkins* (1808) Hardin (Ky.) 493; *Payne v. Long* (1819) 2 A. K. Marsh. 158; *Roberts v. Desforges* (1819) 2 A. K. Marsh. 39 (party whose children are to be bound must be summoned, or shown to be out of the jurisdiction of the court); *Mendall v. Rickets* (1831) 6 J. J. Marsh. 592; *Rachel v. Emerson* (1845) 6 B. Mon. 280 (next friend must be summoned unless there is a voluntary appearance by him,—a fact which should be shown by the record); *Barrett v. McPherson* (1834) 4 Cranch, C. C. 475, Fed. Cas. No. 1,049; *Howry v. Calloway* (1873)

48 Miss. 587 (construing a provision in the Code of 1871, § 1800, which has been omitted from the Revision of 1892).

¹³ So laid down in *Curry v. Jenkins* (1808) Hardin (Ky.) 493; *Mendall v. Rickets* (1831) 6 J. J. Marsh. 592.

¹⁴ *Ackley v. Tinker* (1881) 26 Kan. 485. The court reasoned as follows: "Jurisdiction, as we have stated, over the matter of apprenticeships, is given to the probate court. The exercise of this jurisdiction does not necessarily depend upon notice to or consent of the parent; the state has the power to provide for the care and custody of minor children, independent of their parents. *People ex rel. Splain v. New York Juvenile Asylum* (1874) 2 Thomp. & C. 475. In some cases the statute provides for the consent of the parents, in others not. The absence of this consent in these latter cases, the entire ignorance of the parent of proceedings actually

the consent of the parents is not a prerequisite to the validity of the binding of such a child, was unquestionably correct. That the proceedings with reference to a statute of the type now under review are *in invitos* in respect of parents as well as of the child has never been disputed. But for the reasons submitted in the note, the writer ventures to think that the views of the court with respect to the non-necessity of notifying the parents were erroneous.¹⁵ A similar doctrine, however, has been propounded with respect to cases in which an apprenticing by overseers of the poor, and other officials of that description, is involved, see § 2107, *b*, *ante*.

g. Registration of indenture.—In Virginia a statutory requirement that an indenture executed pursuant to the order of the court shall be filed within "six months" was construed as meaning six calendar months.¹⁷

had, does not invalidate the power, or render the proceedings void. Perhaps the natural right of the parent to the custody of his minor child may not be destroyed by proceedings to which he is not a party, or to which he has not given consent. Such seems to have been the idea of the supreme court of Wisconsin, from the opinion in a case involving the validity of the act providing for committing vagrant children to the custody of an industrial school. *Milwaukee Industrial School v. Milwaukee County* (1876) 40 Wis. 328, 22 Am. Rep. 702. See also *Howry v. Calloway* (1873) 48 Miss. 587. But no such question arises in this case; the parent is not here asserting his rights to the custody of his child. The petition is that of the child claiming that it is illegally restrained, and the question is not whether, under these proceedings, the right of the father is destroyed, but whether any right of custody has been given to the defendant. . . . It is alleged in the habeas corpus petition that the parents had no knowledge or notice and gave no consent, but the statute does not provide for either; it contemplates independent action by the superintendent of the poorhouse whenever any child becomes a county charge, and the validity of the court's action in such a case in no manner depends upon the wishes or knowledge of the parents."

¹⁵ The theory entertained apparently was that notice to the parents was un-

necessary because their child might be bound without their consent. That this was an unwarrantable position, however, seems to be sufficiently clear from the consideration that the primary jurisdictional fact which was to be established before the court could take action was their inability to support the child whom it is proposed to apprentice. This was certainly a matter with regard to which they were entitled to a judicial hearing, not merely because the effect of an order that the child should be bound would be to deprive them of its custody and services, but also because such an order would import *per se* a declaration that they were, in the judgment of the court, either paupers or in some other way unsuitable persons to retain control of him, and would therefore seriously affect their social reputation and standing. In the given case the record showed that the child was actually chargeable to the county at the time when he was bound. Such a situation might doubtless be properly taken as importing an admission on the part of the parents that they were paupers during the period when their child was supported at the public cost. But it cannot justifiably be regarded as doing away with the necessity of notifying them when the permanent disposition of the child for a long term of years was in question.

¹⁷ *Brewer v. Harris* (1848) 5 Gratt. 285.

2111. Enactments relative to the binding of poor children by or to charitable and reformatory institutions.—As examples of enactments of this type the following provisions may be cited:

Indiana.—Burn's Anno. Stat. 1908, § 3640 (3181). Incorporated asylums for children are authorized to bind out children received by them, who have neither father, mother, nor guardian, and also children surrendered to them by living parents.

Michigan.—Comp. L. §§ 2262–2264. Provisions regarding the indenturing of juvenile offenders. These provisions apparently supersede How. Anno. Stat. § 9820, by which it was declared that the State Reform School might apprentice male offenders imprisoned therein, and § 9839, relating to the apprenticing of girls in the State Industrial School.

How. Anno. Stat. 1882, § 4594; Comp. Laws, § 8292. Trustees of hospitals or asylums for the relief of indigent persons may bind them out.

Comp. Laws, § 8286 (How. Anno. Stat. 1882, § 4603a). Officers of industrial and charitable schools controlled by private corporations are empowered to bind out a child committed to their guardianship until he reaches lawful age.

How. Anno. Stat. 1882, § 2003—a; Comp. Laws, § 5559 (Laws 1887, p. 207). Procedure in cases where minor inmate of charitable institution is bound out to applicant.

Minnesota.—Rev. Laws 1905, § 1907. Provisions made for binding out minor criminals committed to the State Training School.

Sec. 1947. Provision made for apprenticing dependent children at State Public School.

New York.—Domestic relations law, Consol. Laws 1909, p. 548, § 124. Trustees, directors, or managers of any incorporated orphan asylum or institute may bind out any orphan, or indigent children who have been absolutely surrendered to the care and custody of an orphan asylum or have been placed therein as poor persons under § 56 of the poor law, or have been left to the care of the asylum by the parent, relative, or guardian of the child, for its support, for the year then next preceding.

(This provision replaces those *in pari materia* in Laws 1870, chap. 431, § 1; Laws 1875, chap. 522, § 1; Laws 1884, chap. 438, § 5; Laws 1896, chap. 272, § 74.)

Laws 1866, chap. 245, § 18; Laws 1851, chap. 332, § 1. The Juvenile Asylum of the City of New York is empowered, in its discretion, to bind out or indenture as clerks or apprentices in this state or in any state of the United States which shall by its laws recognize the validity of such indentures, the children intrusted or committed to its charge.¹

Laws 1863, chap. 448, § 6. The Catholic Protectorate Society was authorized to bind out any child under their care, with his consent, during his minority.

North Carolina.—Rev. Laws 1905, § 203 (Laws 1889, chap. 169, § 18). Orphan asylums or charitable institutions organized for the purpose of taking care of indigent children may execute indentures apprenticing children over fourteen years of age.

¹Held constitutional in *People ex rel. Splain v. New York Juvenile Asylum* (1874) 2 Thomp. & C. 475.

Ohio.—Bates's Anno. Stat. 1904, § 3135. Minors may be bound by and to orphan asylums or children's homes.

Pennsylvania.—Brightly's Dig. *Apprentices*, § 4. All corporations organized for the purpose of providing homes for friendless or destitute persons are authorized to receive such child, upon indenture from the guardians, overseers, or director of the poor, and also to bind out all children committed to their charge, when maintenance is unprovided by their parents or guardian. Act of May 25, 1878, § 1.

Virginia.—Code 1887 and 1904, § 2582. Minors who are placed by the same authority and under the same limitations as specified in § 2581 [binding, by guardian, father, etc.] with any incorporated association, asylum, or school, may be bound out by it.

Sec. 2583. Any overseer of the poor of a county or corporation, if allowed by an order of the court thereof, may place in any incorporated association, asylum, or school instituted for the support of destitute children (Code 1849, chap. 126, § 3).

Wisconsin.—Sanborn & B. Anno. Stat. § 4966. Boys in the State Industrial School may be bound out by the managers.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 19. Managers of charitable institutions may apprentice children under their charge.

New South Wales.—Apprentice act 1901, No. 41, §§ 5, 6. Persons in control of charitable institutions are authorized to apprentice children under their charge.

Sec. 8. Children deserted or left without adequate means of support may be bound out by two justices of the peace.

Victoria.—Master and apprentice act, 54 Vict. No. 1117, § 7. Persons in control of charitable institutions are authorized to bind out children under their charge.

Sec. 11. Children deserted or left without adequate means of support may be bound out by two justices of the peace.

2112. Construction and effect of these enactments.—*a. Conditions precedent to a valid exercise of the statutory power. Generally.*—The question whether the circumstances declared by the legislature to be prerequisite to the exercise of the powers conferred must be determined by a construction of the given enactment.¹

¹In one case it was held that "no absolute surrender" of a child to an asylum which would give it jurisdiction to bind or apprentice it, under N. Y. Laws 1884, chap. 438, § 5, (now replaced by Dom. Rel. Law, § 124), was predicable where the child had been placed in the custody of the asylum by its mother under an arrangement by which she was to pay for its support a portion of her wages earned as an employee of the asylum. *People ex rel. Stewart v. Paschal* (1893) 68 Hun, 344, 52 N. Y. S. R. 298, 22 N. Y. Supp. 881.

The New York Juvenile Asylum of the city of New York has power, under § 18 of their charter, to bind out a child who has been committed to its charge by a police justice, after having been proved by competent evidence to be embraced within § 18 of the "act relative to the powers of the common council of the city of New York and the police and criminal courts of said city, approved January 23, 1883." *Re Forsyth* (1883) 66 How. Pr. 180 (per Lawrence J., in Chambers). In *Manuel v. Beck* (1910) 70 Misc.

b. Obligatory covenants for the child's benefit.—In two cases the *ratio decidendi* was that the indentures in question were valid or invalid as containing or not containing the obligatory covenants for the benefit of the apprentices.²

See §§ 2127 *et seq.*, *post*.

E. DURATION OF APPRENTICESHIPS.

2113. Period covered by contract.—The provision in the repealed act of 5 Eliz. chap. 4, under which service for seven years as an apprentice was declared to be a condition precedent to the exercise of certain trades, was deemed to have been satisfied where the apprentice was bound for that period to serve two masters consecutively.¹ That provision, when read in connection with the invalidating clause in § 41, was construed as importing that an indenture which covered periods of more or less than seven years was subject to avoidance by the apprentice, but remained binding, so far as third persons were concerned, while he refrained from exercising his right to rescind it.²

357, 127 N. Y. Supp. 266, where a child had been simply put into a charitable institution and left there without any adequate commitment under the New York poor law (Consol. Laws, chap. 42), § 56, and subsequently taken by an employee of the institution, and left in the defendant's family, to be returned at any time if the arrangement was not satisfactory, it was held that there was no valid apprenticeship, and that the child was consequently entitled to recover the reasonable value of the services rendered while he was in the defendant's family. The conclusion that there had been no legal binding was deemed to be clearly indicated by an examination of various enactments relating to apprentices: domestic relations law (Consol. Laws, chap. 14) §§ 115–124, authorizing charitable institutions for the care of orphans to bind an orphan out as a servant by an indenture in writing; state charities law (Consol. Laws, chap. 55) §§ 300, 301, providing who may place out destitute children in a family in the manner provided by law; and penal law (Consol. Laws, chap. 40) § 493, making it a misdemeanor to take an apprentice without having first obtained the consent of his legal guardian or unless a written agreement has been entered into as prescribed by law.

² *Re Barre* (1872; Sup. Ct. Spec. Term) 14 Abb. Pr. N. S. 426; *State ex rel. Splain v. New York Juvenile Asylum* (1874) 2 Thomp. & C. 475.

¹ *Rex v. Louth* (1828) 8 Barn. & C. 247, 2 Moody & R. 273 (settlement case, decided after the repealing statute 54 Geo. III. came into force, but with reference to an indenture made before its enactment).

² Lord Hardwicke, Ch. J., in *Rex v. St. Nicholas* (1736) Burr. Sett. Cas. 91, 2 Strange, 1066, 2 Bott, Poor Law, 373 (settlement gained by service); *Rex v. Evered* (1777) Cald. 26, 1 Bott, Poor Law, 576 (defaulting apprentice amenable to summary statutory remedies); *Gray v. Cookson* (1812) 16 East, 13 (similar decision); *Guppy v. Jennings* (1793) 1 Anstr. 256 (covenants of father not enforceable against him, after his son had abandoned his employment under an indenture covering five years).

These English cases were followed in *Fish v. Doyle* (1831) Draper (U. C. Q. B.) 328; *Dillingham v. Wilson* (1840) 6 U. C. Q. B. O. S. 85; *Webster v. McBride* (1856) 5 U. C. C. P. 109.

In *Burney v. Jennings* (1806) 6 Esp. 9, a *nisi prius* case, Lord Ellenbrough intimated, without deciding, that a binding for five years only was "void." But if this expression was intended as

After the passage of the act of 54 Geo. III. chap. 96, § 2, by which it was declared to be lawful to take apprentices, "though not according to" the provisions of the earlier statute, the fact that the stipulated term of service was different from that originally prescribed by the legislature ceased to be, even as regards the immediate parties to the contract, a ground for repudiating it.³

Clauses defining the length of the term of apprenticeships have been enacted in some of the American states and British colonies.⁴

2114. From what age a child may be bound.—*a. Apart from express statutory provisions.*—At common law there is no restriction as to the age at which a child may lawfully be bound. This rule is controlling where the statute regarding apprentices is silent upon the subject.¹

anything more than a loose synonym for "voidable," his opinion was clearly opposed to the authorities cited above.

³See *Smedley v. Gooden* (1814) 3 Maule & S. 189, where a plea in an action against the father of the apprentice, that the articles were made for the term of five years, contrary to the statute, was held bad.

⁴Georgia Code 1895, §§ 2598 (1871). It is provided that any person of full age may bind himself, for a valuable consideration, to any citizen of the state, for a limited number of years, not exceeding five.

New York Laws 1871, chap. 934, § 2 (1). It was provided that the indenture should contain a covenant binding a minor apprentice to serve for not less than three nor more than five years. But this statute was repealed by the domestic relations law.

North Carolina Revisal 1905, § 204 (1). Same provision as the repealed New York statute above mentioned.

Manitoba Rev. Stat. 1902, chap. 108, § 2. No indenture binding for more than nine years.

Victoria. Master and apprentice act 1890, No. 1117, § 9. Term not to exceed seven years.

¹On the ground that there was no limiting provision in the act of 43 Eliz. regarding the earliest age at which a poor child might be bound, it was held in one case that a girl of eight years might be lawfully bound as apprentice in housewifery. *Rea v. Saltern* (1784) Cald. 444, 1 Bott, Poor Law, 613. The court contrasted the statute of 5 Eliz.

chap. 4, which invalidates the binding of children of less than ten years, and said that the propriety of the binding in any given instance was a matter of discretion for the tribunal charged with the power of reviewing the action of the officials.

In *Brotzman v. Bunnell* (1840) 5 Whart. 128, 34 Am. Dec. 537, the binding of an infant less than seven years of age was held valid, there being no limitation as to age in the Pennsylvania act of 1770. Discussing the contention that the rule of the criminal law regarding the age of discretion was applicable, the court said: "In regard to the choice of an occupation or the judicious selection of a master, he has probably as little capacity at eight years of age as he has at six. In these matters, in truth, no reliance is placed on the judgment of the infant; they are left to the determination of the parent, or guardian or next friend, whose assent is made indispensable to the validity of the binding. It is of importance to the interests of the community, as well as of the infant, that this power of binding should be exercised; and of the time it is proper to exercise it, others must judge for the infant, as he is incapable of deciding for himself. Cases may occur in which it may be expedient that an infant under seven years of age should be provided for by being bound an apprentice, and it may be manifestly to his advantage to be so."

In *Franklin Twp. v. South Brunswick Twp.* (1808) 3 N. J. L. 443, the binding of a poor child three years old to

b. Under express statutory provisions.—By § 25 of the repealed statute, 5 Eliz. chap. 4, it was enacted that apprentices in husbandry might be bound between the ages of ten and eighteen years. There was no restriction as to any other class of apprentices.

By § 7 of 56 Geo. III. chap. 139, the binding of poor children under nine years of age was prohibited. The rules promulgated under the later poor law contain a similar restriction.

Some of the special English statutes which relate to the apprenticing of minors in certain occupations contain language prohibiting their employment under a certain age.²

Under § 1 of the New South Wales apprentice act 1901, § 1, children can be bound only between the ages of fourteen and twenty-one.

2115. To what age a child may be bound.—*a. Apart from express statutory provisions.*—As the parental right to services of a child ceases when he reaches his majority, a father cannot at common law bind his child beyond that time.¹

If a mother is competent, apart from statute, to bind out her child after her husband's death—a point which is not yet fully settled (see § 2075, *b, ante*)—her power is, of course, limited to the same extent as his.

As to the right of the apprentice to terminate the contract when he attains his majority, see § 2201, *post*.

b. Under express statutory provisions.—The enactments in some jurisdictions provide for the binding of children of both sexes until they reach the age of twenty-one years. But in most of the American states the limit of age specified by the legislatures is twenty-one years for males and eighteen for females.² A contract which purports to cover a period which will not expire until the apprentice has passed the age limited is clearly not binding upon the apprentice after that age has been reached.³ Whether it is to be treated as

serve until the completion of its eighteenth year was held to be lawful.

In *People ex rel. Barbour v. Gates* (1870) 43 N. Y. 40, it was held that the tender age of the two infants in question (six and four years) at the time of entering into the apprenticeship did not vitiate an indenture which was duly executed with the consent of their guardian.

² See, for example, 28 Geo. III. chap. 48, § 4, as to the apprentices of chimney sweepers, which in *Rex v. Hipswell* (1828) 8 Barn. & C. 466, 2 Mann. & R. 474, 7 L. J. Mag. Cas. 4; was construed

as importing that indentures made with minors under the forbidden age of eight years were absolutely void for all purposes. See § 2131, note 2, *post*.

¹ For a specific decision to this effect, see *Walton v. Atchison, T. & S. F. R. Co.* (1904) 131 Iowa, 423, 101 N. W. 506.

² In Vermont Const. chap. 1, art. 1, these restrictions are treated as a deduction from the general proposition that all men are born equally free.

³ *Walton v. Atchison, T. & S. F. R. Co.* (1906) 131 Iowa, 423, 101 N. W. 506.

merely voidable by him, or absolutely void, will depend upon the phraseology of the given enactment. In one English case, the binding of a poor child for a longer period than that authorized by a special enactment somewhat similar in its terms to the Elizabethan statute was regarded as being merely voidable, the rationale of this doctrine being that the clause in question was merely permissive in its tenor, contained no express words declaring a longer binding to be null or illegal, and did not involve any consideration of public policy.⁴ Some of the American statutes have been construed in the same sense, but not always from the same standpoint.⁵

The provision respecting poor apprentices, in the repealed act of 43 Eliz. chap. 2, § 5, was considered to be merely directory. In this point of view it was held that children might lawfully be bound for a term which would expire before the age limited,⁶ or for an indefinite time.⁷ The same doctrine has been applied with reference to a Virginia enactment which directs that female children shall be bound out until they are eighteen years old.⁸ On the other hand, the provision in the Massachusetts statute, that male children may be bound out "till they come to the age of twenty-one years," is construed as importing that they must be bound out to that age.⁹ But in this jurisdiction it is not essential to specify the precise day of the month when the apprenticeship is to terminate. Accordingly, in the ab-

⁴ *Rex v. St. Gregory* (1834) 2 Ad. & El. 99, 4 Nev. & M. 137, 4 L. J. Mag. Cas. N. S. 9. See further as to the case in § 2131, note 3, *post*. (Effects of invalidity.)

⁵ In *Walker v. Chambers* (1850) 5 Harr. (Del.) 311, the jury were instructed that a contract made with a minor apprentice to serve beyond full age was voidable, but that it was not against public policy, and might be ratified after he reached majority.

In *People ex rel. Splain v. New York Juvenile Asylum* (1874) 2 Thomp. & C. 475, the objection that the indenture was unlawful as binding the child beyond his majority was overruled, for the reason that the term of the apprenticeship was estimated with reference to his age as ascertained by the asylum in accordance with its statutory duty.

In *Emery v. Gowen* (1826) 4 Me. 33, 16 Am. Dec. 233, the right of a father to maintain an action for the seduction of a daughter whom he had bound beyond her minority was affirmed on the ground that the contract was good at

common law, so far as third persons were concerned. See further as to this case in § 2135, note 7, *post*.

⁶ *Rex v. Chalbury* (1736) 1 Bott, Poor Law, 606.

⁷ *Rex v. Woolstanton* (1739) 1 Bott, Poor Law, 606.

⁸ *Brewer v. Harris* (1848) 5 Gratt. 285 (binding till the age of seventeen held valid).

⁹ *Reidell v. Congdon* (1834) 16 Pick. 44. The court said: "We think this provision of the statute must be strictly pursued. The services of the apprentice are of more benefit to the master if he continues with him till he arrives at the age of twenty-one years, and more advantageous terms may therefore be obtained of the master if it is stipulated that he shall so remain. The binding out of a male child until he shall arrive at the age of twenty years is not a compliance with the statute, and is not for the benefit of the minor, and for both of these reasons this indenture is invalid."

sence of any imputation of bad faith, a slight, accidental, and perfectly natural mistake as to the exact date will not vitiate the indenture, but will leave it in the same situation and with the same legal effect as if no attempt had been made to name the day when the apprentice would become of full age.¹⁰

In one of the Australian states it is provided that either party shall be bound until their majority, or until the time of marriage with the consent of the public official appointed to give consent to the marriage of minors.¹¹ But the language of most of the enactments which specify marriage as a *terminus ad quem* for the binding is applicable to females only.¹²

In a settlement case it has been held that an indenture which purports to bind a girl until she is twenty-one years of age, and does not specify the time of her marriage as an alternative, is not void, but merely voidable.¹³

2116. Recital of age of apprentice in the indenture, how far conclusive.—*a. Apart from express statutory provisions.*—It is agreed

¹⁰ *Bardwell v. Purrington* (1871) 107 Mass. 419. There an indenture which purported to bind one J. S. from its date until a day named, when the said J. S. will arrive at the age of twenty-one years, during which time the said J. S. shall faithfully serve, etc., was held not to be wholly void because, under the rule of law excluding fractions of a day in computation of time, J. S. would become of full age on the day next preceding that so named. The court said: "A person who was born on the 8th day of September, 1852, would become of the full age of twenty-one years if he should live to the 7th day of that month in 1873. He would be entitled to be considered as having attained his majority at the earliest minute of that day. It was not in the power of the overseers of the poor, therefore, so to bind out the minor in this case as an apprentice that he could lawfully be held to service as such for any appreciable portion of that day. If the indenture necessarily implies an intent on their part to do so, we should be obliged to say that, in so doing, they exceeded the authority given them by statute, and that the act of binding out the minor was void and of no effect."

¹¹ New South Wales apprentices act 1901, § 15.

¹² By the following provisions the

binding of females to the age of eighteen years or marriage was authorized:

England.—43 Eliz. chap. 2, § 5 (parish apprentices).

Colorado.—Rev. Laws 1908, § 133.

Connecticut.—Gen. Stat. 1902, § 4684.

Indiana.—Burns's Anno. Stat. 1908, § 3881 (7299) (indentures "annulled" by marriage).

Maine.—Rev. Stat. 1903, chap. 64, § 1 (applicable to female apprentices generally); § 22 (applicable to poor children).

Massachusetts.—Rev. Laws 1902, chap. 155, § 1 (applicable to female apprentices generally); chap. 155, § 4 (applicable to poor children).

New Hampshire.—Pub. Stat. 1901, chap. 180, § 1.

Rhode Island.—Gen. Stat. 1896, chap. 198, § 1.

South Carolina.—Rev. Stat. 1894, § 670 (applicable to poor children).

Texas.—Rev. Stat. 1895, apprentices, Title 5, art. 25.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 1.

Victoria.—Master and apprentice act, 54 Vict. No. 1117, § 9.

The provision in Iowa Code 1907, § 3234, is to the effect that poor children of both sexes may be bound until they attain the age of eighteen or marry.

¹³ *Rex v. St. Petrov* (1745) Burr. Sett. Cas. 248.

by all the authorities that where the indenture states the age of an apprentice incorrectly, and purports to bind him for a term which, if reckoned from his true age as a starting point, will extend beyond his majority, the contract ceases to be obligatory when he actually reaches full age. In one case this rule has been referred to the conception that the recital of age is not of the essence of the contract.¹ Under the theory applied in another case the initial assumption is entertained that the actual period of service which the parties to such a contract must be taken to have in mind when it is made is the number of years between the age as recited and the actual age of majority. In this point of view it is clear that, if the age as specified errs by way of excess, the result of correcting the recital will be that the term of service will expire before the age of majority is reached, while if the real age is more than that stated the result of correcting the recital will be to carry the term beyond the age. The position taken is that, in the former of these situations the obligations of the apprentice will expire at the end of the term specified, and in the latter when he reaches his majority.² But the soundness of the assumption upon which this doctrine is founded would seem to be at least disputable. A contract in this form may well be construed as im-

¹ In *Houston v. Turk* (1834) 7 Yerg. 13, "the contract was that the apprentice should serve until he was twenty-one years old. This must have been the understanding of all the parties. If mistake in the recital of the age occurred, the infant is not to be prejudiced by it." Everywhere the plea of the defendant in an action brought upon the covenants by the apprentice after attaining his majority was that he had deserted before he had reached full age. The court said: "Master taking an apprentice is put upon his inquiry touching the age of the apprentice. He is supposed, therefore, not to be deceived."

² In *Hooks v. Perkins* (1852) 44 N. C. (Busbee, L.) 21, the court argued thus: "It is set out in . . . [the order of court and the indenture] that the boy, at the time he was bound out, was eighteen years of age, and he is bound as an apprentice until he arrives at the age of twenty-one. Does this mean until he arrives at the age of twenty-one in fact? Or until he arrives at the age of twenty-one according to the fact that he is now eighteen, which is agreed on by the contracting

parties? There can be no question that the latter was the meaning; for why set out the fact that the boy was then eighteen, unless for the purpose of fixing the time when he would arrive at the age of twenty-one? And in that way express the extent of the time for which it was the intention to bind him?—that is, for three years. In our case the court did not bind out the boy for as long a time as they had power to do. *Non constat*, that for this reason the master has a right to the services of the boy beyond the time for which he was actually bound. The more rational conclusion is that as the court had not, by the first indenture, bound out the boy for as long a time as they had power to do, upon the expiration of the first term of service it was the duty of the court to bind him out again, either to the same or some other master. . . . If in point of fact the . . . court is mistaken as to the age, and it is set out as being eighteen instead of fifteen, the master, at the expiration of the term of service agreed on, may enter into new indentures, and have the boy bound to him again for the residue of his minority.

porting rather that the apprenticeship is to continue until the age of majority is reached, irrespective of whether the recital of age is correct or not. The practical consequences of the doctrine, however, are virtually the same as those deducible from another which has also been relied upon, *viz.*, that the master cannot by parol contradict his seal, and is at law estopped to deny that the age of the apprentice is that specified in the indenture.³

In a case where the defendant was sued for harboring an apprentice who had been bound by a court, it was held that, under the general rule that judicial acts are presumed to have been rightly performed, the burden of proving that the age as inserted in the indenture was incorrectly stated lay upon the defendant.⁴ In another case of the same description it was held that a mistaken recital might be corrected by the trial court, but that this correction could not be made to relate backwards for the purpose of rendering the defendant a tortfeasor.⁵ For aught that appears, both the doctrines thus propounded would be equally applicable with reference to a contract made without the participation of a court.

From the foregoing review of the decisions it is apparent that there is much diversity of opinion regarding the theoretical ground upon which the probative value of recitals of age is to be considered. The simplest, and possibly the most rational, theory would seem to be that, irrespective of whether the rights of the master or the apprentice are involved, such recitals are to be treated merely as statements which raise a rebuttable presumption regarding the fact affirmed.

b. With relation to statutory provisions.—The statutory clauses which define the evidential significance of the recital of the age of the apprentice which they require to be inserted in the indenture variously provide that it shall not be conclusive in a legal proceeding;⁶ that it shall be treated as presumptive evidence;⁷ that it shall be taken *prima facie* to be the true age;⁸ that it shall be open to inquiry

If it is set out as being twelve instead of fifteen, the apprentice, when he arrives at the age of twenty-one, may give notice to show cause why the indenture should not be cancelled, on the ground that the court had exceeded its authority."

³ *McCutchin v. Jamieson* (1806) 1 Cranch, C. C. 348, Fed. Cas. No. 8,743 (master contended that in a habeas corpus proceeding that apprentice had still two more years to serve).

⁴ *Bonnel v. Brotzman* (1842) 4 Watts. & S. 178.

⁵ *Hooks v. Perkins* (1852) 44 N. C. (Busbee L.) 21.

⁶ *New Jersey*.—Gen. Stat. 1895, *Apprentices*, § 2.

⁷ *South Dakota*.—Code 1908, § 168.

⁸ *New York*.—Dom. Rel. Law, Art. 8, § 121 (2), Consol. Laws 1909, p. 1082) (applicable to apprentices generally); Laws 1875, chap. 522, § 3 (applicable to children bound by charitable asso-

and correction; ⁹ that it shall be taken to be the true age; ¹⁰ that it shall be taken to be correct without further proof.¹¹

With reference to the original New York enactment, by which it was declared that the age inserted in the indenture should be taken to be the true age, without further proof, it has been held that the apprentice is not precluded from proving the correctness of the recital, either in a habeas corpus proceeding,¹² or in a case where his right to abandon the contract at a given time is in question;¹³ and that in an action brought by the master against a third person to recover for services rendered by an apprentice to the latter, the defendant may show that he was of full age when he was hired, and consequently was then entitled to abandon his contract and enter another employment.¹⁴

F. WHAT PERSONS ARE ENTITLED TO HIRE APPRENTICES.

2117. Capacity considered with reference to the occupations or legal status of the parties.—*a. Stat. 5 Eliz., chap. 4, effect of.*—In a case where a special statute was construed as operating so as to render wholly void an indenture which contravened its provisions,¹ the opinion was expressed by Lord Tenterden that § 26 of the act of 5 Eliz. chap. 4, did not render absolutely void indentures which should

ciation); Laws 1866, chap. 245, § 18 (applicable to New York Juvenile Asylum).

⁹ *Delaware*.—Rev. Code 1893, chap. 79, § 5.

¹⁰ *Ohio*.—Bates's Anno. Stat. 1904, § 3121.

¹¹ *Wisconsin*.—Sanborn & B. Anno. Stat. 1889, § 2380.

¹² *Colorado*.—Rev. Laws 1908, § 158.

¹³ *Michigan*.—How. Anno. Stat. 1882, § 6357; Comp. Laws 1871 (4863) § 7.

¹⁴ *New York*.—Rev. Stat. 1852, art. Masters and servants, §§ 8, 12, 13. As to the provision now in force, see note 8, *supra*.

¹² *Re Brennan* (1848) 1 Sandf. 711.

¹³ *Drew v. Peckwell* (1852) 1 E. D. Smith, 408; *Banks v. Metcalfe* (1823; Recorder's Ct.) 1 Wheeler, C. C. 381 (proceeding by master to punish apprentice for absconding).

¹⁴ *Drew v. Peckwell* (1852) 1 E. D. Smith, 408.

¹ In 10 Geo. II. chap. 31, § 5, after recital of the inconvenience which happened by watermen, etc., taking appren-

tices before they were housekeepers or had any settled habitation for themselves for their apprentices, it was enacted, that it should not be lawful for any waterman, though a freeman of the (watermen's) company, or his widow, to take to keep any person as his or her apprentice, unless he or she should be the occupier of some house or tenement wherein he or she should lodge or lie, on pain of forfeiting £10 for every offense. By § 4 it was provided that no such freeman or freeman's widow should take or retain more than two apprentices at the same time, under a penalty. A pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, etc., but it being understood that he was to live at the house of a freeman of the company (which he did), and to serve him conformably to the indenture, he having two other apprentices at the time. Held, such indenture was absolutely void, and that no settlement was gained by serving under it.

be made by persons other than those whom it authorized to take apprentices.²

b. American enactments.—Many of the existing enactments, both in the United States and in the British possessions, purport to specify the descriptions of masters to whom minors other than paupers may be bound. Their phraseology is so broad that, for all practical purposes, it would seem that they may be regarded as embracing every kind of occupation for the pursuit of which special skill and knowledge are required.³

Unless the given statute is restrictive as regards the descriptions of employers to whom poor children may be apprenticed, they may, as it would seem, be bound to any persons who are competent to qualify them for some remunerative occupation.⁴

2118. Validity of a binding to a married woman.—That an indenture which purports to bind an apprentice to a married woman is void at common law is a necessary consequence of the contractual incapacity to which that law subjects her.¹ Such a binding is invalid although her husband may have given his assent to it; for, not being a party to the indenture, he is not liable on the covenants.² The question to what extent this rule shall be taken to have been modified by the statutes which have in varying degrees enlarged the powers of married women to make contracts does not appear to have been judicially considered. Some light is thrown upon the question by the decisions with regard to the hiring of servants (§§ 111, 112 *ante*); but in view of the fact that contracts of apprenticeship and service are materially different in respect of some of their incidents, those

² *Rex v. Gravesend* (1832) 3 Barn. & Ad. 240, 1 L. J. Mag. Cas. N. S. 20.

The question whether, having regard to the phraseology of the invalidating clause in § 41 of this act, the theory thus adopted with regard to the intention of the legislature, is sustainable, has been discussed generally in § 2130, note 2, *post*.

³ The Pennsylvania statute which validates indentures "to serve in any art, mystery, occupation, or labor" has been held to authorize a binding to serve as a sweep (*Com. v. Moore* (1811) 1 Browne (Pa.) 275); and a binding to learn housewifery (*Com. v. Jennings* (1810) 1 Browne (Pa.) 197).

A tailor has been held to be a "mechanic" within the meaning of the

Maryland act. *Charles v. Matlock* (1827) 3 Cranch, C. C. 230, Fed. Cas. No. 2,615.

That the superintendent and manager of a business may make a valid contract of apprenticeship by which boys are to be taught and employed in the business was held in *O'Connor v. Simonson* (1900) 24 Pa. Co. Ct. 576.

⁴ In *Warner v. Swett* (1835) 7 Vt. 446, it was held that children may be bound to farmers, as well as to tradesmen and mechanics.

¹ *Rex v. Guildford* (1820) 2 Chitty, 284. Compare the cases cited in §§ 111, 112, *ante*, with regard to the hiring of servants.

² *Com. v. Medwinter*, cited in 1 Brightly's Purdon's Dig. (1894) p. 118.

decisions are necessarily inconclusive as precedents in the present connection.

2119. —to an infant.—There is authority for the doctrine that a settlement may be acquired by service under a contract made with an infant master, this rule being based upon the consideration that such a contract is merely voidable.¹

2120. —to partners.—In one of the American states the doctrine has been propounded that an indenture which purports to bind an apprentice to two or more partners is invalid.¹ This doctrine, however, is essentially inconsistent with that which affirms the validity of a binding to a corporation. (See next section.) In several cases, moreover, the obligatory character of a binding to a partnership has been taken for granted.²

¹ *Rea v. St. Petrox, Dartmouth* (1791) 4 T. R. 196.

¹ *Thorpe v. Rankin* (1842) 19 N. J. L. 36, 38 Am. Dec. 531 (action by partners against apprentice). The court said: "This defendant, it appears by the state of the case, was bound to three masters. Can this be? If to two or three, why not to a dozen or twenty? The father, or in case of his death the mother, may covenant with as many as he or she pleases for the services and faithful conduct of the minor; but the minor cannot bind himself to two or more masters. The statute manifestly contemplated but one master or mistress, and it is clearly against the policy of the law, and wholly inconsistent with the relationship that ought to subsist between master and apprentice, that there should be several masters. The public has an interest in the proper discharge of the reciprocal duties growing out of that relationship. The master, to a certain extent, stands *in loco parentis*, and it is of great importance, as well to society as to the parents and the apprentice, that he should be well instructed in the art or trade to which he has been bound, and that his moral conduct and character should be watched over and cultivated. These duties are too little attended to where the obligation and responsibility rests only on one master; but when it comes to be divided between several masters, it will soon become, in practice, the duty of neither of them to teach the apprentice, either in art or morals. A binding of an apprentice to a particular person arises (at least in contemplation of law,

and should be so in fact) from an esteem and good opinion of the party to whom he is committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and therefore the law has made it such a personal trust or confidence that the master cannot transfer or assign it to another. Bacon, Abr. title *Master and Servant*, letter E. All this is inconsistent with the idea of a plurality of masters. In case of dissensions between them, which of them is the apprentice to obey? If the apprentice is disobedient, by which of the masters is he to be corrected? If one master instructs one way, and another, another way of doing a thing, whose instructions must the apprentice follow? In case of the death or withdrawal of one master from the firm, is the apprentice to survive to the remaining members of the firm? Or in case of a dissolution of the partnership, and each member setting out in a new business, what is to become of the apprentice? These and many other questions may arise out of such a binding, that may prove embarrassing to all concerned."

In another case an indenture executed by one of two copartners in trade, in behalf of the firm, was held void. *Taylor's Case* (1808) 1 Browne (Pa.) Appx. 73. This, however, was merely a decision by a mayor's court.

² See *Rea v. St. Martin's Exetor* (1835) 1 Harr. & W. 69, 4 Nev. & M. 385, 2 Ad. & El. 655; *Hiatt v. Gilmer* (1846) 28 N. C. (6 Ired. L.) 450.

In *Brook v. Dawson* (1869) 20 L. T. N. S. 611, where it was held that the

2121. —to corporations.—There is authority for the doctrine that, apart from any express statutory provision upon the subject, the fact that the master to whom an apprentice is bound is a corporation does not render the contract invalid.¹ Accordingly, a binding to a corporation will be held valid, unless it is deemed to be for some special reason unfit to be intrusted with the control and instruction

death of one partner dissolved the contract, Mellor, J., remarked, during the argument of counsel, that the usual course, when there is a partnership, is to bind the minor to one of the partners only,—a statement which implies that a binding to more than one partner is valid.

In *Com. v. Linker* (1870) 8 Phila. 455, a partnership was held to be bound by the indenture, as it had been signed in the firm name by one of its members, and had been repeatedly recognized and confirmed by all the members.

In *Reg. v. McNaney* (1871) 5 Ont. Pr. Rep. 438, where an apprentice who had been committed to prison for disobedience was brought up on habeas corpus, the application for his release was refused on the ground that the indenture, having been executed by one of the employing firm, was sufficiently executed, and therefore obligatory as regarded both him and the apprentice.

For cases in which the contention that a partnership cannot take an apprentice was not raised, although it would, if accepted, have been decisive, see, *Lloyd v. Blackburn* (1842) 11 L. J. Exch. N. S. 210, 9 Mees. & W. 363, 1 Dowl. N. S. 647; *Eaton v. Western* (1882) L. R. 9 Q. B. Div. 636, 52 L. J. Q. B. N. S. 41; *Young v. Brown* (1785) 3 Pat. App. (H. L.) 42; *Ragans v. —*, 10 Sc. Jur. Rep. 90; *Com. ex rel. Fisher v. Leeds*, 1 Ashm. (Pa.) 405.

¹*Burnely Equitable Co-op. & Industrial Soc. v. Casson* [1890] 1 Q. B. 75. Hawkins, J., reasoned thus: "It is said that a contract of apprenticeship is a personal contract, and that as such it is one into which a corporation is incapable of entering. But I do not agree that it is necessarily a personal contract. In the case of a large firm of traders or manufacturers, some of the partners may have nothing to do with the practical working of the business in which their capital is invested, and may have no further connection with it beyond drawing their share of the profits; but

no one doubts that a boy may be lawfully apprenticed to any member of the firm, whether personally engaged in the practical conduct of the business or not. There is nothing dishonest in such a person taking an apprentice; for the obvious intention of the parties is that the apprentice should get his instruction from the persons, whether partners or managers, who have the practical superintendence of the business. Take again the case of an articulated clerk of a solicitor; it could never be said that the solicitor binds himself personally to give every particle of the instruction. There may be five or six members of the firm, and the one to whom the clerk is articulated may have very little to do with him; the whole of the clerk's instruction may be given to him by some one or more of the other partners, or by the managing clerks. It seems to me impossible to maintain that it is essential to the contract of apprenticeship that the master should personally communicate the instruction to the apprentice. . . . The business of a trading corporation is usually carried on upon a large scale, and presumably the larger the scale on which the business is carried on the greater the opportunities which the apprentice will have of obtaining the instruction he requires. It would be the height of absurdity to hold that, while the apprenticeship of a lad to an individual who was only able to give him very limited instruction was good, an apprenticeship to a corporation who were able to give him the very best instruction obtainable was invalid."

The right of a corporation to take an apprentice was taken for granted in *Walton v. Atchison, T. & S. F. R. Co.* (1904) 131 Iowa, 423, 101 N. W. 506.

By § 12 of the New South Wales apprentices act 1901, it is provided that the manager of a company may take as many apprentices as he may require, to serve under him and his successors in office.

of children.² It is no objection to the validity of a binding to a religious society, that the contract purports to be made with a certain party as trustee of the society. The additional words will be regarded as being merely descriptive of the person so executing it, and he will be personally liable on the covenants, and will alone have a right to complain of a breach of the indenture.³

2122. Intentional misstatement concerning the age of the apprentice, effect of.—It has been held that, where a misstatement concerning the age of an apprentice is fraudulently inserted in an indenture for the purpose of evading the operation of a statute, no settlement is gained by residence under the apprenticeship, although the district insisting on the settlement was not a party to the fraud.¹

G. JURISTIC CONSEQUENCES OF THE INVALIDITY OF CONTRACTS OF APPRENTICESHIP.

2123. Previous indenture in force at the time of the binding in question.—During the period covered by an indenture which entitles the master to the whole of the apprentice's time, the apprentice cannot bind himself to any other person as long as the indenture remains undischarged.¹ A contract which purports to bind him to another person confers no rights upon the second master,² and is also

² In *People ex rel. Barbour v. Gates* (1870) 43 N. Y. 40, reversing (1869) 39 How. Pr. 74, 57 Barb. 291, an apprenticeship of a child to the Shaker community was held valid. It was observed that, although the peculiar doctrines of the Shakers are generally regarded as erroneous and fanatical, yet neither the legislature nor the courts have considered them "so obnoxious and detrimental to individual well-being or the public good as to deprive the members of the community of the care, education, and training of children legally committed to their care and custody by parents and guardians. The legislature has not forbidden the binding of infants to them, and courts have refused to recognize these peculiarities as good ground for taking from them the custody of infants bound to them under forms of law and with the consent of the proper authorities."

³ *Fowler v. Hollenbeck* (1850) 9 Barb. 309; *People ex rel. Fowler v. Pil-low* (1848) 1 Sandf. 672. The binding

in both these cases was to a trustee of the "Shakers."

¹ *Rex v. Barmston* (1838) 3 Nev. & P. 167, 7 Ad. & El. 858, 7 L. J. Mag. Cas. N. S. 31, 2 Jur. 537. There father and son executed an indenture by which the son was bound apprentice to the father, as a tailor for seven years, and the instrument was antedated by two years, in order that the son might, by serving five years, obtain the benefit of the seven years' service ordained by Stat. 5 Eliz. chap. 4, as a prerequisite to exercising certain occupations.

¹ In general an apprentice is not capable of contracting the relation of servant to any other master, until the end of the term for which he was bound." Lord Kenyon in *Rex v. Chip-ping Warden* (1799) 8 T. R. 108.

² *M'Gregor v. Mitchell* (1825) 4 Shaw & D. Sess. Cas. 52 (application by second master for a judicial order compelling the apprentice to return to him was refused).

invalid in such a sense that no settlement can be gained by serving under it.³

2124. Binding unauthorized quoad the persons bound.—If the circumstances indicative of pauperism which are declared by a statute to be a condition precedent to the exercise of the power of certain officials to bind out poor children did not in point of fact exist in respect of the child in question, the contract is absolutely void. Accordingly, if the apprentice commits a breach of duty, such a contract cannot serve as a basis for an action against the officials, even upon the theory of their having subjected themselves to a common-law obligation by becoming parties to the indenture.¹ Such a con-

³ *Buckington v. Shepton Bechamp* (1724) 8 Mod. 235; *Rea v. St. Luke, Middlesex* (1765) 1 W. Bl. 553, Burr. Sett. Cas. 542; *Rea v. Chipping Warden* (1799) 8 T. R. 108.

As bearing upon the effect of subsisting obligation to perform services, reference may also be made to the cases in which it was held that a man who, while he was serving in the militia or volunteers, hired himself to an employer without stating that he was so serving, could not gain a settlement (*Rea v. Witnesham* [1835] 2 Ad. & El. 648, 4 Nev. & M. 447, 1 Harr. & W. 43, 4 L. J. Mag. Cas. N. S. 84; *Rea v. Taunton St. James* [1829] 9 Barn. & C. 831); that if he did state that fact, his service under the hiring entitled him to a settlement (*Rea v. Westerleigh* [1773] Burr. Sett. Cas. 753; *Rea v. Holsworth* [1827] 6 Barn. & C. 283; *Rea v. Elmley Castle* [1832] 3 Barn. & Ad. 826); that a man in the regular army could not gain a settlement by hiring himself during a furlough (*Rea v. Beaulieu* [1814] 3 Maule & S. 229); and that a deserter from the marines could not gain a settlement by service (*Rea v. Norton* [1808] 9 East, 206).

¹ *Butler v. Hubbard* (1827) 5 Pick. 250. The court said: "There is no doubt concerning the position which is stated by the counsel for the plaintiff, that one person undertaking to contract in the name and behalf of another without any authority is personally bound, if there be not something in the contract itself which destroys its validity. The contract which the plaintiff would enforce is clearly within the exception to the general rule. It is void upon its face, because it is not made according to the provisions of the stat-

ute." The plaintiff cannot have "any remedy against the defendants for doing what the plaintiff, as well as the defendants, knew to be unlawful. We say knew, because all the citizens are presumed to know the law. Perhaps the parties did not advert to the provisions of the statute. . . . If the defendants are to be considered as acting in their individual, and not in their official, capacities, it will not cure the difficulty. It would be a contract in restraint of the liberty and rights of the subject. Suppose the undertaking had been by the defendants personally and without any authority that the plaintiff might shut up the minor in prison until he should be twenty-one; or that he might beat the minor when he thought the minor deserved chastisement;—it would upon its face be illegal. It would not be obligatory upon the defendants, and would not give any right to the plaintiff to beat or imprison the subject of the bargain. The statute of 1794, chap. 64, § 1, does not apply to this case. It provides that all minors of fourteen years and upwards may be bound by deed, as apprentices or servants, by their father, and in case of his decease, by their mother or guardian; and any such minors having no father, mother, or guardian within the commonwealth, may by deed bind themselves, with the approbation of the selectmen, or the major part of them, of the town where they reside. Now it does not appear in the deed whether this minor had any father, mother, or guardian in the commonwealth. All that is said upon that matter is that he is called the son of Gilson Strong, lately of Williamsburgh, in the county of Hampshire. Now although it appears that the minor signed

tract is also void in the sense that the master cannot maintain an action in respect of the enticement of the apprentice.²

2125. Contract not executed by apprentice.—A contract not executed by the apprentice himself is wholly invalid, so far as he is concerned. It does not invest the master with any control over his person.¹ Nor does it render him amenable to the special remedies provided by the statute.² Nor can he gain a settlement by serving under it.³ Nor does it give the master such a right to his services as will furnish a

and sealed the deed, yet it does not purport to be a binding by himself, but to express his consent to be bound in manner aforesaid. The parties do not appear to have acted at all in reference to this statute, but to the statute of 1793, which they disregarded or violated, as we have seen, in a most essential point. "This case differs from *Day v. Everett* (1810) 7 Mass. 145. In that case . . . the father had a right to the services, and authority to assign them at common law. In the case at bar the defendants individually had no right to the services, and no right to assign them at the common law. It is not analogous to an undertaking of one as surety for another for the performance of a lawful contract; but this is an original stipulation, under color of law, but really without authority, and in restraint of personal liberty. Putting the contract into its intended application and effect, it would be that the plaintiff might take the minor and make him work, and punish him in case of his refusal to labor at the plaintiff's trade. It could not, we think, be maintained by any principle of the common law. The fallacy of the argument for the plaintiff consists in the supposed good intentions on the part of the defendants, and the supposed benefit which might arise to the minor from this voluntary interference of strangers. It seems to be conceded that the minor would not be bound, and we can see no good reason why the contract, being between strangers to the minor, and tending to bring him under actual subjection, should not be void as between themselves. . . . It seems not to be contended that in fact the provisions of the statute have been followed. So the defendants are not justified in their official characters. If not, then the defendants are acting upon their own assumed power over the

personal rights and freedom of the minor. A contract with such aspects cannot be supported. Nor do we think the plaintiff could by any amendment of his declaration make the case better for himself. If, as is suggested in the close of the argument, the minor had no father, mother, or guardian in the commonwealth, it would follow that the parties were altogether mistaken in regard to the statute by which they obviously intended to be governed. The defendants would then be left as unauthorized individuals attempting to control the liberty and course of life of the minor; and the plaintiff must be considered as partaking in that illegal transaction. We think that the law will not afford a remedy to either against the other in such a case."

² *King v. Brockway* (1794) 2 Root, 86.

¹ *Com. ex rel. Murray v. Moore* (1822; C. P.) 1 Ashm. (Pa.) 123 (apprentice discharged on habeas corpus); *Com. v. Atkinson* (1871) 8 Phila. 375 (similar decision).

In this connection, however, it should be observed that, as long as the apprentice himself does not exercise his right to repudiate the contract, his father is, according to several American decisions, not entitled to take advantage of its invalidity, for the reason that he is deemed, by executing it, to incur a common-law obligation which precludes him from challenging the master's rights, in respect of the child's services. See § 2134, note 1, *post*.

² *Ex parte Byrne* (1849; New South Wales Sup. Ct.) cited in *Ex parte Erwin* (1854) Legge's Rep. 810.

³ *Rex v. Arnesby* (1820) 3 Barn. & Ald. 584; *St. Nicholas, Rochester v. St. Botolph, Bishopsgate* (1863) 12 C. B. N. S. 645, 31 L. J. Mag. Cas. N. S. 258, 6 L. T. N. S. 495, 9 Jur. N. S. 101.

foundation for an action against a third person for enticing or harboring him.⁴ But it is binding upon the master in such a sense as renders him liable for a breach of covenant committed while it was still treated by the apprentice as subsisting.⁵

2126. Contract not assented to by parent of apprentice.—In a Scotch case it has been laid down that, irrespective of whether a minor is or is not bound by an indenture executed without his father's consent, a third person who joins in the contract as cautioner [*i. e.*, surety] is liable to the master for such damages as may be caused by the minor's departure from the service.¹ This decision was rendered in a jurisdiction in which there is no enactment which expressly requires that a father shall consent to the binding of his minor child. A similar doctrine would doubtless be applied in the American states in which such consent is prescribed. In the case cited, the court also expressed the opinion that, *quoad* the minor, the contract was not void, but only voidable on proof of lesion (*i. e.*, prejudicial operation).

2127. Failure to authenticate the contract by a written instrument. Effect as regards the parties themselves.—In every jurisdiction it is provided that the binding of an apprentice shall be authenticated by a written instrument, the only difference in this respect between the enactments being that, under some of them, it is not obligatory that the instrument shall be sealed. See § 2093, *ante*. A contract which does not conform to this requirement confers no legal rights upon the parties,¹ and they are entitled to renounce it at any time.²

The doctrine that even third persons are entitled to take advan-

⁴ *Lyon v. Whitmore* (1811) 3 N. J. L. 845; *Ivins v. Norcross* (1812) 3 N. J. L. 977; *Fisher v. Lunger* (1868) 33 N. J. L. 100; *Pierce v. Massenburg* (1833) 4 Leigh, 493, 26 Am. Dec. 333.

⁵ In *Balch v. Smith* (1841) 12 N. H. 437, an action by a guardian to recover a sum which the master had agreed to pay for the services of his ward, it was held that, as the services had been performed without objection by the apprentice, the defendant was not in a position to dispute the claim on the ground of a noncompliance with the statutory requirement that the minor's assent should be expressed in the indenture.

In *Stokes v. Hatcher* (1818) 4 N. J. L. 84, 86, the actual point decided was that the mother of the apprentice might sue the master during the term for the

reason that, as the apprentice was not a party to the indenture, this was the sole remedy available.

¹ *Stevenson v. Adair* (1872) 10 Sc. Sess. Cas. 3d series, 919. The court relied upon the general principle that the obligations of a cautioner may be wider than those of his principal.

² In *Pray v. Gorham* (1850) 31 Me. 241, it was held that an apprentice whose widowed mother had bound him by parol was entitled to maintain an action for compensation in respect of his services, because under such a contract she was not entitled to his earnings.

³ *Peters v. Lord* (1847) 18 Conn. 337 (Minor bound under parol contract, entitled to leave at any time during his minority); *State ex rel. Mayne v. Baldwin* (1846) 5 N. J. Eq. 454, 45 Am. Dec.

tage of the invalidity of the contract (see next section) might seem to indicate that the contract is to be regarded as absolutely void in such a sense that no rights of action can be founded upon it, even after it has been completely performed. But there is authority for the opposite view.³

2128. —effect as regard third persons.—It is fully settled that the invalidity of the contract which is predicable on the ground of its not having been authenticated by a written instrument is of such a character that even third persons may take advantage of it. This doctrine has been applied in settlement cases;¹ in actions for the entice-

399 (ordered that an infant daughter should be delivered to her father, on a habeas corpus applied for by him, though he had verbally committed her to the care and custody of the respondent until she should attain the age of twenty-one, and the respondent had adopted her accordingly); *Brown v. Whittemore* (1862) 44 N. H. 369 (assumpsit for services rendered to a third person by an apprentice after he had run away was held not to be maintainable by the master).

In *Squire v. Whipple* (1826) 1 Vt. 69 (assumpsit against father of deserting apprentice), the court was divided upon the question whether an unsealed agreement of apprenticeship was binding as a contract of service between the father of the infant and the employer, and no decision was rendered regarding this point.

³ In *Eubanks v. Peak* (1831) 2 Bail. L. 499, an action by the apprentice for the value of certain articles which the master had, by an unsealed agreement made with him and his mother, stipulated to present to him at the end of the term, it was held that recovery might have been had if the plaintiff had not ratified, after attaining his majority, a release given by him while under age. The *ratio decidendi* was that, although the contract had not been legally executed, and was therefore not binding upon the apprentice, it was binding at common law upon the master in such a sense that he could not resist a claim for the value of the apprentice's services after they had been performed. It is doubtful, however, whether the attention of the court was properly directed to the distinction which, as a comparison between the following section and § 2135, *post*, will show, has been taken between

cases which turn upon the consequences of nonconformity with the primary and fundamental requirement that the contract shall be attested by a writing, sealed or unsealed, and those which involve merely the effect of noncompliance with such subsidiary requirements as those discussed in §§ 2129 *et seq.*, *post*.

¹ For cases in which the specific point decided was that no settlement could be gained by service under an apprenticeship not attested by an indenture, see *Reg. v. Daniel* (1705) 6 Mo. 182; *Rex v. Mellingham* (1732) 1 Sess. Cas. 417, 2 Bott, Poor Law, 363; *Rex v. Stratton* (1748) Burr. Sett. Cas. 272; *Rex v. Holbeck* (1742) Burr. Sett. Cas. 199; *Rex v. Whitechurch* (1765) Burr. Sett. Cas. 540, 1 Bott, Poor Law, 532; *Rex v. All Saints* (1770) Burr. Sett. Cas. 656; *Rex v. Kingsweare* (1776) Burr. Sett. Cas. 839; *Rex v. Margram* (1793) 5 T. R. 153; *Rex v. St. Margaret's* (1826) 6 Barn. & C. 97; *North Brunswick v. Franklin* (1838) 16 N. J. L. 535; *Hopewell Twp. v. Amwell Twp.* (1822) 6 N. J. L. 169 (scroll by way of seal not sufficient); *Niskayuna v. Albany* (1824) 2 Cow. 537.

That no settlement was gained where a boy had been put out as apprentice by his father with merely an executory agreement for an indenture, was held in *Rex v. All Saints* (1770) Burr. Sett. Cas. 656.

For cases in which it was laid down that no settlement could be gained by service under a parol binding, see *Rex v. Stratton* (1748) Burr. Sett. Cas. 272; *Rex v. Mawnan* (1749) Burr. Sett. Cas. 290; *Rex v. Whitechurch* (1765) Burr. Sett. Cas. 540, 1 Bott, Poor Law, 532; *Rex v. Kingsweare* (1776) Burr. Sett. Cas. 839; *Haley v. Taylor* (1835) 3 Dana, 221.

ment or harboring of apprentices;² and in an action by the master against a clergyman for marrying his apprentice in contravention of a statute forbidding clandestine marriages.³

2129. Nonconformity to special requirements of the English act of 5 Eliz. chap. 4. Effect as regards the parties.—By § 41 of 5 Eliz. chap. 4 (now repealed), it was declared that “all indentures for the taking of any apprentice, made otherwise than was by the statute limited, ordained, and appointed,” should be “clearly void in the law to all intents and purposes,” and that every person who should thenceforth take an apprentice “contrary to the tenor and true meaning of the act” should forfeit a specified sum for each apprentice so taken. In spite of the peremptory language of this clause the courts adopted the theory that, in cases involving the rights and obligations of apprentices,¹ contracts which were authenticated by an indenture, but which contravened one of those provisions of the statute which merely derogated from common-law rights and privileges, were to be treated as being merely voidable at their election.² In this point of view it

An illegitimate minor went, in pursuance of a parol agreement between his mother and a mechanic, to another town to learn a trade, and lived with master in the situation of an apprentice until he was twenty-one. Held, that he was an apprentice within the meaning of the poor law. *Huntington v. Oxford* (1810) 4 Day, 189. This decision is clearly opposed to the general current of authority.

² *Smith v. Birch* (1727) Sess. Cas. 222, 1 Bott, Poor Law, 528 (master had taken a deed poll instead of an indenture); *Peters v. Lord* (1847) 18 Conn. 337.

³ *Zieber v. Boos* (1798) 2 Yeates, 321.

¹ The effect of noncompliance with the statute was held to be different in respect of the master. See § 2130, note 2, *post*.

² *St. Nicholas v. St. Peter* (1736) 2 Strange, 1066, Cas. t. Hardw. 323, Burr. Sett. Cas. 91, 2 Bott, Poor Law, 363. See further as to this case § 2130, note 1, *post*.

In *Fish v. Doyle* (1831; U. C. K. B.) Draper, 328, an action upon the covenant of the surety of the apprentice, a plea alleging that the indenture was made for a period of less than seven years was held to be bad. The position of Robinson, Ch. J., was that if the deed was merely “voidable” the surety could

not discharge himself from his covenant by pleading that the deed was absolutely void. The theory upon which the judgment of Macauley, J., proceeded was that the contract, not being within the statute, was to be treated as a common-law agreement. The decision in *Guppy v. Jennings* (1793) 1 Anstr. 256, (note 4, *infra*), was apparently not brought to the attention of the court.

In *Webster v. McBride* (1856) 5 U. C. C. P. 109, an action against the father of an apprentice who had been bound for less than seven years, under an indenture made before the passage of the Upper Canada statute authorizing apprenticeships for terms shorter than that period, a plea alleging an election by the apprentice to avoid the indenture was held bad on the ground that the contract was binding, although for less than the legal term. Under the doctrine of *Guppy v. Jennings*, note 4, *infra*, such a plea should apparently have been treated as valid; but that case was not brought to the attention of the court. In the final analysis, the decision, as it stands, seems to require for its support the American doctrine, under which the father of an apprentice is held liable on any covenants in which he joins, although they may not be binding on the apprentice. See § 2134, *post*.

was held that an apprentice might avoid at any time a contract covering a shorter period than the prescribed seven years, but that he continued, as long as he had not formally repudiated it, to be amenable to the summary remedies provided by the legislature for breaches of duty.³ The position was also taken that, after the apprentice had exercised his right to avoid such a contract, the covenants of the indenture could not be enforced against his father or any other third party who had joined in them.⁴ This doctrine, it will be observed, is in conflict with those American decisions (see § 2134, note 1, *post*) which proceed upon the ground that, by joining in the covenants of a voidable indenture, the father of an apprentice subjects himself to common-law obligations.

2130. Same subject. Effect as regards third parties.—The theory that an indenture which was invalid in the sense explained in the preceding section was merely voidable by the apprentice was held to involve the corollary that service under it was sufficient to entitle the apprentice to a settlement under the poor laws.¹ On the other hand, an action for wrongfully harboring an apprentice was held not to be

³ *Rea v. Evered* (1777) Cald. 26, 1 Bott, Poor Law, 534 (absconding apprentice held to be liable to punishment on the ground that his having absented himself did not of itself constitute an avoidance of the contract); *Gray v. Cookson* (1812) 16 East, 13 (similar decision). As to these cases see further § 2202, *post*.

In *Reg. v. Templeton* (1872: Victoria) 3 Australian J. R. 106, it was held that an apprentice bound by an indenture which his father had not signed was not liable to punishment for absentsing himself from work. This decision, which was rendered with reference to a statute which does not contain any express invalidating clause, is doubtless correct as regards the main point of the right of the apprentice to abandon the employment at any time. But, so far as the report shows, the attention of the court was not directed to the English doctrine that the apprentice remains amenable to summary statutory remedies until he has formally renounced the contract.

⁴ *Guppy v. Jennings* (1793) 1 Anstr. 256. Hotham, B., observed: "If the indenture is void, all the covenants entered into merely to secure performance of that indenture must be void also." Thompson, B., also spoke of the con-

tract as being "clearly void by the statute." As *St. Nicholas v. St. Peter* note 2, *supra*, was cited by counsel, it was presumably the authority relied upon by the judges, although they do not refer to it. The word "void" in the above statements was apparently used by them in the laxer sense of "voidable." If they had intended to dissent from the earlier case, they would doubtless have explained more fully their position in that regard.

In *Burney v. Jennings* (1806) 6 Esp. 9, a *nisi prius* case in which an apprentice had been bound for five years only, and a bond conditioned for his service had been given by his mother, Lord Ellenborough was strongly inclined to the opinion that, as the binding was "void" under 5 Eliz. the bond was also "void." The learned judge presumably used "void" in the inexact sense of "voidable." Upon any other supposition his opinion would have been opposed to the earlier authorities.

¹ *Rea v. St. Nicholas* (1736) Burr. Sett. Cas. 91. The position of the court was thus explained by Lord Hardwicke: "It is to be inquired, first, whether this 41st section has a relation to and runs over all the several clauses of the act so as to reach the 26th section; second-

maintainable by a master who did not belong to any of the classes of persons authorized to take apprentices. The *rationale* of this doctrine was that the penal part of the invalidating clause of the statute imported that an indenture not made in accordance with the statute was, so far as the master was concerned, absolutely void, and not merely voidable. In this point of view it followed that, as "such a taking was illegal, and contrary to this law, it was impossible that the master could recover damages for the violation of a supposed right originating only in a contract which the law forbade."²

ly, if it does, then whether it makes such an indenture void, or whether it makes it voidable only. First, I do not see but that it does run over the several clauses of the act, so as to reach the 26th clause. Secondly, but I am of opinion that it does not make this indenture void. . . . I am of opinion that the indenture is not void, so as to be liable to be taken advantage of by a third person, but voidable only at the election of the parties, if they think fit to take advantage of it. And it would be extremely hard that all these indentures should be absolutely void for want of any single qualification. . . . If the time of service was the only circumstance liable to this objection, I should not think it so much consequence (for I believe there are not many bindings for a less term than seven years); but there are a vast many other qualifications that are mentioned in the act of 5 Eliz., which are all liable to the same objection; and if a binding for seven years be necessary, it follows that, if any one of these qualifications are wanting, the indenture will be in the very same case as if this circumstance of time was wanting; and if so, I question whether any one settlement under an indenture of apprenticeship has been gained for fifty years past." The learned judge cited *Barber v. Dennis*, 1 Salk. 68, where the mistress of an apprentice who had been impressed for the Navy was held to be entitled to recover from a third person two tickets earned by him, although the indentures had not been enrolled as required by the statute. But this decision seems inconsistent with that in *Gye v. Felton*, note 2, *infra*.

The doctrine thus laid down was afterwards affirmed in *Rex v. Evered* (1777) Cald. 26, 1 Bott, Poor Law, 534;

Rex v. Whitchurch (1726) cited in Viner's Abr., *Apprentice*, K. 22 (contract made with a master who did not follow any trade); and in an anonymous case in which the contract had been made with a person who had no right to take an apprentice. See Viner's Abr. *Apprentice* K. 12.

² *Gye v. Felton* (1813) 4 Taunt. 876. Mansfield Ch. J., remarked: "There have been many cases cited which say that indentures which do not conform to the act shall be only voidable, and not void. If the word 'voidable' were applied to adults, it would be extremely strange, with respect to infants, if applied to them one can understand it. In all those cases the question arose with respect to the rights of infant apprentices; but there has been no case cited where the doctrine that the contract is voidable, not void, is applied to the case of a master, and it would be very wonderful if there were." As this decision declared in effect that a third person might, under the particular circumstances involved, avail himself of the invalidity of the contract, it established an important qualification of the general theory that third persons could not take advantage of the invalidity of the contract. See the passage quoted from Lord Hardwicke's judgment in *Rex v. Nicholas*, note 1, *supra*. Whether such a theory was correct even to the extent declared in that case is a question with regard to which it is perhaps permissible even now to feel some doubts. It is difficult to avoid the conclusion that the position taken was largely influenced by certain considerations of an extra-juristic nature, *viz.*, that doubts were very generally entertained as to the expediency of the statute (see the remarks of Lord Tenterden in *Rex v. Gravesend* (1832) 3 Barn. &

2131. Nonconformity to the requirements of other English statutes.—

a. Statutes affecting certain occupations.—In one case an apprenticeship which contravened a statute (10 Geo. II. chap. 31) which declared it to be unlawful for a waterman to take an apprentice, unless he was the occupier of a house to lodge himself and the apprentice, and which also prohibited a waterman from taking more than two apprentices, was held to be void in such a sense that no settlement could be gained by serving under the contract.¹ In another

Ad. 240); that, in settlement cases, the consequences of construing those provisions strictly would be extremely inconvenient, not to say disastrous; and that in such cases the doctrine adopted would operate equitably, since the parish in which the apprentice had actually resided and worked would necessarily have had the benefit of his service. It is noteworthy that, in a case decided not long after the enactment of the statute, while its expediency was presumably still taken for granted, the invalidating clause seems to have been understood in a sense different from that which ultimately prevailed. In *Cardinal v. Hesketh* (1599) Cro. Eliz. pt. 2, p. 723, it was laid down that, in an action upon an apprentice's fidelity bond, the declaration must show in what place he became an apprentice, and that he was such a person as might be apprenticed under 5 Eliz., and that, though the statute was not pleaded, the defendant might take advantage of it, because it was a general statute. Such a decision necessarily implies that, in the view of the court, no legal right could accrue to a third person from an indenture made by a minor not within the purview of the statute.

Since the repeal of the statute its construction and effect are no longer of any material importance in England itself, so far as the law of apprenticeship is concerned; but if the decisions with reference to it were, in point of fact, based in any degree upon elements of this character, they cannot warrantably be treated as relevant precedents in those American states in which express invalidating clauses have been inserted in the statutes.

The case of *Rex v. St. Nicholas* note 1, *supra*, is cited among those reviewed in Maxwell on Interpretation of Statutes (pp. 289–297). The learned author does not offer any criticisms upon

it. The phraseology of the statute 5 Eliz., seems to be more peremptory than that of any order enactment to which he refers.

In *Dillingham v. Wilson* (1840) 6 U. C. Q. B. O. S. 85, the *ratio decidendi* was that the character of indentures covering less than seven years was determinable, not with reference to their conformity or nonconformity to the Elizabethan statute, but with reference to common-law principles. In this point of view, the given contract, being for the advantage of the infant, was not void, but merely voidable. The conclusion arrived at was that, as the defendant, the father of the apprentice, had ordered his son to return home, he might be held liable in case, but that an action of enticement could not be maintained against him. The decision was rendered upon the assumption that the Elizabethan statute has never been in force in Upper Canada.

¹ In *Rex v. Gravesend* (1832) 3 Barn. & Ad. 240, the ground upon which the decision was mainly based was that the provisions in question, unlike those of the earlier statute of 5 Eliz., were negative and prohibitory, and not merely permissive. But it seems to be at least arguable that the effect of the general invalidating clause in that statute was to impart a prohibitory quality to all preceding provisions, irrespective of the character of their own phraseology. Another ground of distinction relied upon, *viz.*, that the special statute under construction was designed to remedy a certain definite mischief, and that no such consideration was involved in respect of the general statute, would seem to be scarcely tenable in view of the consideration that the general statute was, as the preamble expresses it, enacted in the hope that, being duly executed, it would "banish idleness, advance husbandry, and yield the hired

case which involved the effect of a statute (28 Geo. III. chap. 48), which prohibited the binding of children under eight years of age to chimney-sweepers, and declared that all indentures made otherwise than as ordained should be "absolutely void," this expression was construed as importing "void" in such a sense that no settlement could be gained by serving under a contract made in violation of the statute.²

b. Statutes relating to poor apprentices.—With reference to a local statute by which guardians of the poor were empowered to bind out poor children until they should have attained a certain age, it was held that an indenture binding a child for a longer term than that allowed was merely voidable, and consequently that he had gained a settlement by serving under it.³ On the other hand, it was held that a provision requiring that, where a poor child is bound out to a master resident in another parish, notice should be given to the overseers in that parish was not merely directory, and that a failure to comply with it rendered the indenture void in such a sense that no settlement could be gained by serving under it.⁴

2132. Nonconformity to the special provisions of American statutes.

Generally.—For the purposes of the present subtitle the American statutes may be divided into the following classes:

(1) Those which declare in general language that any contract

person a convenient proportion of wages." The objects thus indicated were certainly not less important than those which it was sought to attain by the special statute.

² *Rex v. Hipswell* (1828) 8 Barn. & C. 466. Bayley, J., observed: "It is said that 'void' is sometimes construed 'voidable,' and where the provision is introduced for the benefit of the parties only, such a construction may be right, but where it is introduced for public purposes and to protect those who are incapable of protecting themselves, it should receive its full force and effect. Here I think it would be contrary to the spirit of the act to consider the indenture voidable only."

³ *Rex v. St. Gregory* (1834) 2 Ad. & El. 99. Taunton, J., said: "It is impossible to reconcile the decisions by reference merely to the objects for which the statutes have been passed. It is clear that in some cases the provisions may have been matter of direction only; but again, the direction may be accompanied by a proviso affording an

inference that the act to which it relates will not be legal if the proviso be not observed; as, where the statute imposes a penalty for doing it, thereby denoting its illegality. Carth. 252; *dictum* of Holt Ch. J. in *Bartlett v. Vinor*. Also *Gye v. Felton* (1813) 4 Taunt. 876. It is not necessary to go through all the varieties of form in which such enactments may be found: it is enough to say, in the present case, that the power given to the corporation of guardians to bind apprentices is an authority or privilege; the enactment is of a permissive nature, and therefore falls within the distinction drawn by Lord Tenterden when commenting on *Rex v. St. Nicholas* (1736) Burr. Sett. Cas. 91, s. c. 2 Strange, 1066 (See § 2130, note 1, ante) Cas. t. Hardw. 323, 2 Bott. Poor Law, 363, in *Rex v. Gravesend* (1832) 3 Barn. & Ad. 246, 1 L. J. Mag. Cas. N. S. 20."

⁴ *Rex v. Newark-upon-Trent* (1824) 4 Dowl. & R. 745, 3 Barn. & C. 59; *Rex v. Whiston* (1836) 4 Ad. & El. 607, 6 Nev. & M. 65, 5 L. J. Mag. Cas. N. S. 67.

which is not made in conformity with their provisions shall be "void," "absolutely void," or "without any binding effect."¹

(2) Those which contain invalidating clauses which by their terms are applicable to the apprentice only.² Some of these clauses, it will be observed, are general in their scope; others have reference merely to some particular requirement.

(3) Those which do not contain any explicit declaration respecting the consequences of a failure to execute the contract in the manner prescribed.

The decisions reviewed in the following sections are not entirely consistent. But as their inconsistencies are apparently not susceptible of being explained as being the result of different theories regarding the construction of the statutes which belong to each of the above classes, it has been deemed inadvisable to take the diversity of the statutes as a basis for the division between the sections themselves. The form of the statutes with reference to which the decisions were rendered is, however, usually mentioned.

¹ *California*.—Civ. Code 1909, § 266. Every indenture entered into otherwise than as provided is absolutely void.

Delaware.—Rev. Code 1893, chap. 79, § 20. Binding or assignment must conform to statute, or it shall be void.

New York.—Laws 1871, chap. 934. It was declared by § 3 that any person taking an apprentice without complying with the provisions of the act was guilty of a misdemeanor. And by § 6 that any indentures wherein parts conflicted with or were not in accordance with the provisions of the act should be invalid and without any binding effect. These provisions were inconsistent with, and therefore superseded by, the clause in the Revised Statutes which is referred to in the following note (see *Barton v. Ford* (1885) 35 Hun, 32). But the whole of the statute in which they were inserted was repealed by the domestic relations law 1896, chap. 272.

South Carolina.—Gen. Stat. 1882, § 2073; Rev. Stat. 1893, § 2206. Indenture void and of no effect, unless trial justice certifies presence and approbation of the father and mother or guardian of the minor at the time when it is executed.

² *Colorado*.—Rev. Laws 1908, § 142. All indentures entered into otherwise than as provided shall be, as to minor apprentices, utterly void.

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Illinois.—Starr & C. Anno. Stat. (Ill.) chap. 9, ¶ 13. All indentures not in conformity with the act are utterly void in law as against the apprentice.

Kansas.—Gen. Stat. 1899, § 305. All indentures entered into otherwise than according to law shall be utterly void, so far as concerns the apprentice.

Missouri.—Rev. Stat. 1899, § 4803. Indenture "utterly void as to apprentice," unless his age is inserted.

New Jersey.—Gen. Stat. 1895, *Apprentices*, § 3. Indenture not made according to the act is "void as against the minor only."

New York.—2 Rev. Stat. 1829, p. 158, § 26. No indenture shall be valid against the person whose services may be claimed, unless made in the manner prescribed (*Birdseye's Rev. Stat.* 1882, p. 1906).

South Dakota.—Civ. Code 1908, § 175. No indenture binding upon apprentice unless made as prescribed.

Virginia.—Code 1904, § 2587. A master to whom an apprentice is bound by a court must file within six months the writing by which the contract is evidenced, and his bond for due performance; otherwise he is not entitled to the services of the apprentice.

West Virginia.—Code 1899, chap. 81, § 6. Same provision as in Virginia Code.

2133. Same subject. Effect of nonconformity as regards the master and the apprentice.—a. Obligations of master.—It has been laid down, with reference to a statute which contains no invalidating clause, that a defective indenture does not impose any legal obligations on the master.¹ This broad statement is perhaps to be understood as importing merely an affirmation of the right of the master to terminate the apprenticeship at any time. Its correctness to this extent would probably be conceded in any jurisdiction in which either an enactment similar to that which was under consideration, or an enactment which expressly declares a nonstatutable contract to be void, is in force. If the court intended to assert a broader proposition than this, its opinion was in conflict with the doctrine which has been applied in several cases decided with reference to enactments belonging to all three of the categories mentioned in the preceding section, *viz.*, that a defective indenture continues to be the measure of the obligations of the master to the apprentice until it has been actually repudiated by the latter. Proceeding upon this ground, the courts have laid it down that the covenants of the indenture may be enforced against the master after the stipulated services have been performed.²

¹ *Englehardt v. Yung* (1884) 76 Ala. 534, where a charge of the master's administrator for support of the apprentice after the master's death was disallowed on the ground that the contract had not been judicially approved.

² "If the apprentice fulfils the stipulations of a voidable contract, he will be entitled to the benefits accruing to himself from its terms." *Page v. Marsh* (1858) 36 N. H. 305.

In *Luby v. Cox* (1837) 2 Harr. (Del.) 184 (justice's approbation of the contract not certified under his own hand), it was held that an action for a breach of covenant committed while a defective indenture was treated as a subsisting obligation might be maintained against the master. Delaware is one of the jurisdictions in which the statute declares defective indentures to be "void." The theory of the court that the contract was merely "voidable" was based mainly upon the consideration that one of the grounds upon which, under the explicit terms of the statute, an apprenticeship might be judicially dissolved at the instance of the apprentice, was the "invalidity of the binding." It was pointed out that "the application to the

court or judge for relief would be nugatory, or at least unnecessary, if the apprentice might, without the aid of the court, hold his indenture void, and plead *non est factum*, or demur to it, in an action upon it for covenant broken." This argument, however, is scarcely conclusive. There seems to be no valid reason why such a provision as the one adverted to should not be construed merely as giving the apprentice a cumulative remedial right.

In *Day v. Everett* (1810) 7 Mass. 145, it was held that the master might be sued for a breach of covenant in not paying to the father the sum stipulated in the indenture.

In *Stewart v. Rickets* (1840) 2 Humph. 151, where the apprentice had not assented to the contract, the court thus stated its position: "In the absence of any statute, or of any common-law principle, to render void such a contract, the question of the covenantor's liability is too plain for argument. It is briefly this: A covenants that Matthew, who happens, indeed, to be his son, should work and perform services, for a period of six years, for B, and B covenants that he will do certain things.

In some jurisdictions the accepted doctrine is that neither the apprentice nor his father can sue on a *quantum meruit* for the value of services rendered with reference to an invalid contract.³ This would seem to be the preferable view. See generally the cases cited in § 541, *ante*. But the position has also been taken that a contract which does not conform to statutory requirements is to be regarded as void

and pay certain sums for the benefit of the son (as it happens to be in this case), and, the services having been performed, he insists it is unlawful for him to pay the amount stipulated, or to perform his covenants. This is the case before us."

In *McGunigal v. Mong* (1847) 5 Pa. 269, the court said: "This is not a case in which either the mother or the apprentice alleges and is bound to prove performance of his mother's covenants; and the question is, after the infant has served out his time, whether the law will permit the master, who was no infant, to turn round and say, 'True, you did your duty and performed your mother's covenants, but as you did not put your hand and seal to the paper, my hand and seal goes for nothing, and I am relieved from fulfilling my duty.' The law is not so absurd. The wisdom of the law will not permit a master who has held an infant to the end of his apprenticeship in accordance with the indenture, to turn round and say he was imperfectly bound, and my covenants do not bind me to do my duty to the apprentice. In such a case it would be a disgrace to the jurisprudence of our state to permit a master to say the mother had no right to bind her infant, therefore I will disregard my engagements."

In *Austin v. M'Cluney* (1850) 5 Strobb. L. 104 (indenture not signed by apprentice), it was held that, although the indenture was void as to the apprentice, his mother might maintain an action on one of the covenants, she herself having performed the covenant on her part that he should duly serve for the term stipulated.

In *Davies v. Turton* (1860) 13 Wis. 185, it was held (on demurrer) that an infant apprentice might, after having fully performed the stipulated services, maintain an action for the wages specified by a contract which was not attested by an indenture in two parts, as the statute required. The court said:

"It appears very clearly to us that it was not the design of the legislature to interfere with the benign doctrines of the common law, but to add to the privileges of infants by enabling them, with the advice and consent of some experienced and discreet person of full age, to make contracts which should be completely obligatory in law. The intention was not to take away from them advantages which they already possessed, but to add new ones."

That the master's omission to record an indenture, as prescribed by the Ohio statute, did not render the contract absolutely void, so as to relieve him of liability on his covenants, was held in *Haber v. Heis* (1831) Wright (Ohio) 19.

³ This is the *ratio decidendi* in *Maltby v. Harwood* (1852) 12 Barb. 473 (father of minor had not assented to the binding); *Potter v. Greene* (1886) 39 Hun, 72 (certificate of justice of the peace regarding the fact of the father's abandonment of his family had not been given).

In *Page v. Marsh* (1858) 36 N. H. 305, where no indenture of the second part was ever executed, and the single instrument as executed remained in the possession of the defendant, it was held that the law will not imply a promise by the master to pay the father for the services of the son, during a portion of his apprenticeship, if, by the terms of the contract, nothing was to be paid for his services during the whole period thereof. The court said: "The statute does not require duplicate indentures, to render the contract binding on the other parties thereto, and does not authorize anyone but the minor to avoid its obligations because only a single instrument is executed. As between the plaintiff and defendant the contract is good and valid at common law, as well as by statute. The plaintiff, being entitled as a father to the services of his minor son, and bound to support and educate him, had a right to transfer

in such a sense that it neither operates as a bar to an action for work and labor, nor furnishes a foundation for a claim for damages by way of recoupment.⁴

In one of the jurisdictions in which no invalidating clause has been enacted, it has been laid down that a nonstatutable indenture can be avoided only by the apprentice.⁵ But this broad doctrine was not necessary for the purposes of the case in question, and its correctness would seem to be extremely disputable, except as regards the states in which the only specified consequence of nonconformity to the legislative requirements is that the contract is void in respect of the apprentice. In another of the jurisdictions in which no invalidating clause has been adopted, it has been held that the special remedies given by the statutes are not available against the master.⁶ This

those services, and his own right to compensation for them, to the defendant, in consideration of the defendant's furnishing to the son the support and education stipulated for in the indenture, and he must be bound by the contract he has made on that subject. A contract of apprenticeship which is not conformable to our statute is voidable only by the apprentice, and cannot be avoided by any other person or party, for that reason. As between the plaintiff and defendant, the indenture of apprenticeship referred to in the case is a valid contract, of binding force, in no way impaired or vitiated by the want of the proper execution of a duplicate thereof, nor by the conduct of the apprentice in avoiding its obligations upon himself. So far as relates to the mutual rights and duties of the parties to the present suit, they are precisely the same they would have been if an indenture of the other part had been duly and properly executed. If either has just cause of complaint against the other, growing out of the contract between them, the remedy is upon the contract. *Fowler v. Hollenbeck* (1850) 9 Barb. 309. Upon this view of the proper construction of the statute and of the rights of the parties, it is apparent that an action of *indebitatus assumpsit*, on a *quantum meruit* for the labor and services of the minor, which must be taken to have been performed in fulfilment of an express subsisting contract, under seal, between the parties, cannot be maintained. . . . It would be absurd to hold that where the

contract expressly provides that nothing whatever shall be paid to the party for the whole service, the law can imply a promise to pay anything for less than the whole. The law will imply a promise, when substantial justice requires it, where none existed before, and will so construe the express stipulations of parties as to raise therefrom an implied promise to pay an equitable recompense for any excess of value received by one in consequence of the nonperformance or abandonment of his contract by another, estimating such excess by the standard of value established by the mutual agreement of the parties themselves. But it will never imply a promise to pay for that as valuable which the parties have understandingly agreed and deliberately treated between themselves as valueless, nor enable a party to recover, by any implication, compensation for a portion of services rendered under a distinct and positive contract that he should not claim or receive anything for the whole. . . . The relation of master and apprentice subsisted by the express and valid agreement of the plaintiff, still binding upon him; and, while the minor continued with the defendant under that agreement, the plaintiff can have no possible claim to compensation for his services by either express or implied contract."

⁴ *Tague v. Hayward* (1865) 25 Ind. 427.

⁵ *Page v. Marsh* (1858) 36 N. H. 305, p. 307.

⁶ *In Day v. Everett* (1810) 7 Mass. 145, the court after laying it down that

doctrine is at variance with the English view that those remedies are available as long as the contract has not been formally repudiated. See § 2129, *ante*.

b. Obligations of apprentice.—With reference to a statute which declares in general terms that a defective indenture is void, it has been held that the apprentice does not incur any liability by departing from a service commenced in pursuance of that indenture.⁷

With reference to a statute which contains no invalidating clauses it has been held that an apprentice bound by a defective indenture is not amenable to the summary remedies provided by the legislature.⁸

2134. —as regards the father of the apprentice.—*a. Father a party to the contract.*—A doctrine which has been adopted with reference to statutes belonging to all three of the classes enumerated in § 2132, *ante*, is that a parent who joins in the covenant of a defective indenture which purports to bind his minor child subjects himself to a common-law obligation in respect of the performance of the contract. In this point of view the master has, as against a parent so covenanting, a right to the custody and control of the child as long as the child himself chooses to treat the contract as subsisting.¹ Other conse-

the Massachusetts act of 1794, chap. 64, had not, like the act of Elizabeth, taken away the common-law right of a father to assign the services of his minor son to another person, summed up its views as follows: "It is therefore our opinion that the covenants declared on are not within this statute, so that either party or the minor could have relief according to the provisions of the statute; but as the covenants are good at common law, and the statute has not made them void, it is also our opinion that the covenants are not void, but that no remedy lies for either party on a breach of them but by action at law. And as well parents and guardians, as masters, ought duly to consider that if the contract of apprenticeship does not pursue the statute the apprentice cannot be discharged, if the master break the contract on his part; neither, if the contract be broken on the part of the apprentice, can the master have those remedies and that relief provided in the statute for contracts made pursuant to it; but the remedy for each party is by action, which in many cases may be inadequate."

⁷ In *Frazier v. Rowan* (1806) 2 Brev.

47, the right of a master to maintain an action against an apprentice for refusing to serve was put upon the ground that the indenture was voidable by him. In so far as this decision implies that the action might have been maintained if the indenture had been made in accordance with the statute, it was clearly erroneous. See § 2177, *post*.

⁸ *Day v. Everett* (1810) 7 Mass. 145.

¹ In *State v. Barrett* (1863) 45 N. H. 15, where it was held that the father of an apprentice was not entitled to a writ of habeas corpus, the court thus discussed the agreement in question, which was in substance that, in consideration of the engagement of the respondents to maintain and educate the child, the father relinquished and surrendered to them the control and custody of the child until eighteen years of age: "Under these circumstances the question is whether the relator has so parted with his parental right of the custody of the child that he is not entitled to the aid he seeks. It is quite clear, as suggested by the plaintiff's counsel, that this agreement is not in conformity with the requisitions of our statute in respect to the binding out of apprentices or serv-

quences of the doctrine are that the parent cannot, after receiving the remuneration stipulated to be paid for the services of the child,

ants; therefore the infant itself is not bound. But we are of opinion that the father may bind himself by such an agreement. At common law the father, being entitled to the services of his minor child, might assign those services, so as to bind himself, to another for any period during the minority, and for a consideration to enure to himself and as a necessary consequence might also assign the custody of such minor child. By the laws of this state the father cannot bind his infant child, after fourteen years of age, as an apprentice, without its consent, nor without indentures of the character prescribed by the act; and yet the infant alone can avoid such contract for not conforming to the statute requirements; and the father, as well as the master, will, notwithstanding, be bound by their covenants."

In *Curtis v. Curtis* (1855) 5 Gray, 535, an indenture made in another state, between citizens thereof, by which a mother, after the death of the father, committed a child to the care and custody of a trustee of a society of Shakers, to be brought up and instructed according to their principles and usages, was held to be binding on the mother, although not in the form prescribed by the laws of that state in order to bind the child. As the child had been well cared for by the Shakers, and, being of sufficient mind and capacity to judge, desired to remain with them, the mother was not allowed to reclaim her.

In *Doane v. Covel* (1869) 56 Me. 529, the indenture was held to be sufficient to transfer to the master the right of the apprentice's father to his services.

In *Re M'Dowle* (1811) 8 Johns. 328, where an infant, not party to the indenture, was brought up on habeas corpus, as there was no evidence of restraint on the part of the master, the court refused to order him to be delivered to the father, and gave him leave to go where he pleased, saying: "The father, who, on his part, executed the indenture with the master, sues out the writ. There is nothing before the court to show any improper treatment of the infant, nor that the party to whom the father intended to bind him has not hitherto faithfully performed the stipu-

lations in the indenture. This is not a case, then, in which the father has any equity, or any right to complain. He may be bound still by the covenants in the indenture, though the infant is not. It is for the infant alone to take advantage of the defect, and if he does not choose to do it, he may waive the defect, and avail himself of the benefit of the apprenticeship. All that the court are required to do, under the present writ, is to see that the infant is not restrained against his will."

In *Fowler v. Hollenbeck* (1850) 9 Barb. 309 (an action of trespass for taking an apprentice out of the master's custody), it was laid down that, where a father is a party to indentures of apprenticeship, and conveys to the master his right to the custody and services of the minors, and covenants not to take or entice them away, it is obligatory on him, both at law and by statute, and he will not be protected in violating such covenant.

In *Anderson v. Young* (1898) 54 S. C. 388, 44 L.R.A. 277, 32 S. E. 448, the general doctrine propounded in *Day v. Everett* (1810) 7 Mass. 145, was approved, and the conclusions of the court were stated as follows: "A parent cannot, at common law, irrevocably divest himself of his trust and duty to care for and train his children, and surrender their care and custody to another merely for his own comfort or pecuniary gain but he may lawfully place his children in the custody of another, and assign their services during minority for their own welfare, as to learn some useful trade or occupation, in which case a court is not bound to restore the child to the parent's custody, unless it appears that the real welfare of the children require it. We think reason and authority warrant us in stating as the law, that the custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, is not unlawful or against public policy, and is not such illegal restraint as a court must relieve at the will or caprice of the parent."

In *People ex rel. Barbour v. Gates* (1869) 39 How. Pr. 74, 57 Barb. 291, the court argued thus: "She [the mother] has consented to the binding of

sue again for those services in the name of the child;² that, if the defective indenture provides for the payment of wages to the child himself, the parent cannot assert his common-law right to the child's earnings;³ and that the parent may be held liable for a breach of any of the covenants of the indenture.⁴ Under the circumstances ordinarily presented in cases which involve an informal contract, the father cannot invoke the want of consideration as a defense to an action for a breach of covenant.⁵ On the other hand a release from

the child, and covenanted by the indenture that she will not entice or cause the minor to be enticed, from the services and government of the respondent, during the continuance of the indenture; and is she not thereby estopped from asserting any right to take away the minor from the custody of him to whom she has thus voluntarily confided it?" This point was not discussed in court of appeals (1870) 43 N. Y. 40.

² *Ford v. McVay* (1870) 55 Ill. 119.

³ In *Kerwin v. Wright* (1877) 59 Ind. 369, it was laid down that, even if the indenture be so informally executed as not to bind the child, it will operate as a valid agreement between the mother and the master, so far as she has any right to contract respecting the child's services, and to authorize the master to pay the stipulated wages to the child.

⁴ In *Lobdell v. Allen* (1857) 9 Gray, 377, it was laid down that "if, after the execution of an indenture of apprenticeship at common law in this commonwealth [Massachusetts] by the father and the master of the apprentice, with covenants that the apprentice shall serve the master faithfully for a term of years, and shall board with his father at a certain rate as long as the latter shall be disposed to board him, the master removes with the apprentice to another state, with his and his father's consent, the father, if he subsequently takes his son away before the expiration of the term, is liable for breach of his covenants. *Aliter*, it seems, if the apprentice had been taken to the other state without the father's consent."

In *Van Dorn v. Young* (1852) 13 Barb. 286, where a complaint alleging that the father of the apprentice in question had failed to perform his covenant that the apprentice should serve was held not to be demurrable, the court remarked: "Is there any principle or authority which forbids a father's bind-

ing himself that the services of his infant child shall be rendered to another during the period for which he is by law entitled to them, without regard to the length of time, for instruction to be rendered to the child, and in addition a compensation to be paid to himself? This obligation, imposed as well by municipal law as by the laws of nature and religion, to maintain and educate the child, is in no respect diminished by such a contract; there is nothing in a fair contract of that character inconsistent with the proper discharge of that obligation; and the parental duty may often be better discharged in that way than in any other. What prejudice can result to the child or the public which might not be more frequently and certainly anticipated from denying than allowing the power to make such an arrangement?"

See also *Musgrove v. Kornegay* (1859) 52 N. C. (7 Jones, L.) 71, where the rule in the text was stated by the court, *arguendo*.

⁵ In *Phelps v. Townsend* (1829) 8 Pick. 392, the defendant gave the plaintiffs a written contract, by which, after reciting that it placed his son with the plaintiffs to learn the art of printing, to stay till he was twenty-one years of age, the defendant agreed in consideration of the son's being so old (he was then eighteen), to pay the plaintiffs a stipulated amount if the son did not continue in the plaintiffs' employment six months after he was twenty-one. The son entered into the plaintiffs' employment in pursuance of the agreement, and was instructed by the plaintiffs in the art of printing for some months, when he left them without cause. Held, that there was a sufficient consideration for the defendant's contract; that he was liable on it to the plaintiffs, and that the want of a counterpart to such a contract did not ren-

his liability under a covenant is a good consideration for a promise by him to pay the master a certain sum.⁶

The English doctrine regarding the obligations of a father who has joined in the covenants of a nonstatutable indenture is not the same as that of the American courts. See § 2129, *ante*. This conflict of opinion is due simply to the fact that the courts in England and the United States happen to have reasoned from different primary principles, each of which may, without any juristic impropriety, be treated as controlling in respect of the circumstances involved. The situation, therefore, is one of those in which any criticism, adverse or favorable, of the antagonistic positions, would be somewhat unprofitable. It will be sufficient to suggest that the theory under which a person who covenants for due performance by the apprentice is in effect deemed to be obligated, subject to the implied condition that the indenture is legally binding upon the apprentice, is probably the more consistent with what may be fairly assumed to be the actual intention and understanding of the covenantor himself. This consideration is of course not decisive, but it is an element which may well be taken into account in a case where the conclusion to which it points can be supported on other grounds, and is not essentially inconsistent with the specific terms of the contract which defines the liability.

b. Father not a party to the contract.—Merely informal defects in the indenture of a poor child bound out by public officials acting within the scope of their authority cannot be taken advantage of by the child's father.⁷

der it invalid. The judges were "all of opinion that the acceptance of the contract by the plaintiffs, and the execution of it in part by receiving the apprentice, created an obligation on their part to maintain and instruct the defendant's son. . . . It is clear, that where one makes a grant to another, which is accepted, and by the instrument something is to be done by the grantee, the grantor may compel performance. This is not a contract under the statute respecting apprentices, but a contract by a father for the services of his minor son, which he has a right to dispose of."

⁶ *Crombie v. McGrath* (1885) 139 Mass. 550, 2 N. E. 100.

⁷ *People ex rel. Wehle v. Weissenbach* (1875) 60 N. Y. 385. There a father had, after handing over his child to the

commissioners of public charities in New York city, under an agreement to pay a certain weekly sum for his board, left the state after having paid for one month only. Three years afterwards the commissioners indentured the child to the defendants. In proceedings on habeas corpus, instituted by the father, it was held (1) that, as to the father, the indenture was as valid as if he had acted personally, and he could not, therefore, avail himself of an omission, on the part of the child, to execute it; and (2) that he could not avail himself of an omission, on the part of defendants, to execute the obligation required by the act of 1869, for the better protection of minors (§ 4, chap. 411, Laws 1869), of one receiving a child bound out from a public or private institution. It was also held that a change

2135. —as regards third persons.—a. *In actions by the master for the value of services rendered by the apprentice to a third person.*—With reference to a statute which declares a defective indenture to be void as regards the apprentice, it has been held that the master of an apprentice bound by such an indenture is not entitled to maintain an action for the value of services rendered by him to a third person after having abandoned the contract.¹ The court intimated that an action in tort might have been maintained on the ground of his having *harbored* the apprentice. But the doctrine thus suggested would seem to be untenable.²

b. In actions for wrongful interference with the performance of the contract.—With reference to a statute which contains no invalidating clause, the broad doctrine has been laid down that no action will lie against a third person for enticing an apprentice bound under a nonstatutable indenture. The *ratio decidendi* was that the indenture was voidable at any time, and that the apprentice had, by leaving the service, legally manifested his intention not to be bound by it any longer.³ But in other cases involving the effect of similar enactments, it has been held that in an action of this description the defendant is not entitled to take advantage of the voidability of a

made in the name of the apprentice after the execution of the indenture was not within the prohibition in § 3 of the act against changing the child's name. With reference to the first of these points, the court argued that the fact of nonexecution by the apprentice "cannot be availed of by the parent, where he has given his consent to the binding. Thus held in *Re M'Dowle*, 8 Johns. 328, a case often cited and approved of. The parent, the relator, did not himself execute or consent to the indentures; but the commissioners who stood *in loco parentis*, who had by law the power and authority of the parent, did; and thus the indentures are, as to him, as valid as though he had acted personally in the execution. The minor might perhaps avail himself of the defect, but not one in the position of the relator." For the other point decided in the case, see § 2106, note 14, *ante*.

¹ *Barton v. Ford* (1885) 35 Hun. 32 (decision under the later New York statute.)

² The court relied upon the authority of *Gye v. Felton* (1813) 4 Taunt. 876; but the point there decided was that the master could not recover for the

enticement of an apprentice, for the reason that the indenture was absolutely illegal, so far as he was concerned. See § 2130, note 2, *ante*. In that English case it seems to have been assumed that the plaintiff might have recovered if the effect of the statute had been merely to render defective indentures voidable by either party. However this may be, it seems clear that a case which affirms the right of a master to sue for the enticement of an apprentice from a voidable contract which had been treated by the apprentice as subsisting up to the time of the enticement cannot be treated as an authority for the proposition that an action will lie against a person who has employed an apprentice after he has exercised his right of avoidance. In some jurisdictions the right to maintain even an action for enticement is denied. See the following subsection.

³ *Campbell v. Cooper* (1856) 34 N. H. 49 (indenture not in two parts). The court was of opinion that the indenture took effect as a common-law agreement on the part of the apprentice's father for the assignment of the services of his children during a certain period; but it

contract which has never been duly avoided.⁴ In one of those cases a nonsuit was held to be erroneous, for the reason that the apprentice's departure did not of itself operate as an avoidance of the contract,—more especially as the binding had been effected by the court.⁵

For a general discussion of the conflict of opinion with regard to the question whether the mere act of departure from the service constitutes a legal avoidance of the indenture, see § 2205, *post*.

In one case it was laid down that, in a suit for the seduction of a female apprentice bound by the father under a defective indenture, he, and not her master, is the proper party plaintiff.⁶ In another case the rule adopted was that the father could not bring such an action unless the tort was committed after the indenture had been actually avoided.⁷ The latter of these views seems to be the preferable one, because the immediate damage under such circumstances is sustained by the person to whom the services are being rendered at the time when the seduction occurs.

c. In settlement cases.—The doctrine that a settlement under the poor laws may be gained by services performed in pursuance of a de-

was held that the action could not be maintained on the ground of the existence of such an agreement, as the power of the father to dispose of his children's services was limited to his lifetime, and he had died before the alleged enticement occurred.

⁴ *Doane v. Covel* (1869) 56 Me. 529 (general rule laid down); *Heinecke v. Rawlings* (1836) 4 Cranch, C. C. 699, Fed. Cas. No. 6,326 (stranger cannot take advantage of the omission to insert the age of the apprentice in the indenture); *Jones v. Mills* (1830) 13 N. C. (2 Dev. L.) 540 (defect here was in the bond required by the act of 1801 [Rev. Stat. chap. 583], obligating the master not to remove the apprentice out of the county where he was bound); *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61 (statutable covenants not inserted in the indenture). In the last mentioned of these cases the court laid it down "that a third person who has harbored or maintained him cannot set up the misconduct of the apprentice as a justification of his invasion of the rights of the master *de facto*."

That the existence of the relation of the master and apprentice, until it was dissolved by the quarter sessions, could not be questioned in a penal action by

the master for harboring his apprentice, was laid down in *Bonnel v. Brotzman* (1842) 3 Watts & S. 178.

⁵ *Dowd v. Davis*, *supra*.

⁶ *Bolton v. Miller* (1855) 6 Ind. 262 (contract neither sealed, nor acknowledged, nor recorded). The court proceeded upon the ground that it was merely a license to the daughter to appropriate her time and wages to her own use till she reached the age specified, and that the license could be recalled by the father at pleasure. It was accordingly held that, for the purpose of enabling him to sue for her seduction, she was to be regarded as being constructively in his service after the contract was entered into.

⁷ In *Emery v. Gowen* (1826) 4 Me. 33, 16 Am. Dec. 233 (infant bound beyond the age limited by statute) the rationale of the decision was that the contract was good, so far as third persons were concerned, up to the time when it was renounced, and no longer. *Day v. Everett* (1810) 7 Mass. 145, *supra*, was cited with approval. The court observed that, if the apprentice had continued in her master's service up to the time of the seduction, the action could have been brought only by the master.

fective indenture has been applied with reference both to an invalidating clause of a general tenor,⁸ and to a clause which is applicable to the apprentice only.⁹ This doctrine would doubtless be applied in those jurisdictions also in which no such clause has been enacted.

2136. Noncompliance with stamp acts.—With reference to the provisions of the English stamp act, 8 Anne, chap. 9, by which it was declared that an indenture not worded and stamped according to the tenor of the statute should be “void and not available in any court or place, or to any purpose whatsoever,” it was held that no action could be maintained for enticing an apprentice from a service begun in pursuance of such an indenture,¹ and that a settlement could not be acquired by service under it.² *A fortiori* was it void as between the parties themselves.

H. ASSIGNMENT OR TRANSFER OF THE APPRENTICE OR HIS SERVICES TO ANOTHER EMPLOYER.

2137. Assignment during the master's lifetime. General rule apart from statutes relating to assignment.—It is fully settled that an apprentice cannot, without his consent, be assigned to another master.¹ The consideration upon which this doctrine is founded is that “the

⁸ *Hudson v. Taghkanac* (1816) 13 Johns. 245; *Owasco v. Oswegatchie* (1826) 5 Cow. 527; *Hamilton v. Eaton* (1827) 6 Cow. 658.

⁹ *Bloomfield v. Acquackanunck* (1826) 8 N. J. L. 257.

¹ *Cox v. Muncey* (1859) 6 C. B. N. S. 375.

² See § 2095, *ante*.

¹ The earliest affirmation of this doctrine seems to be an *Anonymous Case* decided in 1701, and very briefly reported in 12 Mod. 441.

In *Baxter v. Burfield* (1747) 2 Strange, 1266, 1 Bott, Poor Law, 581, where the actual question involved was whether the refusal of the apprentice to serve his master's executrix was a breach of the contract (see § 2210, *post*) the decision that no breach was predicable was put upon the ground that “a master has an interest in his apprentice, yet it is not such a one as a person has in lands and chattels, which is transferable, but is an interest coupled with a personal trust annexed to the person of the master, which cannot be assigned.” The effect of *Herns v. Drake* (1710) an unreported case,

cited in 1 Bott, Poor Law, 582, was thus stated: Debt on bond to stand to an award that an apprentice should be assigned; and the award was held bad, for an indenture of apprenticeship is not assignable by law or equity, unless it be by custom, and even then not without the consent of the apprentice.

The doctrine that a contract is not assignable has not infrequently been formulated without any qualification in respect of the absence of the minor's consent. *Walker v. Johnson* (1820) 2 Cranch, C. C. 203, Fed. Cas. No. 17,073; *Burger v. Rice* (1851) 3 Ind. 125 (*arguendo*); *Davenport v. Gentry* (1849) 9 B. Mon. 427; *Futrell v. Vann* (1848) 30 N. C. (8 Ired. L.) 402; *Allison v. Norwood* (1853) 44 N. C. (Bushbee, L.) 414; *Biggs v. Harris* (1870) 64 N. C. 413; *Stringfield v. Heiskell* (1831) 2 Yerg. 546. But it is manifest that in any statement which pretends to precision, account must be taken of this factor.

It has been held that an indenture of apprenticeship was not assignable under the Kentucky act of February 10, 1798, authorizing the assignment of “bonds,

contract is in its nature fiduciary, implying a personal trust and confidence." ²

The question whether the consent of any other person besides that of the apprentice himself is requisite to validate an assignment of the contract may arise with relation to two different situations.

(1) The rights of the parties may be defined and controlled by a statutory provision which declares the joinder of some third person to be a condition precedent to the validity of the contract. The failure to comply with such a provision manifestly renders the contract void, or, at all events, voidable.³

(2) Some third person whose joinder in the contract was not a

notes of hand, promissory notes, and all other writings whatsoever." *Shult v. Travis* (1802) Sneed (Ky.) 142; *Pigman v. Ward* (1804) Sneed (Ky.) 305.

² *Phelps v. Culver* (1834) 6 Vt. 430 (*arguendo*). The element of "personal trust" is also adverted to in *Baxter v. Buxfield* (preceding note); *Hall v. Gardner* (1804) 1 Mass. 172; *Davis v. Coburn* (1811) 8 Mass. 299; *Musgrove v. Kornegay* (1859) 52 N. C. (7 Jones, L.) 71. The same element constitutes the basis of the doctrine with respect to the effect of the master's death in dissolving the contract. See § 2210, *post*.

In *Versailles v. Hall* (1833) 5 La. 281, 25 Am. Dec. 178, the court said: "The contract of indenture appears to us to be personal, and not susceptible of alienation. The character, temper, etc., of the master enter much into the considerations on which such an agreement is made, and he has not a right to substitute another in his place without the consent of the minor or his legal representatives." The conclusion arrived at was that an assignment made with the approbation of the mother of the apprentice and the mayor of the city where he resided would be good; otherwise, if made without their approbation. The court professed to follow the English cases; but it is submitted that they do not afford any support for the theory which, as the concluding words of the general statement quoted above seems to indicate, was entertained; *viz.*, that the consent of the "legal representatives" of the apprentice will validate an assignment, even though his own has not been given.

In *Tucker v. Magee* (1850) 18 Ala.

99, it was held that if a person to whom a slave was bound as an apprentice renounced his trust before the expiration of the term, and suffered the slave to be converted by a third person, the owner would become entitled to the immediate possession, and might bring trover for the conversion.

³ In *Hudnut v. Bullock* (1821) 3 A. K. Marsh. 299, the court reasoned thus: "The obligations of a master to an infant apprentice ought to be held sacred; and too great facilities ought not to be afforded to him in dissolving these obligations. The apprentice ought to be kept in his duty, strictly, and not be allowed to believe that he can, by contract, discharge himself from the station to which his parent has assigned him. Infants are not allowed to act for themselves, and hence the law provides for their being at all times subject to the control and disposition of a parent, guardian, or master. Leave them to themselves, or allow them to purchase their freedom, whenever it may be in their power, and experience will soon demonstrate that their want of capacity, united with their youthful follies and inexperience, will make them bad citizens instead of industrious tradesmen. For these reasons we conceive it is a good general rule, that the policy of the law forbids the coercion of a contract in which the master by negotiation has sold out the time of his infant apprentice bound by the father, and has agreed to receive a pecuniary consideration for a release from his own duties, and for placing the infant into the world at random, in the enjoyment of a liberty which may prove ruinous to himself and injurious to others."

legislative condition precedent to its validity may have executed it as covenantor for the due performance of its stipulations. As the only necessary parties to an indenture in England are the master and the apprentice, this is the situation which nominally presents itself in that country whenever a contract is executed by a parent, guardian, or surety. That an assignment of the contract without the assent of a person who has executed it in any of these capacities must be invalid seems to be a necessary deduction from the general rule that a contract cannot be altered in its terms or discharged except with the acquiescence of all the parties thereto. The decisions which bear upon the point are on the whole in accord with this conclusion. See § 2139, *post*.

2138. Same subject. Formal requisites of a valid assignment.—The rule under this head has been thus formulated by an English author: "In order to give effect to an assignment of indentures, it is necessary that a formal document be executed and properly stamped, and until this is done it does not release the original master from the covenants of the indenture, and the apprentice is under no obligation to serve the new master. All the parties to the original indenture must joint in the execution of the assignment."¹ This statement, except in so far as it has reference to the requirement of stamping, is applicable to American jurisdictions also. The rationale of the rule is of course that, in its essence, a contract of assignment is an apprenticing to a new master, and that its validity must consequently be determined upon the same footing as if it were an original binding.

2139. Same subject. Effect of invalidity of assignment as regards the parties to the indenture and the assignee.—a. Apprentice.—Where an assignment is invalid, either as being effected without the consent of the apprentice, or as being made without a due compliance with the formal requirements prescribed by law for an original binding, he is entitled to avoid the assignment,¹ or avail himself of its invalidity as a defense to a civil or criminal action founded upon the nonperformance of its stipulations.²

¹ Austin, *Appr.* p. 73. For the English forms used in cases of assignments by a new indenture, or by indorsement upon the original indenture, see 2 Enc. Forms & Precedents, pp. 43–45.

² *Phelps v. Culver* (1834) 6 Vt. 430.

² *Rex v. Channel* (1676) 3 Keble, 519, 1 Bott, Poor Law, 578. For the facts of this case see § 2143, *post*.

In *Edinburgh Glasshouse Co. v. Shaw* (1789) Morison's Dict. 597, where the assignee sought to enforce performance by the apprentice, the court laid it down that indentures made to one trading company were not assignable to another company which had taken over its business, although by the articles of the original employers a continual

b. Assignee.—The effect of several cases is that no right of action against the assignee can arise in favor of the master out of an assignment which is invalid upon either of the grounds specified in the preceding subsections.³ It is submitted that this is the correct doctrine,

and indiscriminate change of individual members was admitted. The apprentice was accordingly discharged from the prison to which he had been committed by the lower court. It was conceded by counsel for plaintiff that a contract entered into with an ordinary partnership was not assignable.

³In *Hall v. Gardner* (1804) 1 Mass. 172, where an action for deceit against the assignee of a poor apprentice, in which (*inter alia*) damages were claimed for loss of his services, was held not to be maintainable, the *ratio decidendi* was that the parol assent of the officials who had bound him was not sufficient to validate the assignment, because their statutory authority to bind him could not be exercised except by means of an indenture. The factor of the minor's assent was not referred to, but apparently he had given it.

In *Davis v. Coburn* (1811) 8 Mass. 299, an action against the assignee for money stipulated to be paid for the time of the apprentice, recovery was denied on the broad ground that an apprentice was not assignable. The report states that the minor had given his assent, but this circumstance was not adverted to by the court. The court professed its inability to understand the rationale of the class of English cases discussed in § 2146, *post*. But see remarks made at the end of § 2147.

In *Randall v. Rotch* (1831) 12 Pick. 107, it was held not to be competent for the master, with whom an apprentice is placed to learn the trade (cooperage) of the master, to send him abroad on a whaling voyage, and receive his earnings, although he was to work at his trade while at sea. The court said: "It would be alike contrary to many of the terms and stipulations of the contract itself, and to the nature and purposes of the relation of master and apprentice. It has been repeatedly decided that in the contract of apprenticeship, whether made by the minor himself, in the cases allowed by law, or by his parent or guardian, or by persons clothed with public authority, a special regard shall be presumed to

have been had to the personal character, capacity, and qualifications of the master. He is, for the time being and for a considerable period of time, and a most important one to the development of the character of the apprentice, to stand *in loco parentis*. A high trust and confidence are reposed in the person of the master. All the considerations which go to support the rule that an apprentice cannot be assigned over are arguments against the right of the master to place the apprentice out of his own control and instruction for the long period of a whaling voyage, averaging from two to four years, a large portion of the usual period of apprenticeship. It is directly repugnant to the leading stipulation on the part of the master, to instruct the apprentice in his trade." It was accordingly held that an action for the value of the services rendered to the assignee was not maintainable. So far as appears from the report, the apprentice here had assented to the assignment. It is expressly stated that his mother had done so.

In *Ayer v. Chase* (1837) 19 Pick. 556, where the plaintiff put his apprentice into the service of another person exercising the plaintiff's trade, for a short time, on wages to be paid to the plaintiff, and during that period the apprentice absconded and went to sea, it was held that by such transfer of the apprentice the plaintiff's right to his services was suspended, and that it did not revive upon his absconding, so as to entitle the plaintiff to his earnings on the voyage. The court said: "Where a parent binds his child as an apprentice to learn a trade and for the purpose of suitable education and instruction, he must be presumed to rely upon the knowledge he has of the character of the master, and the confidence he has in his integrity and ability. By such a contract the master acquires an important and interesting trust, which is personal, and cannot be assigned. It is truly said in *Bedell v. Constable* (1665) Vaughan, 177, that 'a more near and tender trust cannot be than the

and that the only remedial rights of the parties to a defective contract of assignment are those which they are able to assert independ-

custody and education of a man's child.' The master, by such a fiduciary contract, is bound not only to instruct his apprentice in his trade or calling, but to be careful of his health, and to attend to his education and morals; and for these purposes he is bound to have him under his own care and inspection, unless by the terms of the contract of apprenticeship it is otherwise agreed. These principles are unquestionable, and are fully established by the case of *Davis v. Coburn* (1811) 8 Mass. 299, and the cases therein cited. It follows, therefore, that the plaintiff, by transferring his apprentice to the service of a carpenter in Lowell on wages, and afterwards to another carpenter in Boston, was guilty of a breach of trust confided to him by the father of the apprentice, which may have been most injurious to the morals, steady habits, and well being of the young man. These carpenters acquired by the transfer no right to the services of the apprentice, and he was at liberty to leave them at any time; and although the plaintiff might reclaim him, he was not bound to return voluntarily to his master." Here also it would appear that the apprentice had assented to the assignment.

That a note given for the assignment of the time of an apprentice is void, as being for an illegal consideration, was held in *Walker v. Johnson* (1820) 2 Cranch, C. C. 203, Fed. Cas. No. 17,073.

In *Allison v. Norwood* (1853) 44 N. C. (Busbee, L.) 414, a promissory note made by the assignee in consideration of the assignment of an apprentice who had been bound by a judge was held to be void in such a sense that the assignor could not maintain an action upon it. The court, referring to the rule that the personal representative of a deceased master has no interest in his apprentice (see § 2210, *post*), said: "The law will not itself make an assignment of the apprentice; will it permit the master to do so? We cannot see how it can, without taking indirectly from the justice of the county courts the power which it expressly confers, of exercising their judgments in the selection of suitable and proper masters, such as they can approve." Commenting upon the case of *Nickerson v.*

Howard (1821) 19 Johns. 113 (see next note and following subsection) the court made the following remarks: "The court seemed inclined to hold further that, although an indented apprentice is not assignable or transmissible, yet the assignment as between the old and the new master would be valid as a covenant for the services of the apprentice and if the apprentice continues to serve his new master, there would be no failure of the consideration of the assignment. Now if the nonassignability of an apprentice was based, like that of a bond at common law, upon an objection of a technical, and not a substantial, character, we might be disposed to agree with the case cited. But the objection in this state, however it may be in New York, is of the most substantial kind; it is an objection against permitting the power of selecting and approving a fit person to have the charge of an apprentice to be taken from the justices holding the county court, upon whom it is expressly conferred by the statute, and given to an individual, even though that individual may be a master formerly appointed by such justices. The policy of such a statute is too necessary for the accomplishment of the purposes it has in view (and which are highly important both to the apprentice and the state), to permit it to be contravened by a contract made in violation of its provisions; and we are gratified to find ourselves supported in upholding it by so respectable an authority as the supreme court of Massachusetts."

In *Musgrove v. Kornegay* (1859) 52 N. C. (7 Jones, L.) 71, where it was held that the master could not sue on the contract of assignment for the services of the apprentice, the court observed: "The same principle which prevents a father from assigning his interest applies to the master of an apprentice bound by the county court under our statute. *Futrell v. Vann* (1848) 30 N. C. (8 Ired. L.) 402. It is a personal trust, created in the one case by nature, and in the other by the act of law, and cannot be transferred to a third person without the assent of the child in respect to the father, and of the county court in respect to the master."

ently of the contract itself. But a different view prevails in some jurisdictions.⁴

c. Third persons.—In a case where the defendant gave the plaintiff a promissory note, in consideration of the assignment of an apprentice to a certain party at his request, it was held, that in an action on the note, the defendant could not set up as a defense that the assignment was not valid, and that its validity could be questioned only in a suit by the assignee to recover back the price on a failure of consideration, or in a suit or proceeding in behalf of the apprentice.¹ But the theory that an assignment which is invalid as between the assignor and assignee may yet be valid as against a third person is

The conclusion actually arrived at in that case, however, was that, as the assignee had, after the return of the apprentice to his master with the consent of all the parties, promised to pay compensation for his services if the master would allow a certain credit, and that credit had been allowed, an action might be maintained on this promise.

⁴In *Middleton v. Taylor* (1794) 1 N. J. L. 445, it was laid down that, where one person agrees to hire out the services of his apprentice to another, the latter cannot, after the stipulated work has been performed, resist a demand for the stipulated price, on the ground that the assignment of the services was by parol.

In *Martin v. Rice* (1812) 2 Browne (Pa.) 191 (nisi prius case), it was held that an action might be maintained upon a promissory note given by the assignee for the price of the services to be rendered under a parol assignment. The theory of the court was that, as the contract, though invalid, was not contrary to law, and not fraudulent, it was binding on the parties to the action.

In *Nickerson v. Howard* (1821) 19 Johns. 113, the court took the same position in the course of its argument; but the actual question involved was the liability of a third party at whose request the assignment had been made. See next subsection.

Compare also *Shoppard v. Kelly* (1831) 2 Bail. L. 93, § 2143, notes 4, 9, *post*.

⁵*Nickerson v. Howard* (1821) 19 Johns. 113. The court said: "On the question whether such an apprentice

may be assigned, the rule of law does not appear to be settled with so much precision as might be expected. Reeve Dom. Rel. 344-346. In this case between the Parishes of *Caister and Eccles* (1702) 1 Ld. Raym. 683, Holt, Ch. J., said: 'Though it be true that an assignment of a poor child bound as an apprentice would not pass an interest in the apprentice; yet it is a good contract that the apprentice should serve the second master during the time, though the words are "grant and assign." Like the case of assigning a bond, though it is not assignable in point of interest, yet it is a covenant that the assignee shall receive the money to his own use.' It amounts to a contract between the two masters, that the child should serve the latter. So that the assignment is good by way of covenant, though not as an assignment to pass an interest. 1 Salk. 68; 3 Vin. Abr. *Apprentice*, F; 2 Wils. 96. In the case of *Rex v. Stockland* (1779) 1 Dougl. K. B. 70, Lord Mansfield said: 'Though an apprentice is not strictly assignable, nor transmissible, yet if he continue with the consent of all parties and his own, it is a continuation of the apprenticeship.' *Non constat*, in this case, but that the apprentice has voluntarily continued to serve his new master, by consent of all parties. But if the apprentice has refused to serve his new master, then the assignee has his remedy against the first master, on his assignment, as a covenant for the service. It appears to me, therefore, that even between the first and second master, the consideration for which this note was given has not failed."

probably not applicable in respect of apprentices bound out by courts.⁶

2140. Temporary assignment of the apprentice.—*a. For the benefit of the master.*—The position taken in one case was that, although a master “cannot transfer his mastership to another,” yet he has, “as a compensation for his care and responsibility, a right to the services of the apprentice, and he is not restrained from hiring him out to service for a day, or a month, or any such reasonable time; but still he must retain the mastership, and be liable for all abuses of the trust.”¹ It is obvious that this qualified description of assignment would not be valid, unless the apprentice assented to it, and the de-

⁶ Such seems to be a reasonable inference from the language used in *Allison v. Norwood* (1853) 44 N. C. (Busbee, L.) 416. See note 3, *supra*. But there only the rights and liabilities of the assignor and assignee were involved.

¹ *Biggs v. Harris* (1870) 64 N. C. 413 (action on bonds payable to the master for the hire of an apprentice). In that case an apprentice, being then nineteen years and two months old, was, in July, 1860, upon his master's removal from the state, hired out by him for the rest of that year and also for the year 1861. Held, that it was error for the court to instruct the jury “that if the consideration of the notes given for the value of the apprentice during the above years was not the assignment of the full unexpired term of the apprentice, but only a hiring by the master for the years 1860 and 1861, the plaintiff would be entitled to recover.” The correct instruction would have been as follows: “Was it the effect of the transaction that the plaintiff transferred his mastership of the apprentice to the defendant? If yea, he cannot recover; if nay, the defendant is liable.” The court said: “In the case under consideration his Honor was of the opinion that the master had the right to hire out the apprentice for any time less than the whole time of servitude. But this is not the rule. The rule is that he cannot transfer the mastership for any time,—not a day, not an hour; but he may transfer the services, and the length of time is not a matter of consideration, except in so far as it may be evidence of the intent to transfer the

mastership. The master is not obliged in person to superintend the labor of the apprentice, but may put him under another, as under a mechanic to learn a trade, or a schoolmaster for instruction, in which case the schoolmaster has the immediate control, the master the general control, and the binding power the paramount control. This is a clear case where the appointing power ought to have revoked the binding, and selected another master; for the fact that the apprentice was bound in May, at the age of about nineteen years, and was hired out in July, for the balance of that year and for the next year, covering almost the whole period of servitude, and that upon the eve of the master's removing from the state, make it probable that the master was trifling with the trust, and ought to have been removed. But the question remains, Can the defendant take advantage of the wrongful act of the master? Is he not *in pari delicto*? Unquestionably he is *in pari delicto*, and therefore we would not aid him; but the defendant is not asking us to aid him; it is the plaintiff who is seeking aid, and we will aid neither, the acts of both being wrongful, as against the policy of the law. This is said upon the supposition that the fact be that the master did intend to abuse his trust and to transfer the mastership to the defendant. If he did, then the act was against public policy; if he did not, then the defendant cannot say, whatever the appointing power might have said, that the act was wrongful. In that case he would have been obliged to comply with his contract.”

cision must in any event be taken as being subject to the limitation indicated by this consideration. Compare the cases cited in § 2146, *post*. But, even with the restriction, the doctrine applied seems to be of very doubtful soundness. Viewing the matter with reference to the fundamental consideration that the relation of the master is fiduciary in respect both of the apprentice and the other parties who have joined in or assented to the binding, it would seem that the difference between a temporary and a permanent assignment of an apprentice is simply one of degree. In this point of view it is scarcely possible to allow any weight to the extremely refined distinction which, in the case cited, was taken between a transaction which amounts to a hiring out of the services for the time being, and one which involves a transfer of the "mastership." The conclusion indicated, therefore, is that an arrangement which is essentially designed to enable the master to reap a profit from services rendered to a third person should, even if it be merely temporary, be treated as invalid, unless it is authenticated in the same manner as a definitive assignment. The reasons for taking this ground are, as it would seem, especially strong in a jurisdiction such as North Carolina, where the statute required that the binding of minors shall be judicially approved.

b. For the benefit of the apprentice.—There is some authority for the doctrine that a master may, when the state of his business prevents him for the time being from keeping an apprentice at work, find temporary employment for him with another person in the same line of business.² In the case cited, the transfer was intended to enable the apprentice to receive instruction during a period when it was beyond the power of the transferrer to give it, and the most reasonable view would seem to be that an arrangement of this description should not be deemed lawful, unless it is made solely for that purpose.

² In *Smith v. Francis* (1891) 55 J. P. 407, a person qualified to take apprentices under the English waterman and lighterman act 1859 was held to be entitled to transfer them to another qualified person. The actual point upon which the opinion of the court was sought was whether it was legal for the second master to take the apprentice temporarily. But the decision necessarily involves also the doctrine stated in the text. That this aspect of the matter was present to the minds of the judges is indicated by the observation of Day, J., that there was nothing to prevent the master from controlling the apprentices during the time when they were working for the other party.

2141. Assignment under special custom.—In England an assignment may be valid by virtue of a special custom.¹ But the assignment cannot be effected without the consent of the apprentice.²

In Massachusetts, on the other hand, this qualification of the general doctrine as to the nonassignability of apprentices has been rejected.³

2142. Assignment, validity of, considered with reference to statutory provisions.—*a. Provisions forbidding assignment.*—Some statutory provisions are in effect merely declaratory of the common-law doctrine stated in § 2137, *ante*.¹ Apparently the only one of these provisions which has been judicially discussed is that enacted in Kentucky.²

¹ This exception is adverted to in *Baxter v. Burfield* (1747) 2 Strange, 1266, 1 Bott, Poor Law, 581.

By the custom of London a freeman of the city may assign his apprentice to another freeman in the same trade. *Rex v. Peck* (1699) 1 Salk. 66, 1 Bott, Poor Law, 579; Bacon, *Abr. Master and Servant*, p. 359.

² See *Herns v. Drake* (1710), an unreported case, the effect of which is stated in § 2137, note 1, *ante*.

³ In *Randall v. Rotch* (1831) 12 Pick. 107, where the master was a master cooper, and the assignee the captain of a whaling ship, but it was contemplated that the apprentice should work at his trade while on the voyage, the evidence of custom was held to have been rightly rejected. The court said: "In many cases evidence of custom would be competent, even under such an indenture, to show what the nature of a particular trade is, of what branches and particulars it consists, and how it is usually learned and taught. But here the custom was relied upon to establish rights and duties directly repugnant to the objects and terms of the contract." The authority of this decision is considerably impaired by the fact that, so far as appears from the report, the attention of the court was not directed to the cases cited in the preceding note.

¹ *Kentucky*.—Stat. 1903 & 1908, § 2595. No master shall have a right to sell the apprentice's term of service, or give another person the right to control him. (Rev. Stat. 1852, p. 466, § 6; Gen. Stat. 1879, chap. 74, § 5.)

Indiana.—Burns's Anno. Stat. 1908,

§ 8393 (7311). Indenture not assignable.

Maine.—Rev. Stat. 1903, chap. 64, § 6. Apprentices not to be transferred to another person.

² In *Haley v. Taylor* (1835) 3 Dana, 221, the court, while affirming the general doctrine that an apprentice cannot be assigned without his consent, held that public policy was not contravened by a contract under which the defendant, the second employer of the apprentice in question who had bound himself was to give a promissory note to the original employer, in consideration of the latter's giving up to the apprentice the residue of his unexpired term. The court distinguished *Hudnut v. Bullock* (1821) 3 A. K. Marsh. 299, as being a case in which the apprentice had been bound by his father.

In *Graham v. Kinder* (1850) 11 B. Mon. 60 (bill in chancery by apprentice to be discharged from custody of master), where a free woman of color had sold to one Graham the services of her son for the residue of his minority, and he had hired out the boy to several other persons, the court thus stated its conclusions: "As the alleged fraud in the contract between her and Graham was not established by the testimony, and the contract cannot be rescinded on that ground, we think it should have the effect of transferring to Graham and vesting in him her right to the value of the services of the children while they remain voluntarily in his employment and under his control. The mother may not have had the right to sell her children as slaves for any period of time whatever; yet if they, with her consent,

b. Provisions regulating assignment.—In some of the statutes relating to apprentices, the circumstances under which apprentices may be assigned, and formalities which must be observed in order to render an assignment valid, have been specified.³

With reference to the Pennsylvania statute it has been held that the consent of the parent or guardian of the apprentice, as well as his own, is an indispensable prerequisite to the validity of an assignment,⁴ and that a parol assignment is not binding.⁵

performed services for another person, she would be entitled to the compensation for their services, unless she had expressly or impliedly waived her right to it in their favor. But as Graham has violated his contract, and forfeited all right under it to the future service of the boys, and as they have manifested their unwillingness to remain with him or serve him any longer, he has no claim upon them or their services, since the institution of the present suit."

In *Huffman v. Rout* (1859) 2 Met. (Ky.) 50, it was held that a master who hired out his apprentice for a part of the term to another person could not maintain an action upon a covenant executed by the latter to pay for the services rendered.

³ *Delaware.*—Rev. Code 1893, chap. 79, § 7. Assignment of apprentices bound to a person and his executors, administrators, and assigns, must be under seal, and with the approval of a judge or two justices.

Sec. 20. Assignment not in conformity to statute is void.

Pennsylvania.—Brightly's Purdon's Dig. *Apprentices*, § 14. If the term of the indenture extend to assigns, a master may assign over his apprentice to any person of the same trade or calling mentioned in the indenture, provided the apprentice, or his parent or parents, or guardian or guardians shall give their consent to such assignment before some justice of the peace (act of April 11, 1799, § 2).

South Carolina.—Rev. Stat. 1894, § 2207 (2074). Trial justice is required to certify the assent of the same parties as in the case of an original binding, to the assignment of the indenture, for sufficient causes, to any person exercising the employment specified therein.

Virginia.—Code 1887 and 1904, § 2588. The writing [contract of the

apprenticeship] may, with the approbation of the court by which the child was bound, be transferred by the master, or, within three months of his death, by his representative.

West Virginia.—Code 1899, chap. 81, § 7. Same as Va. Code, § 2588.

Ontario.—Rev. Stat. 1897, chap. 161, § 11. A master may transfer his apprentice, with his consent, to any person who is competent to receive an apprentice, and who carries on the same kind of business.

British Columbia.—Rev. Stat. 1897, chap. 8, § 12. Same provision as in Ontario.

Manitoba.—Rev. Stat. 1902, chap. 108, § 4. Same provision as in Ontario.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 4. Indenture is not assignable without the apprentice's consent, certified by justice of the peace.

New South Wales.—Apprentices act 1901, § 14. The master or his executors may assign the indenture with the consent of the apprentice and two justices.

Victoria.—Master and apprentice act, 54 Vict. No. 1117, § 12. Same provision as in New South Wales.

⁴ *Com. ex rel. Fisher v. Leeds*, 1 Ashm. (Pa.) 405; *Com. ex rel. Stephenson v. Vanlear* (1815) 1 Serg. & R. 248; *Com. ex rel. Crispin v. Jones* (1817) 3 Serg. & R. 158. In the last cited case, Gibson, J., after stating that it is necessary that the minor should join the instrument by which the assignment is attested, proceeded thus: "I am of opinion, however, that the assent of all parties, requisite to give validity to the assignment of an indenture, should be certified by the justice, or at least expressed in writing before him, and attached to the instrument at the time of such assignment. What is the object of requiring the presence of a justice of the peace? Certainly not

The expression "void," which is used in the Delaware statutes to characterize assignments which are not made in conformity thereto, has been construed as importing "voidable."⁶ In the case cited below, the same construction seems to have been placed upon this word as used in the South Carolina statute. But the precise standpoint of the court in this regard is somewhat obscure.⁷

Where the apprentice refuses to serve under an assignment which is invalid by reason of the nonobservance of statutory requirements, the assignee is, in the absence of some special element, entitled to recover, on the ground of a failure of consideration, either the whole or a part of the price paid for the transfer of the contract.⁸

merely that he may be a witness, to prove the assent of the apprentice, parent, or guardian, in case that fact should be disputed; for any other witness of equal personal respectability, would answer the purpose quite as well; but his intervention is to be official, and should therefore be attested or certified in the same manner as any other official act. He is to receive the assent of the apprentice, and see that it is not extorted by the coercion or fraud of the master. This provision of the act was intended to afford the same protection to the apprentice that a separate examination does to a *feme covert* about to acknowledge a deed."

The assent of the parent or guardian must be certified by the justice, or at least expressed in writing before him, and attached to the instrument at the time of the assignment; and parol evidence will not be received to prove that the assent was given. *Com. ex rel. Crispin v. Jones, supra.*

An assignment of an indenture, made before an alderman, is valid. *Com. ex rel. Stephenson v. Vanlear* (1815) 1 Serg. & R. 248.

⁵ *Martin v. Rice* (1812) 2 Browne (Pa.) 191.

⁶ *Luby v. Cox* (1836) 2 Harr. (Del.) 184.

⁷ *Welborn v. Little* (1818) 1 Nott & M'C. 263. In that case one of the commissioners of the poor took away a poor apprentice from an assignee who was about to remove him from the state. Thereupon the assignee sued the assignor for the money paid in respect of the transfer of the apprentice's time, and was awarded one cent by the jury. A new trial asked for on the grounds that the consideration on which the

plaintiff had paid his money had failed, and that the jury were not at liberty to award a smaller sum than that which he had paid, was refused. The court said: "While the apprentice served under this indenture and assignment, irregular and illegal as it was, he incurred the duty, and was entitled to the rights, of an apprentice. *Reeve, Dom. Rel. 344, 345; Rex v. Stockland* (1779) 1 Dougl. K. B. 70, 71. The plaintiff had therefore a legitimate possession of him for the six or eight months which he remained in his possession, and is secured against any claim against him for those services at the suit of the apprentice. There is not, therefore, an entire failure of consideration." In this point of view it was considered that the assignor, although not entitled to recover the whole sum paid to the assignee, might legitimately have properly claimed a larger sum than that awarded by the jury, if the assignment had not been attended by improper incidents.

⁸ *Welborn v. Little* (1818) 1 Nott & M'C. 263 (note 7, *supra*); *M'Kee v. Hoover* (1824) 1 T. B. Mon. 32. In the latter case the assignee sued in equity, asking to be released of a judgment rendered against him for the amount of a note given in consideration of the assignment of certain indebted servants. Discussing the contention that, if he acquired no legal right to their services the consideration of his purchase had failed, and he ought not, in equity, to be compelled to pay, the court said: "It should be remarked, that the transfer was made of the indentures to Hoover, in the mode desired by him; and if, owing to any irregularity in that transfer, he has sustained an injury, the loss

2143. Assignment after the master's death.—*a. Rule apart from statute.*—The necessary result of the general rule that the covenant for service is dissolved by the master's death (see § 2210, *post*) is that an assignment of an apprentice after that event cannot be effected, unless it appears, in the first place, that the continued existence of the covenant has been provided for by an express stipulation, or may be implied from the operation of a special custom.¹ If a survival of the assignment is predicable on one or other of these grounds, the further question is presented whether the person who made the assignment was a person within the scope of the given stipulation or custom.² Finally, it is a condition precedent to the validity of an assignment that the assent of the apprentice to the transaction should be attested by a formal execution of the contract.³

In one case, where the actual decision was rendered with reference to a statute, the opinion was expressed that, even though the apprentice himself may be entitled to determine his relationship with the person to whom he has been assigned by the administrator of his deceased master, the assignment constitutes a good consideration at common law for a note given by the assignee for the value of the unexpired portion of his term.⁴

b. Rule as affected by statute.—Provision has been made in several jurisdictions for the transfer of apprentices, after the death of their masters, to the control of other persons.⁵ Under the principle of the maxim, *Expressio unius est exclusio alterius*, it is clear that pro-

should not fall upon M'Kee [assignor]. He received the indentures held by M'Kee, and accepted a reacknowledgment of them by the Germans, after the name of M'Kee was stricken out, and his substituted. By thus accepting and causing to be altered, the indentures, Hoover has deprived M'Kee of the means either of making a legal transfer or resuscitating his right to the service of the Germans, and ought not now to be permitted in a court of equity to throw the loss on him."

¹ By the custom of London the executors of a deceased master are required to put out his apprentice to another master in the same trade. Holt, Ch. J., in *Peck's Case* (1699) 3 Salk. 41. This rule was referred to in *Petrie v. Voorhees* (1867) 18 N. Y. Eq. 285.

² In *Kennedy v. Savage* (1812) 2 Brown (Pa.) 178, the right of the personal representative of the master to recover wages earned by working for the

assignee of the master was denied on the ground that the use of the word "assigns" in the contract did not invest the executors and administrators with the power of assignment.

³ In *Rex v. Channel* (1676) 3 Keble, 519, where the apprentice has merely attested his consent to the assignment by writing his name and words expressive of the consent upon an indenture of assignment entered into by the executors of his deceased master, it was held that, as he had not been made thereby a party to the instrument, no legal binding to the assignee had been effected, and that he was consequently not liable to be indicted for departing from the assignee's service.

⁴ *Shoppard v. Kelly* (1831) 2 Bail. L. 93. See subsec (b), note 9, *infra*.

⁵ *Alabama*.—Code 1907, § 2904 (504) (1482) (1741). On the death of the master of an apprentice judicially bound, the court must bind out the ap-

visions of this tenor constitute, in any jurisdictions in which they have been enacted, a special reason for applying the general rule as to the invalidity of an assignment of an apprentice during his master's lifetime.⁶

With reference to the Pennsylvania act, which empowers executors and administrators, if they are named in the indenture, to assign an apprentice of their decedent, it has been held that, where an apprentice is bound to a certain person and "his assigns," they have no authority either to receive his wages,⁷ or to assign him to another master.⁸

prentice again, giving the preference to the decedent's widow or other member of his family, if a suitable person.

Kentucky.—Stat. 1903, § 2597. Apprentice bound by county court may be bound out to another party after the master's death.

Louisiana.—Civ. Code 1900, art. 172 (166). If the heir or one of the heirs of the master be a man of the same condition, trade, or profession, he can cause himself to be authorized to take the place of the deceased with regard to the apprentice.

Maryland.—Pub. Gen. Laws 1904, art. 6, § 28. The widow of the master of a male apprentice, with the approbation of the parties by whom he was bound, may assign the residue of the term to some other person of the same trade as the first master.

Sec. 29. A female apprentice of a married man shall serve out the residue of her time with his widow.

New York.—Domestic relations law, § 126, Consol. Laws 1909, p. 1086. A poor apprentice may be assigned after his master's death.

Pennsylvania.—Brightly's Purdon's Dig. *Apprentices*, § 14. The executors or administrators of a deceased master, provided that the indenture extends specifically to them, have the right to assign over the remainder of their term to such a suitable person, of the trade and calling mentioned in the indenture, as shall be approved by the court of quarter sessions (act of April 11, 1799, § 2).

South Carolina.—Gen. Stat. 1882, § 2075, Rev. Stat. 1894, § 2208. After the master's death the residue of the term of an apprentice indented to serve executors or assigns is assets in the hands of the master's executor or administrat-

or, and he may retain the apprentice in his service if he carries on the same trade, calling, etc., as the master.

Ontario.—Rev. Stat. 1897, chap. 161, § 10. If the master dies the apprentice, if a male, shall, by act of law, be transferred to the person, if any, who continues the establishment of the deceased, and such person shall hold the apprentice upon the same terms as the deceased, if alive, would have done.

British Columbia.—Rev. Stat. 1897, chap. 8, § 11. Same provision as in Ontario.

Manitoba.—Rev. Stat. 1902, chap. 108, § 3. Same provisions as in Ontario.

New South Wales.—Apprentices' act 1901, § 14. Executors of deceased master may assign indenture with consent of the apprentice and two justices.

Victoria.—Apprentices' act, 54 Vict. No. 1117, § 1. Same provision as in New South Wales.

⁶ This was the *ratio decidendi* in *Handy v. Brown* (1810) 1 Cranch, C. C. 610, Fed. Cas. No. 6,019, defining the effects of the Maryland provision authorizing an assignment of the time of an apprentice for the benefit of the master.

⁷ *Kennedy v. Savage* (1812) 2 Browne (Pa.) 178.

⁸ *Com. v. King* (1818) 4 Serg. & R. 109. The court said: "The binding in this case is not such as the act describes; and to construe the words 'heirs and assigns' as being equivalent to executors and administrators would make a new contract for the parties, and, in most cases, defeat their actual intention. The contract is, in its nature, fiduciary on the part of the master. The personal confidence reposed in him, is one (perhaps the chief) ingredient in the consideration of the contract; and,

In South Carolina it has been held that the administrator of a deceased master may maintain an action of assumpsit upon a note given in consideration of his assigning to the promisor the unexpired time of the apprentice.⁹

2144. Assignment as an incident of proceedings in bankruptcy or insolvency.—By the English bankruptcy act 1883, chap. 52, § 41 (2), it is provided that the trustee may, on the application of any apprentice or articted clerk to the bankrupt, or any person acting on behalf of such apprentice or articted clerk, transfer the indenture of apprenticeship or articles of agreement to some other person, instead of discharging the contract altogether, the alternative course authorized by the statute. A similar provision is inserted in the New South Wales bankruptcy act 1887, § 49 (2), and in the Victoria insolvency act 1890, § 116.

however willing a parent or guardian may be that the apprentice shall be assigned by the master himself, in whose integrity and discretion they have confidence, or remain with his family after his death, yet they may, with reason, be unwilling to delegate the same authority to his executors or administrators, who may be strangers to them, or persons wholly unworthy of their confidence. The act confers an authority unknown to the common law, and we must adhere strictly to its words. But, were it otherwise, the executor acquires no interest in the residue of the term; he has a naked authority to assign with the approbation of the court, and in the meantime he is entitled to the custody of the apprentice, and cannot exercise any personal authority over him. The power delegated by the act must be exercised in a reasonable time, under all the circumstances of the case; otherwise the apprentice will be at liberty to provide for himself. Here the executors, even if the term had extended to them, have not exercised the authority in the manner prescribed; and Letitia King cannot, by their authority and direction, exercise a power which they have not."

⁹ *Shoppard v. Kelly* (1831) 2 Bail. L. 93. The court argued thus: "Such an assignment, then, would not, at common law, be a nullity; it would transfer the unexpired time of the apprentice, subject to be determined if he did not choose to continue with the assignee,

and might no doubt be a consideration for an assumpsit. . . . Independently, then, of our statute of 1740, this note would have been given on a sufficient consideration. That statute provides that the unexpired time of the apprentice shall be assets in the hands of an executor or administrator. If the statute had stopped here, no doubt the executor or administrator might have assigned in any manner he might have thought proper. It goes on to provide, however, that the apprentice's time may be assigned with the consent of two justices of the peace of the county in which the assignee resides. What the consequence shall be if the assignment is made in any other manner, the act does not declare. It does not declare that the assignment on the indentures shall be void. I cannot suppose that the assignment has less effect than at common law, to transfer the right to the unexpired term of the apprentice, subject to be determined if he shall not choose to continue with the assignee. At all events, the assignment must be good against the administrator himself; he could not reclaim the apprentice or bring an action for his earnings. This is a prejudice to him which makes a consideration. The assignee received a right to the apprentice's time if he should choose to continue with him. This may seem a very precarious benefit; but the chance of benefit is a consideration."

2145. Special rules applicable to poor apprentices.—a. In England.

—Prior to the enactment of 32 Geo. III. chap. 57, § 7, a master could not discharge himself from the obligation to maintain a parish apprentice, by assigning him to another person; nor were the apprentice and the new master subject to the ordinary jurisdiction of the justices with respect to masters and parish apprentices.¹ By § 7 of that statute the master was enabled to discharge himself by assigning the apprentice, with the consent of two justices.² The consent of two justices was also made a prerequisite to the validity of an assignment under § 9 of 56 Geo. III. chap. 139.

By § 2 of 32 Geo. III. chap. 57, it was provided that two justices should have power to direct a poor apprentice, after his master's death, to serve his widow, son, etc., or his executor or administrator, for the residue of the term.³

b. In the United States.—The assignment of an apprentice bound by the overseers of the poor is valid, if made with the assent of the overseers. His own assent is not necessary.⁴

In some jurisdictions there are special statutory provisions relative

¹ *Rea v. Barleston* (1822) 5 Barn. & Ald. 780. This statement seems to be inconsistent with the decision in *Rea v. Barnes* (1715) 1 Strange, 48, to the effect that the covenant to provide for a poor apprentice is well performed if the original master assigns him to another person.

² In *Rea v. Barleston*, note, 1, *supra*, the assignment was held to be invalid on the ground that the justices had not given their consent.

In *Rea v. Spreyton* (1832) 3 Barn. & Ad. 818, 1 L. J. Mag. Cas. N. S. 79, the master of a parish apprentice being resident abroad (where he had remained some years), his steward assigned the apprentice by a written instrument signed, "Lord Viscount C. (the master), by J. P. his steward J. P. had no special authority to assign this or any apprentice, but he had occasionally made such assignments during Lord C's absence, and had been allowed the expenses in his account. The assignment was in other respects regular. The steward paid the new master 5, which was allowed in his account by Lord C. as usual. For reasons thus explained by Lord Tenterden, Ch. J., it was held that no settlement had been gained under the assignment; "It is not expressly said that the master assigning the ap-

prentice shall himself sign the instrument; but I do not see how it could be valid unless he did, and the form given in schedule (D) purports to be so signed. But, assuming that a person duly authorized by the master might execute the assignment, we think that, in this case, no sufficient authority is shown. The master ought, at all events, to exercise his own discretion as to the making of the assignment. Here no discretion was exercised on his part. There is no proof of any direction given by him: it only appears that, after the assignment was made, he allowed the expenses of it in his steward's account. We think that is not equivalent to a distinct authority from Lord Courtenay to the steward to execute this instrument for him."

³ In *Rea v. Sheepshead* (1812) 15 East, 59, it was held that no settlement had been gained by serving under the assignee, because the direction of the justices had not been indorsed on the indenture within three months, as required by the act.

⁴ *Phelps v. Culver* (1834) 6 Vt. 430 (evidence that apprentice had, after the assignment, become unwilling to serve his new master, was held to have been properly rejected).

to the manner in which the assignment of poor apprentices is to be effected.⁵

2146. Service under a second master without a formal assignment of the contract, settlement, when gained by. English decisions reviewed.—The doctrine applied in a large number of English cases is that, without any formal assignment of the contract, an apprentice may gain a settlement by service under a second master, if the following facts are shown:

(1) That the arrangement under which the given service was performed was consented to by himself, by the master, and by the party or parties, if any, who executed the indenture in his behalf.¹ So far as the consent of the master is concerned, it must be, with respect to the new services in question, "particular,"² or, as it is

⁵ The effect of § 126 of the New York domestic relations law is as follows: An apprentice bound by poor officers may be assigned, with his written and acknowledged consent, by the master's personal representatives, and, without his consent, by the county judge, upon proof that fourteen days' notice has been given to him, to the poor officers, and his parents or guardian, if in the country. (Bank's Rev. Stat. 7th ed. p. 1907, § 39.)

¹ In *Rex v. East-Bridgeford* (1740) Burr. Sett. Cas. 133, 2 Strange, 1115, the court observed that an assignment of an apprentice is not considered as a strictly legal transaction, because the person of a man is not strictly and legally assignable; but that it had been an equitable construction "that where the apprentice has lived forty days under an assignment he shall thereby gain a settlement, because of the consent."

In *Rex v. Stockland* (1779) 1 Dougl. K. B. 70, Lord Mansfield remarked: "Though an apprentice is not strictly assignable, nor transmissible, yet if he continue with the consent of all parties and his own, it is a continuation of the apprenticeship." In that case the assent of the master's executors was held to be sufficient.

"The authorities show that where a party has been bound apprentice in one parish, and expressly permitted by his first master to work for another in a different parish, the service to the second master is constructively a service under the indenture, and that the original binding continues in force during the whole period of such service." Lord

Denman, Ch. J. in *Rex v. Banbury* (1833) 5 Barn. & Ad. 176.

For cases in which the presence or absence of the element of the master's consent was adverted to as a material element, see *Holy Trinity v. Shoreditch* (1717) Strange, 10, 2 Bott. Poor Law, 405; *St. Olave v. All-hallows* (1723) 8 Mod. 169, 1 Strange, 554, 2 Bott. Poor Law, 406; *Rex v. St. George Hanover Square* (1734) Burr. Sett. Cas. 12; *Rex v. Allhallows* (1736) cited in Viner's Abr. *Apprentice*, K., 21; *Rex v. Clapham* (1747) Burr. Sett. Cas. 266; *Rex v. Mary Kallendar* (1748) Burr. Sett. Cas. 274; *Rex v. Fremington* (1757) Burr. Sett. Cas. 416; *Rex v. St. Luke's Middlesex* (1765) Burr. Sett. Cas. 542; *Rex v. Sanford* (1786) 1 T. R. 281 (no settlement gained where services under the second master were rendered under the impression that the indentures had been relinquished by the first master); *Rex v. St. Paul's Bedford* (1796) 6 T. R. 452; *Rex v. Barnsley* (1813) 1 Maule & S. 377; *Rex v. St. Outhbert* (1834) 5 Barn. & Ad. 939, 3 Nev. & M. 100, 3 L. J. Mag. Cas. N. S. 35; *Rex v. St. Martin's* (1835) 2 Ad. & El. 655, 1 Harr. & W. 69, 4 Nev. & M. 385, and the cases cited below.

In *Rex v. Tavistock* (1767) Burr. Sett. Cas. 578, a settlement was held to have been gained by an apprentice who had served with a master to whom he had been transferred by the person to whom his original master had assigned him.

² *Rex v. Fremington* (1757) Burr. Sett. Cas. 416 (no settlement gained where master merely gives his appren-

defined in some cases, "express."³ It is sufficient, if given after the commencement of the second service.⁴ But it does not relate back, where the master gives it, upon casually hearing of the service, after the time when the settlement claimed should have been complete.⁵ It need not be attested by writing.⁶ It may be implied from circumstances.⁷ But it cannot be inferred from the mere fact that the master knows that the apprentice is working for another person.⁸

(2) That the service under the second master was "in pursuance of" the original contract, and, in some way or other, in furtherance of the object of the apprenticeship.⁹ If the service answers

tice a general license to serve whom he will; *Rex v. St. Luke's* (1765) Burr. Sett. Cas. 542, 1 W. Bl. 553 (no settlement gained by service under a second master, where the original master had simply told the apprentice that he might "go about his business, and do what he pleased"); *Rex v. Crediton* (1800) 1 East, 59; *Rex v. Shebbar* (1800) 1 East 73; *Rex v. St. Helen Stonegate* (1801) 1 East, 285; *Rex v. Ashby de-la-Zouch* (1818) 1 Barn. & Ald. 116; *Rex v. Whitechurch* (1823) 1 Barn. & C. 574; *Rex v. Maidstone* (1836) 5 Ad. & El. 326, 6 Nev. & M. 545, 5 L. J. Mag. Cas. N. S. 119.

³ *Rex v. Holy Trinity* (1790) 3 T. R. 605; *Rex v. Banbury* (1833) 5 Barn. & Ad. 176, 181, 2 Nev. & M. 105, 2 L. J. Mag. Cas. N. S. 66; *Rex v. Sandhurst* (1837) 6 Ad. & El. 130, 138, 1 Nev. & P. 296, W. W. & D. 34, 6 L. J. Mag. Cas. N. S. 57.

⁴ *Rex v. Bradstone* (1787) 2 Bott, Poor Law, 422.

⁵ *Rex v. Maidstone* (1836) 5 Ad. & El. 326, 6 Nev. & M. 545, 5 L. J. Mag. Cas. N. S. 119.

⁶ *Rex v. East-Bridgeford* (1739) Burr. Sett. Cas. 133, 2 Strange, 1115. In *Rex v. Langham* (1782) Cald. 126, 1 Bott, Poor Law, 612. This rule is taken for granted in most of the cases cited in this section.

⁷ *Rex v. Bradwinch* (1770) Cald. 461, 2 Bott, Poor Law, 199; *Rex v. St. Mary, Lambeth* (1785) Cald. 533, 4 Dougl. K. B. 329, 2 Bott, Poor Law, 419 (assent held to have been established where the original master had given the apprentice a character, for the purpose of inducing the second master to take him).

In *Rex v. Barleston* (1822) 5 Barn. & Ald. 780, a written assignment of a

parish apprentice, although it was not made with the consent of two justices, as prescribed by 32 Geo. III. chap. 57. § 7, was held to be sufficient to show the consent of the first master to the service with the assignee.

⁸ *Rex v. Ideford* (1776) Burr. Sett. Cas. 821.

⁹ In *St. Olave's v. All-hallows* (1723) 3 Burn's J. P. 333, 8 Mod. 169, 2 Salk. 479, 2 Bott, Poor Law, 406; where it had been verbally agreed that the apprentice should serve out the rest of his term with another master in another parish, the decision that he had gained a good settlement in the second parish was put upon the ground that it was "still intended that he served his master upon the agreement, and that it was but a continuance of the apprenticeship." See also *Rex v. St. Petrox* (1745) Burr. Sett. Cas. 248, where a settlement was allowed on the ground that the second service "continued under the first binding."

In *Rex v. Chipping Warden* (1799) 8 T. R. 108, Lord Kenyon, Ch. J., observed: "It is clear that in general an apprentice is not capable of contracting the relation of servant to any other master, until the end of the term for which he was bound. But it is equally clear that if the master and apprentice put an end to the apprenticeship by mutual consent, it is the same as if the indentures had never been executed; and the latter may gain a settlement by hiring and service with any other master before the expiration of the time which he was bound to serve as an apprentice. Then there is a third case: That where the apprentice leaves his master, and enters into the service of another, if the indentures still subsist he is not sui

this description, it is immaterial whether the second master did or did not know of the existence of the apprenticeship.¹⁰ At most, his

juris, but is incapable of gaining a settlement by serving another master, unless he serve with the consent of his former master; and in such case he gains a settlement, not as an hired servant, but as an apprentice. These are axioms in this branch of settlement law, and cannot now be called in question."

In *Rex v. Banbury* (1833) 5 Barn. & Ad. 176, a pauper was bound apprentice for seven years to a breeches-maker, and served his master half a year. The latter then failed in business, and told the pauper he might go and work for one B., who lived in another parish, and if pauper did not become troublesome to him, the first master, or to his parish, till the end of his time, he would give pauper his watch. The pauper agreed with B., and worked for him at breeches-making, by the piece, at the usual rate. B. frequently carried messages between the first master and the pauper. The latter having worked for B. a year, in B's parish, agreed (with the consent of his first master) to work by the piece for C., another breeches-maker living in a third parish, who gave him better terms. While he so worked with C. his first master came to see him, and again promised him his watch at the end of his time. The pauper worked two years for C., living in C's parish; he afterwards left, and his first master then sent him his watch. The pauper kept his earnings and maintained himself. Held, (*Parke J. dissentiente*), that the inhabitation of the pauper in the parishes of the second and third master was connected with the apprenticeship, and that he thereby gained settlements in those parishes." Patteson J., observed: "In these cases small circumstance are laid hold of in each particular instance; but I should say, in general, that whenever the original contract continues, and the apprentice, with the consent of the first master, works at a trade with a view to be taught that trade, he must be considered as living with the person under whom he so works, in the character of an apprentice."

In *Rex v. Sandhurst* (1837) 6 Ad. & El. 130, it was held (1) that the service with the second master, since it was

an express oral contract that he was to board and lodge the pauper and to teach him his trade, being the same trade as the first master carried on, was so far in furtherance of the indenture, as that the two objects of that indenture, namely, the maintenance and teaching of the apprentice, were provided for; and (2) that, as it had been expressly agreed between the first master, the pauper, and his father, that the indenture should not be given up, and the instrument had, in point of fact, not been given up until long after the expiration of service under the second master for the period required for gaining a settlement, "the service to the second master was under the indenture, the relation of master and apprentice still subsisting between them, and the covenants in the indenture being performed on both sides by the teaching and maintaining by, and the service with, the second master."

In *Rex v. Offerton* (1775) Burr. Sett. Cas. 802, it was held that an agreement between a master and a parish apprentice that the apprentice should work when he pleased on his own account, and pay the master so much a week in satisfaction of his services, did not operate as dissolution of the indenture.

But no settlement is gained where the master tells his apprentice that "he may go where he pleases," and gives up his indentures (*Rex v. Norton* [1768] Burr. Sett. Cas. 629, 2 Bott, Poor Law, 412); nor where, the master being dead, his widow tells the apprentice that he must not stay with her, and that he is at liberty to work where he thinks proper (*Rex v. Chirk* [1774] Burr. Sett. Cas. 782); nor where the service under the second master is under a new indenture, without reference to a recognition of the original indenture. (*Rex v. Christowe* [1809] 11 East, 95, new indenture here was executed by original master: *Rex v. Ecclesfield* [1817] 6 Maule & S. 173); nor where work for a third person is done under a contract of hiring, and not under the original indenture (*Rex v. Shipton* [1828] 8 Barn. & C. 88, 6 L. J. Mag. Cas. 92).

¹⁰ *Rex v. Sandhurst* (1837) 6 Ad. & El. 130. Lord Denman, Ch. J. said: "Upon examination of the older cases

ignorance of that fact constitutes evidence which tends to show that the service under him was unconnected with any apprenticeship.¹¹

The true question in all cases of this type is merely "whether the service to the second master is a constructive service to the first master under the indenture, as between him and the apprentice."¹² The transfer of the service does not operate so as to pass an interest in the apprentice, but amounts to a contract, which is good by way of covenant, as between the assignor and the assignee.¹³

2147. Same subject. American cases reviewed.—The doctrine explained in the preceding section has been followed in New Jersey,¹

upon this subject, it will be found that in some of them the second master did know the fact; in others it may be doubtful whether he did or did not; but in none of them is such knowledge expressly negatived. No point is, however, made in any of them upon the knowledge or ignorance of the second master, until the case of *Rex v. Ashby-de-la-Zouch* [(1817) 1 Barn. & Ald. 116] followed up by *Rex v. Whitechurch* [(1823) 1 Barn. & C. 575]; but neither of these cases turns upon that point, inasmuch as in the former the sessions negatived the consent of the first master to the particular service, which is clearly necessary; and in the latter such consent was plainly never given. In the subsequent case of *Rex v. Banbury* (1833) 5 Barn. & Ad. 176, 2 Nev. & M. 105, 2 L. J. Mag. Cas. N. S. 66, it seemed doubtful whether the second master knew the fact, and the court differed in opinion, both as to the fact of knowledge, and its materiality. It can hardly be said, upon these authorities, that there is any clear and express decision upon this point. . . . Here the residence was in furtherance of the object of the apprenticeship, viz., maintenance and teaching; it was in pursuance of the contract; for the first master, having no employment, consented to the service with the second, that by his means he might perform his covenant; for, having been partially taught by the first master, he is permitted to go to the second to have his education completed under the indenture. Of what consequence, then, can it be, whether the second master knew that the pauper was an apprentice? What difference would such knowledge have made in the situation or relation of the parties? None whatever. It

could not have created the relation of master and apprentice between the second master and the pauper; such relation could only be created by a regular assignment of the indenture (even supposing, for the purpose of the argument, that such would be the effect of an assignment of any other than a parish apprentice), or by cancellation of it and a new binding by another; it never subsisted, nor was intended to subsist, between the second master and the pauper, but continued uninterrupted between the latter and the first master."

¹¹ See the remarks of Lord Denman at p. 142 of his judgment in *Rex v. Sandhurst*, *supra*.

¹² Lord Denman, Ch. J., in *Rex v. Sandhurst* (1837) 6 Ad. & El. 130.

¹³ *Coister v. Eccles* (1702) 1 Ld. Raym. 683, Salk. 68, 1 Wils. 96, 12 Mod. 553. According to the first mentioned of these reports, Lord Holt observed: This assignment is a good agreement between the first and second master, that the apprentice should serve the time with the second. And so it is a service as apprentice, and so makes a good settlement."

¹ For a case in which a settlement was held to have been gained, see *Kingwood v. Bethlehem* (1832) 13 N. J. L. 221.

In *Trenton v. Nottingham* (1795) 1 N. J. L. 289, where it was shown that the pauper had entered into a new contract, and received wages from the second master, it was held that he had not worked under the original contract, and consequently that no settlement had been gained with reference to that contract.

In *Orange v. Springfield* (1834) 14 N. J. L. 321, the evidence showed that a proposition had been made by one

and in New York,² and possibly in Pennsylvania.³ But in an early Massachusetts case, in which the general doctrine that an apprentice cannot be assigned by his master without the observance of certain formalities was affirmed, the court confessed its inability to "extract any consistent principle" from the English authorities.⁴ It is somewhat remarkable that so learned a tribunal should have failed to comprehend the obvious distinction between cases which involve the validity of an assignment of the contract, and cases in which the fundamental assumption is that the original master has never divested himself of the obligations of that contract. The two classes of cases have quite properly been associated with different juristic incidents.

2148. Effect of apprentice's enlistment in the Army.—In a case where an apprentice who had enlisted in the Army as a substitute for his master's son sued his master for damages on the ground of his having been wrongfully enlisted, his claim to be awarded as damages the price of a substitute was rejected on the ground that his master was entitled to his services until the expiration of the stipulated term.¹ But it has been held that an apprentice who en-

S. to be security for the payment of \$40, if M., the master, "would give up the balance of a poor apprentice's time;" and that M. had agreed to this, and sold his time, not to S., but to the person for whom S., was security. The court said: "Here then, so far as could be done by the master and the apprentice, was a dissolution of the relation that subsisted between them. It is true, this transaction, so far as concerned the town, and, it may be, the apprentice too, was an illegal one. The indenture was still in force; and therefore, if the master had made a turn-over of the apprentice to Smith, or had understood and agreed, as part of the bargain, that he should serve Smith as an apprentice, the law would have considered the service with him as under the indenture, and so giving a settlement in Springfield. But instead of such a transfer or agreement, Matthews expressly testifies 'that nothing was said about the apprentice continuing to learn the trade, or with whom he was to work, or what he was to do.' He discharged him, and made no provision for his future service." The conclusion was that no settlement had been gained by service under the new master, the object of the apprentice

and his father being "to get clear of the apprenticeship."

² *Guilderland v. Knox* (1826) 5 Cow. 363, (apprentice held to have gained a settlement although the agreement between the two masters was not in writing.

³ In *Reading v. Cumree* (1812) 5 Binn. 81, where the right to settlement under a special act with reference to "indentured servants" imported from Europe was the actual point involved, the court expressed the opinion that, for the purpose of gaining a settlement, service with an assignee of the original master would be as effectual as service with the original master himself, although the assignment was formally defective. This ruling was somewhat influenced by the terms of the act in question. But it indicates a position similar to that taken with regard to apprentices in England. In fact the English authorities were relied upon.

⁴ *Davis v. Coburn* (1811) 8 Mass. 299. See § 2139, note 3 *ante*. The doctrine of that case has been referred to with approval in *Allison v. Norwood* (1853) 44 N. C. (Busbee, L.) 414.

¹ *Gent v. Cole* (1873) 38 Md. 110. Discussing the admissibility of certain evidence offered by the plaintiff as bear-

lists as a substitute is entitled to maintain against the person whose place he takes an action for the value of his services as a substitute.²

The enlistment of a minor apprentice with the consent of his master is not a transaction which constitutes a breach of a covenant not to assign him.³

ing upon the amount of damages which he supposed himself entitled to recover, the court said: "The plaintiff was seventeen years of age at the time he entered the Army, in 1864, as a substitute for the son of the defendant. He was at the time an apprentice to the defendant, and, of course, owed him service until twenty-one years of age. He was not at liberty to enlist in the Army against the consent of his master and it is somewhat difficult to perceive upon what principle he can claim to recover of the defendant the price of a substitute for the son, in this action. By entering the Army he absolved himself from his apprenticeship, and ceased to owe service to the defendant, and, as a soldier of the United States, he became entitled to receive, and, as we must presume, did receive, the regular pay of a soldier for the time of his service. . . . Here it does not appear whether the plaintiff was wounded either in body or mind by his service in the Army, and as the time of such service was embraced within the term of his apprenticeship, we are at a loss to understand how the price of substitutes, fixed and regulated by substitute brokers, could have furnished the jury with any proper criterion for assessing damages for any loss sustained by the plaintiff, in respect of either time or property, for which he could claim to recover in this action."

² *Turner v. Smithers* (1867) 3 Houst. (Del.) 430 (nisi prius case). "There a minor apprentice entered the military service, as a substitute for a drafted man, with the consent of his master, the father-in-law of that man, for the sum of \$20, paid to him at the time of so entering it. Held, that, being an infant, he was not bound by the agreement; that, being still under the age of twenty-one years when suit was brought against the drafted man, to recover the value of his services as such, not only was he incompetent then to confirm or ratify the agreement, but he had, by bringing the suit, thereby made his election, before attaining his major-

ity, to repudiate and avoid it." Held, also, that the agreement between the drafted man and the master, which was to the effect that in consideration of his consenting to be enlisted as a substitute, the master should receive the \$500 to be paid by the state to aid such drafted man in procuring a sufficient substitute, and that the plaintiff should be paid by him but \$20 for becoming his substitute, was in contravention of the meaning, object, and policy of the statute of the state in such case made and provided.

³ *Com. v. Barker* (1813) 5 Binn. 423 (proceedings upon a writ of habeas corpus prosecuted by managers of the almshouse who had bound the apprentice). The court said: "By the act of Congress of the 11th of January, 1812, it is provided that no person under the age of twenty-one years shall be enlisted or held in the service of the United States 'without the consent in writing of his parent, guardian, or master first had and obtained, if any he have.' The managers of the almshouse derive their authority from an act of assembly of Pennsylvania. The indenture contains an engagement on the part of the master not to assign it without the consent of the managers. I do not consider the master's consent to the boy's going into the Army as an assignment of the indenture. Still, it would be unwarrantable unless justified by the act of Congress. In the first place, then, this act is to be considered. There is no affirmative direction as to the age of the persons to be enlisted. But from the proviso which I have mentioned, there can be no doubt of an intention to authorize the enlistment of minors, with the consent of their parents, masters, or guardians. If the minor has a parent living, and is not bound to a master, the consent of the parent is necessary; if the parent is dead, and there is a guardian, his consent must be obtained. But whether there be a parent or guardian, if the minor is bound to a master, the consent of the master alone is sufficient."

I. RIGHTS AND OBLIGATIONS OF THE MASTER.

2149. Right of control. Generally.—It is one of the essential incidents of the relation existing between a master and an apprentice, that the former, whether an adult or a minor, shall be entitled to control the latter in respect of the details of the work with reference to which the contract is made. The existence of this right necessarily results from the fact that an apprentice is merely one particular description of servant. But, so far at least as an apprenticeship which involves residence in the master's household is concerned, the relation between a master and a minor apprentice differs from the relation between a master and a minor servant in one important respect, *viz.*, that the master stands with respect to such an apprentice *in loco parentis*.¹ He is consequently invested with powers of control over the apprentice in regard to many matters which, generally speaking, are treated as lying outside the sphere of the authority which is wielded by the employer of an ordinary servant. In this point of view his powers are not confined to the supervision of the apprentice during the hours of work. He is not merely entitled, but bound, to direct the apprentice in so far as it may be requisite for the purpose of regulating his moral and physical education upon a proper footing. The limits of this right and its correlative obligation must, as it would seem, be ascertained with reference to the same standard and considerations as those which are controlling in the case of a guardian. But the decisions afford very little information upon the subject.²

2150. Rights in respect of the reclamation of the apprentice.—A master is entitled to take an apprentice out of the hands of any person who has obtained control of his person.¹ The enactment of a statute creating special summary remedies for enforcing perform-

¹ This aspect of the relationship is adverted to in *Com. ex rel. Gear v. Conrow* (1845) 2 Pa. St. 402. apprentice is discharged. *Com. v. Farley* (1845) 3 Clark (Pa.) 49. *Ibid.*

² It has been laid down by the Philadelphia court of quarter sessions that neither parent, guardian, nor master, has a right to exercise any arbitrary control over an infant as to his religious principles; and that if an apprentice, while he is of a tender age, is sent to the church where the master and his family worship, and is put under the Sabbath School instruction in that church, the master's duty in respect of the religious instruction of the

See also the cases cited in § 2158, *post*, as to the general education of the apprentice.

¹ In *Com. v. Kerr* (1797) Addison (Pa.) 324, where the defendant was indicted for assaulting the plaintiff, who had entered his house for the purpose of reclaiming a runaway apprentice, in pursuance of an advertisement published by the master, the judge stated in his charge to the jury that "at common law a master had a right to take up his runaway servant; and for this,

ance of the contract does not abrogate this right.² The reclamation of the apprentice may also be effected by suing out a writ of habeas corpus and obtaining an order for his delivery to the petitioner.³ But such an order will not always be granted, even when the contract is perfectly valid in all respects.⁴

2151. Rights in respect of the chastisement of the apprentice.—

In § 242, *b*, *ante*, it has been shown that, although the power of the master to inflict moderate chastisement upon a defaulting servant was formerly recognized as an ordinary incident of all contracts of service, it has become entirely obsolete except as regards seamen. But, so far as appears from the authorities, apprentices are in every jurisdiction still legally liable to be corrected in this manner.¹ The

as for any lawful purpose, might enter peaceably into any house, unless forbidden by the owner.”

That a master could reclaim his apprentice if he enlisted, was held in *Wright v. Lumsden* (1742) Morison's Diet. 586.

By the English army act, 44 & 45 Vict. chap. 58, § 96, a procedure is appointed by which a master may reclaim a minor apprentice who has enlisted in the regular army.

The clause of the United States Constitution, and the provisions of the act of Congress 1793 (1 Stat. at L. 302, chap. 7, U. S. Comp. Stat. 1901, p. 3597) and 1850 (9 Stat. at L. 462, chap. 60), providing for the surrender of persons held to labor, is construed as including apprentices who abscond from the state where they were bound. *Boaler v. Cummins* (1853) Fed. Cas. No. 158.

² *Com. v. Kerr*, note 1, *supra*.

³ *Com. v. Beck* (1811) 1 Browne (Pa.) 277.

⁴ In one case the court refused to entertain a proceeding begun on petition for an order to show cause, procured at the instance of an attorney in fact of the father of a colored jockey who was under age, the object of the petitioner being to get possession of the boy for purposes of gain, without regard to his interests. The grounds of the refusal were that all the parties were nonresidents, and that the laws of the state of their residence (Louisiana) as to contracts of apprenticeship were involved and were disputed, and that conflicting contract rights might arise which could be determined only by the laws of that state. *Reiss v. Plicque* (1904; Sup. Ct. M. & S. Vol. VI.—410.

Spec. Term.) 42 Misc. 350, 86 N. Y. Supp. 704.

¹ *Gylbert v. Fletcher* (1630) Cro. Car. 179 (master may “correct” apprentice); *Phillips v. Clift* (1859) 4 Hurlst. & N. 168 (right recognized by Watson, B., *arguendo*); *Matthews v. Terry* (1835) 10 Conn. 455; (right recognized by court, *arguendo*); *Day v. Everett* (1810) 7 Mass. 145 (court observed, *arguendo*, that binding subjects apprentice to “reasonable personal correction for his faults”); *Jones v. St. Louis, N. & P. Packet Co.* (1891) 43 Mo. App. 398 (right recognized by court, *arguendo*); *Com. v. Baird*, 1 Ashm. (Pa.) 267 (cases of hired servants and apprentices were contrasted).

“A master may by law correct his apprentice for negligence or other misbehavior, so it be done with moderation.” 1 Bl. Com. *428, citing 1 Hawk. P. C. 13. This statement was quoted in *M'Knight v. Hogg* (1812) 3 Brev. 44.

The effect of the earliest English authorities is shown by the following extracts from Umer's Abr. vol. 15, *Master & Servant*, p. 319: “A man may beat his apprentice for an offense, as well in the vill where he is apprentice as in another vill, and may beat him twice for one and the same offense; for it may be that the first beating is not sufficient for the offense. Per Fairfax, J., but Spilman *e contra*, Ibid., pl. 353, cites 21 E. 4, 53.”

“In trespass it was doubted if the master may strike his apprentice by way of correction, or shall be put to writ of covenant; *quære* of correction of other servants within age. Brooke, *Trespas*, pl. 349, cites 21 E. 4, 6.”

power thus vested in the master has been compared to the similar right which a parent possesses in respect of his children.² In some of the American states, provisions which embody the common-law rule have been enacted.³

The infliction of excessive punishment amounts to a tortious assault and battery, which constitutes a good cause of action for damages,⁴ and also a valid reason for repudiating the contract,⁵ or for its judicial annulment.⁶ Similar remedies are available in cases

The Scotch doctrine is the same as that of the English and American courts. *Erskine*, Law of Scotland, 2, 7, 62; *Fraser*, Mast. & S. p. 363, citing *Forbes v. Dickson* (1708) 4 Sup. 708; *Smart v. Gairns* (1794) Hume, 18; *Wights v. Burns* (1883) 11 Sc. Sess. Cas. 4th Series, 217, 21 Scot. L. R. 160.

That the power of chastisement cannot be delegated to a foreman was held in *People v. Philips* (1823) 1 Wheeler, C. C. 158.

² *M'Knight v. Hogg* (1812) 3 Brev. 45; *Percival v. Nevill* (1819) 1 Nott & M'C. 452.

³ *Alabama*.—Code 1907, § 2902 (502) (1480) (1739). The master may inflict moderate corporal chastisement.

Georgia.—Code 1895, § 2600 (1880). The master shall govern the apprentice with humanity, using only the same degree of force to compel obedience as a father may use with his minor child.

Louisiana.—La. Civ. Code, Voorhies ed. 1889, art. 173 (167). A man may correct his indented servant or apprentice for negligence or other misbehavior, provided he does it with moderation, and does not make use of the whip; but he cannot exercise this right with those who only let their services. The words italicised seem to have been inserted in consequence of the decision in *Mitchell v. Armitage* (1833) 10 Mart. (La.) 38. See note 6, *infra*.

Montana.—Rev. Code, 1907, § 8316 (404) subs. 4. Force or violence upon the person of another is not unlawful when committed in the exercise of a lawful authority by a parent, guardian, master, or teacher, to correct his child, ward, apprentice, or pupil, and the force or violence is reasonable in manner and moderate in degree.

Texas.—Rev. Stat. 1895, *Apprentice*, art. 32. The master may inflict moderate chastisement.

⁴ *Penn v. Ward* (1835) 2 Crompt. M.

& R. 338, where the actual point discussed was whether on the pleadings, as they stood, the fact that the chastisement in question was excessive could be shown.

In *Wights v. Burns* (1883) 11 Sc. Sess. Cas. 4th Series, 217, the law was laid down as follows, by Lord Young: "The captain of a ship is undoubtedly entitled to chastise his apprentice, and a court of justice cannot review his judgment so as to determine whether he was right or wrong, provided always that his act is truly of that character,—is truly an act of chastisement of an apprentice by him as a captain chastising an apprentice for misconduct, and is not an act of cruelty for his own gratification under cover of his character as captain."

⁵ In *McGrath v. Herndon* (1827) 4 T. B. Mon. 480, an action against a father for the breach of a covenant that his son should serve for a specified period, it was held to be a good plea that the master drove his son away by cruel treatment.

In *Berry v. Wallace* (1834) Wright (Ohio) 657, evidence regarding the treatment which had induced an apprentice to leave was held to be competent in an action against a guardian.

That excessive chastisement will liberate an apprentice from his indentures was laid down in the Scotch case of *Smart v. Gavins* (1794) Hume, 18.

⁶ *Mitchell v. Armitage* (1821) 10 Mart. (La.) 38. There the court refused to annul the indenture, although the apprentice had been beaten severely with a cowhide whip. The treatment was said to be so severe that it should not be countenanced, but not so severe as to justify a discharge of the contract. This decision was treated as controlling in *Versailles v. Hall* (1833) 5 La. 281, 25 Am. Dec. 178, but it would scarcely be approved in all jurisdictions. As to

where the apprentice is punished under circumstances which do not disclose any breach of duty on his part.⁷

At common law the infliction of excessive punishment is a criminal offense;⁸ and this rule has been embodied in some statutes.⁹ Where death results from the punishment inflicted, the master is guilty either of manslaughter or murder, according to circumstances.¹⁰

2152. Conflicting rights of master and guardian.—The master has no such legal interest in the appointment of a guardian over an apprentice as entitles him to appeal from the decree of the probate court appointing a guardian.¹

the present statutory rule in Louisiana, see note 3, *supra*.

⁷ In *People v. Sniffen* (1823) 1 Wheeler, C. C. 502, the defendant was convicted for having chastised an apprentice who had absented himself in compliance with a summons to attend a trial as a witness.

⁸ *Rea v. Keller* (1684) 2 Shower, K. B. 289 (conviction for immoderate beating was sustained); *People v. Philips* (1823) 1 Wheeler, C. C. 155.

In *State v. Dickerson* (1887) 98 N. C. 708, 3 S. E. 687, it was held (1) that it was not competent for the defendant to show, in order to rebut malice, that the apprentice was of bad character and had been charged with larceny, and (2) that the trial judge was not in error in refusing to instruct the jury that, upon the whole evidence taken as true, the defendant was not guilty. The court said: "Exactly what measure of corporal punishment a master may lawfully or excusably inflict upon his apprentice is not settled; but conceding in this case that the defendant might in good faith have given the boy reasonable chastisement, because of his laches or incorrigibility, yet if the whipping inflicted upon him was as cruel and merciless as the evidence tended to prove it was, the jury might well infer that it was done wantonly and maliciously; and in that case, the defendant would be guilty."

In *Com. v. Hodgson*, Lewis, C. L. (Pa.) 105 it was ruled that a master is not liable for an unjust punishment, arising from an error of judgment, but that if he inflicts punishment for the purpose of gratifying a cruel and revengeful disposition, and not for the correction of the apprentice, it is an abuse of his power for which he must

answer. That the master is not liable to indictment for every mistaken exercise of his authority was also laid down in *Com. v. Hemperly* (1850) 4 Clark (Pa.) 440.

⁹ See, for example, Mont. Rev. Code 1907, § 8348, by which persons who cruelly abuse or inflict unnecessary punishment upon apprentices are declared guilty of a misdemeanor.

¹⁰ In *Grey's Case* (1666) J. Kelyng, 64, the conviction of a master for murder was upheld, where he had struck a disrespectful apprentice on the head with an iron bar, and killed him.

¹ *Wright v. Delano* (1882) 62 N. H. 252. The court said: "How far the ward is bound by the indenture of apprenticeship, entered into by her at the tender age of nine years, we need not inquire. There being no stipulation for any definite period of service, either party might terminate the contract at pleasure; and it seems to have been practically terminated more than a year since. But if it is still in force, the appointment of a guardian does not, *ipso facto*, terminate the contract, nor deprive the plaintiff of the services of the apprentice. A guardian has duties to perform which may bring him in conflict with the master of his ward. It is made his duty to inquire into the usage of his ward by his master, to defend him from his cruelty, neglect, or breach of covenant, and to make complaint thereof to a justice. G. L. chap. 187, § 7. It is made his duty to inculcate habits of sobriety and industry in his ward, and he may employ him in a suitable labor, or bind him out to labor for a term not exceeding one year, under certain restrictions. G. L. chap. 185, § 15. An oppressive master, if allowed to nominate a guardian for his appren-

2153. Rights of master and apprentice in respect to the earnings of the apprentice.—This subject has been discussed in § 2036 *ante*.

2154. Rights of master in respect of the removal of an apprentice to other localities.—The question how far a master is entitled to require his apprentice to remove with him to a locality other than that with relation to which the contract was made is obviously one which covers the same domain of facts as the correlative question how far an apprentice is bound to work in such a locality. All the authorities bearing upon either of these questions are collected in §§ 2172, 2173, *post*.

2155. Duties of master. Generally.—The duties which a master is bound to discharge are divisible into three classes:

(1) Those which are, independently of statutory provisions, implied by the law as incidents of the relationship between him and the apprentice.

(2) Those which he has expressly stipulated to perform.

(3) Those which are defined by statutory provisions.

If the legislature has expressly declared that covenants in respect of the performance of certain duties shall be inserted in the indenture, the binding will manifestly be valid or invalid, according as the indenture does or does not contain those covenants.¹ But enactments of this tenor are construed as merely defining the minimum of obligations which are to be assumed by the master. An indenture by which the master agrees to perform additional obligations

tice, would be interested to secure the appointment of one who might act in the interest of the master, rather than in that of the ward. It does not appear in this case that any harm would have resulted from consulting the plaintiff in the appointment of a guardian over his apprentice. But, inasmuch as the interests of a master and his apprentice are conflicting, or may conflict, the master certainly does not possess the exclusive legal right to judge of the necessity for the appointment of a guardian, or to dictate the nomination of one. If he could, it might not be possible to give full effect to the statutory provisions for the protection of children bound out to service."

¹ In *People ex rel. Splain v. New York Juvenile Asylum* (1874) 2 Thomp. & C. 475, the validity of an indenture executed by the defendant to a resident of Illinois, with the written consent of the minor's mother, after a previous

surrender by her of the child to the custody and control of the defendant during his minority, was affirmed, as the instrument contained all the covenants for the minor's benefit required by the laws of Illinois, and conformed to the laws of New York.

In *Re Turner* (1867) 1 Abb. (U. S.) 84, Fed. Cas. No. 14,247, an indenture binding a child of negro descent, which did not contain important provisions for the security and benefit of the apprentice that were required by the general laws of the state in indentures of white apprentices, was held to be void under § 1 of the civil rights bill 1866.

By 7 & 8 Vict. chap. 101, § 12, the poor law commissioners are empowered, by order under their hands and seals, to prescribe the duties of the masters to whom poor children may be apprenticed, and the terms and conditions to be inserted in the indentures.

is binding upon him.* Some decisions with regard to particular covenants will be noticed hereafter.

In the following sections it will be stated what particular duties fall within each of the above categories.

2156. Instruction in the master's business or trade.—a. Generally.—With relation to the duty of instruction, the statutes concerning apprentices are divisible into three classes:

(1) Statutes which contain no specific words regarding the duty of instruction. With reference to statutes of this tenor it has been held that an indenture which contains no covenant as to instruction is not binding upon the apprentice;¹ and also that a settlement cannot be gained by serving under it.² Possibly a contract in which the party who is to perform the agreed services is designated as an "apprentice" should be treated as binding. The position may, as it would seem, reasonably be taken that this expression imports *per se* that instruction is to be given to that party, and, by necessary inference, that it is to be given by the party to whom the services are to be rendered. But, so far as they go, the decisions seem to be opposed to this theory.

(2) Statutes which declare in general terms that a master shall

² *Cochran v. Davis* (1824) 5 Litt. (Ky.) 118; *Davis v. Bratton* (1849) 10 Humph. 179 (act of 1762, chap. 5); *Finch v. Gore* (1852) 2 Swan, 326. In the third case it was held that an apprentice bond, taken under the act of 1762, chap. 5, § 19 (Code 1884, § 3430), by the chairman of the county court, his official character being twice stated in the bond, was a good statutory bond, although it was not made payable to him as chairman, nor to his successors in office, and was signed by him without affixing his official designation to his signature.

¹ "It is clear that this indenture, by which the infant is bound to serve, and not to learn any trade, occupation, or labor, cannot be supported upon the principles of common law, nor by the express words of any statute." *Respublica v. Keppeler* (1793) 2 Dall. 197, 1 L. ed. 347 (habeas corpus case).

In *Baker v. Winfrey* (1854) 15 B. Mon. 499, a judicial binding was set aside on the ground of the indenture's containing no covenant concerning instruction.

The statute under review in *Re Barre*

(1872; Sup. Ct. Spec. Term) 14 Abb. Pr. N. S. 426, authorized the Catholic Protectorate Society "to place the children in their care at suitable employments, and cause them to be instructed in suitable branches of useful knowledge," and "at discretion to bind out the said children, with their consent, as apprentices or servants." It was also provided that any person to whom a child might be bound should execute a bond conditioned for the good treatment of such child, and to instruct, or cause to have him or her instructed, in reading, writing and arithmetic. The corporation was also empowered to insert in the indentures "such clauses and agreements as the poor officers, authorized to bind out children, are empowered or required to insert in like indentures." The indenture in question was held invalid for the reason that it contained no specific covenant binding the master to teach the child any employment.

² *Hopewell v. Amwell* (1808) 2 N. J. L. 422; *North Brunswick v. Franklin* (1838) 16 N. J. L. 535.

be subject to the obligation of instructing his apprentice in respect of some occupation.³

(3) Statutes which require the master to enter into a specific covenant to give proper instruction.⁴

Under enactments of any of these types, the ultimate liability of the master is, of course, the same; but the third seems to be, for practical purposes, that which is calculated to safeguard the interests of the apprentice most effectively.⁵

b. Specification of the subject-matter of the instruction.—The question whether, in a jurisdiction where the point is not covered by a statutory provision, it is necessary to specify in terms the particular occupation in regard to which the instruction is to be given, has produced some conflict of opinion.⁶ The present writer ventures to

³ See, for example, the following enactments:

Georgia.—Code 1895, § 2600 (1880).

Louisiana.—Rev. Civ. Code 1900, art. 169 (163).

Ontario.—Rev. Stat. 1897, chap. 161, § 12.

British Columbia.—Rev. Stat. 1897, chap. 8, § 13.

⁴ As an example of an enactment of this type, the following provision in § 121 (8) of the New York domestic relations law may be quoted: If the minor is bound as an apprentice to learn the art or mystery of any trade or craft, the indenture shall contain an agreement on the part of the employer to teach, or cause to be carefully or skilfully taught, every branch of the business; and, at the expiration of the term, to give the apprentice a certificate of having served a full term. (For the provision in force prior to the enactment of this statute, see N. Y. Laws 1871, chap. 934, § 2 (3).)

Other similar provisions are the following:

Alabama.—Code 1907, § 2900 (500) (1478) (1738). Master required to give a bond for the performance of the duty. In § 2901 this duty is also specified among those which are enumerated in general terms.

Arkansas.—Kirby's Dig. § 267. Master required to covenant to teach the apprentice some useful art, trade, or business, to be particularized in the indenture.

Colorado.—Rev. Laws 1908, § 143,

Michigan.—Comp. Laws 1897, 5560.

Applicable to minors bound out by charitable institutions.

North Carolina.—Revisal 1905, § 204 (4) (5).

Texas.—Rev. Stat. 1895, *Apprentices*, art. 28.

Wisconsin.—Sanborn & B. Anno. Stat. 1889, § 2379 (Rev. Stat. 1858, chap. 113, §§ 4, 8, 19).

For a case in which an indenture which did not obligate the master to teach a trade was held to be voidable by the apprentice, but, as regards third persons, valid until he had avoided it, see *Doud v. Davis* (1833) 15 N. C. (4 Dev. L.) 61.

⁵ In *Re Goodenough* (1865) 19 Wis. 275, the court, in discussing the Wisconsin statute, said: "The reason of this requirement is obvious. Beside their present support and education, the legislature intended that such children should be trained up in the knowledge of some trade or art by which, when they became their own masters, they might honestly maintain themselves. For the attainment of this humane object it becomes the duty of the supervisors or superintendents, whose power in such cases is absolute and compulsory, to name some trade or employment suitable to the sex and mental and physical condition of the child, in which it shall serve, and to cause the same to be inserted in the indentures, and not to leave this most important requirement to the self-interest or caprice of the person about to become the master."

⁶ In New York an indenture is not treated as void merely for the reason

express the opinion that an indenture which lacks the detail should be held to be fatally defective.

By some of the statutes it is provided that the indenture shall specify the occupation with respect to which the apprentice is to receive instruction.⁷

c. Breach of duty, when predicable.—A breach of the duty as to instruction may be imputed to the master on one or other of two grounds.

(1) That he has so acted as to render himself incapable of performing his covenant in the manner contemplated when the contract was made.⁸

(2) That he has refused or neglected to afford the apprentice a reasonable opportunity for acquiring an adequate knowledge of the work specified by his covenant.⁹ His contract in respect of teach-

that it omits to specify the particular employment which the minor is to follow. *People ex rel. Fowler v. Pillow* (1848) 1 Sandf. 672. It is sufficient if the minor binds himself to be under the care and in the employment of the party of the first part, and the master covenants, in addition to supporting and educating the minor, that he will teach him, or cause him to be taught, such manual occupation, or branch of business, as shall be found most suitable to his mental and physical capacity. *Fowler v. Hollenbeck* (1850) 9 Barb. 309.

In Pennsylvania it has been held that the indenture must show specifically the "trade or mystery" in which the apprentice is to be instructed. *Com. v. Atkinson* (1871) 8 Phila. 375.

⁷ *Florida*.—Rev. Stat. 1892, § 2114.

Georgia.—Code 1895, § 2600 (1880).

Virginia.—Code 1887 and 1904, § 2585.

⁸ *Lloyd v. Blackburn* (1842) 9 Mees. & W. 363, 11 L. J. Exch. N. S. 210, 1 Dowl. N. S. 647; *Brook v. Dawson* (1869) 20 L. T. N. S. 611; *Conchonan v. Sillar* (1870) 18 Week. Rep. 757, 22 L. T. N. S. 40. As to these three cases, see further § 2204, notes 2, 3, 4, *post*.

In a Scotch case, where the master had ceased to take out the license requisite for the lawful pursuit of his trade, it was held that the apprentice was entitled to be freed from the indenture, though he was actually receiving instruction in that trade. *Watson v. Grindlay* (1826) 5 Sc. Sess. Cas. 1st Series 3.

In *Batty v. Monks* (1864) 15 Ir. C. L. Rep. 388. A., a licentiate apothecary, covenanted to instruct B, in his art and mystery of apothecary, in the best ways and means he could. B., having sued A. for a breach of this covenant, proved at the trial that, at the time of the execution of the indenture of apprenticeship, A. kept an open shop for the compounding of the prescriptions of other medical practitioners as well as his own, but that he afterwards closed the shop to the public, and used it merely for the purpose of compounding medicines for his own practice, and ceased to be registered as apothecary in the Medical Register. Held, that A. did not, in point of law, thereby become disqualified from teaching B. pursuant to his covenant, so as to entitle the latter to a direction that A. had broken the covenant. The court was of opinion that a person may be an apothecary, although he is not in the habit of making up prescriptions for other medical men.

⁹ It is not competent for the defendant to show that he kept the apprentice at work with other apprentices who are not shown to have been properly instructed themselves. *Bell v. Walker* (1856) 48 N. C. (3 Jones, L.) 320.

Under a covenant to teach an apprentice the business of farming, the master is bound to give him specific instructions. It is not enough merely to keep him at work. *Strader v. Mardis* (1883; Ct. of App.) 4 Ky. L. Rep. 995.

In the unreported Scotch case of

ing is not an absolute engagement that the apprentice shall be taught the trade or business in question, but merely an undertaking that faithful, diligent, and skilful instruction shall be imparted.¹⁰ In this point of view the standard with reference to which it is determined whether the master is in default is the degree of proficiency ordinarily acquired by apprentices who have been properly trained.¹¹ He is not bound, however, to see that this standard of proficiency is attained, irrespective of whether the apprentice does

James Carsewell (1794) it was held that, if a stonemason only taught his apprentice to hew stones, the contract might be annulled. See *Fraser's Law of Domestic & Personal Relations*, p. 604, note (z).

In *Baker v. Lebeau* (1884; Quebec, Q. B.) 7 *Legal News* 299, the specified obligations of the master were to instruct the apprentice in the manufacture of rubber and embroidery stamps, and in the art of ornamental engraving as fast as he might prove himself capable of learning the same. The evidence was that the master had no engraving business worth speaking of, that he kept no journeymen who were acquainted with that kind of work, and he was himself very little in his shop. The petition for an annulment of the contract was granted.

In *Fletcher v. Buzolich* (1881) 7 *Vict. L. R. (L.)* 348, where a minor had been apprenticed for five years, to be taught the art of making silk hats, and had left after three years, when he came of age, an action was held not to be maintainable against his father, the evidence being that no silk hats were made on the master's premises, and no one was there to give instruction.

In *Lyle v. Service* (1863) 2 *Sc. Sess. Cas. 3d Series*, 204, damages were awarded against a master baker on the ground of his having failed to teach an apprentice an important part of his trade, *viz.*, work in the "oven-department."

In *Gardiner's Case* (1775; *Sc. Ct. of Sess. Morr. Dec.* p. 593, it was held that the obligation of the master to instruct his apprentice had been sufficiently fulfilled, where the work was carried on by experienced journeymen while the master himself was casually absent.

At p. 360 of Campbell's edition of *Fraser on Master & Servant*, there is cited a singular case, *Gardner v. Smith*,

in which an apprentice pleaded that his master had, in a great measure, given up his business as a joiner and became a smuggler, and that he seldom attended the shop, and took no care to instruct the apprentice. The relevancy of this defense was conceded; but the court thought it was "not proved that the apprentice was deprived of daily instruction by reason of the casual absence of the master."

¹⁰ *Clancy v. Overman* (1835) 18 *N. C. (1 Dev. & B. L.)* 402. This case was relied upon in *Wright v. Brown* (1853) 5 *Md.* 37, an action of covenant for the breach of an indenture of apprenticeship which was to continue for two years, and by which the master agreed to teach the apprentice "the art and trade of a silversmith in all the branches thereof. There was a plea of performance, and an agreement to waive all errors in pleading. Held, that it was competent for the defendant to prove that it was impossible to teach all the branches of this trade in that time, and that it would have been injurious to the apprentice to attempt to do so; that he was placed at one branch until he became master of it, had attained more than ordinary proficiency in the branches taught him, and for the time had been well and properly taught and advanced in the trade.

¹¹ In *Cridlan v. Marler* (1893) 9 *Times L. R. (C. A.)* 529, a verdict for the plaintiff in an action for breach of the covenant to teach him was set aside on the ground that he had tendered no evidence as to what was the usual and reasonable course of instruction in the business in question (auctioneer, surveyor, and house agent).

In *Barger v. Caldwell* (1834) 2 *Dana*, 129, an instruction that, "to understand the art and mystery of tanning, is to be a workman of as much skill as tanners generally possess who have regu-

or not possess the necessary capacity for attaining it. The extent of his obligation is merely to impart such instruction as the mental and physical endowments of the apprentice enable him to receive.¹²

(1) "A master has the whole term of apprenticeship to perform his stipulation to teach the apprentice; and if he dies without performing it, but so long before the expiration as to leave time for performance had he lived, no action lies for a breach of it."¹³

d. Excuses for nonfulfilment of duty.—To an action for a breach

larly learned the trade," was held to be unobjectionable. The court observed: "The skill which tanners generally possess, who have regularly learned the trade, is not more than is necessary to understand the art and mystery of tanning, and is therefore only that degree of skill which the defendant was bound to teach, under his covenant to teach the art and mystery of tanning. In other words, we do not understand the language used as importing more than ordinary skill or information in the trade."

In *Barger v. Cashman* (1815) 4 Bibb, 278, an action in which it was alleged that the defendant did not use, during the term of apprenticeship, his utmost endeavors to instruct the apprentice in house-joining and cabinet making, it was held that the defendant ought to be permitted to give evidence, in mitigation of damages, that the apprentice, after his term of service, could do and had done good house-joiner's work.

¹² In *Barger v. Caldwell* (1834) 2 Dana, 129, where the trial judge had instructed the jury that "though defendant was not bound to make Wheat a first-rate workman, yet he was bound to make him a workman as good and skilful as tanners generally are who have regularly learned the trade," it was objected that it should have been accompanied with a qualifying proviso that the apprentice had sufficient capacity to learn. The court, after stating the rule in the text, proceeded thus: "But it does not necessarily follow that the instruction should have been accompanied with any such qualification. It does not appear that there was any testimony conducing to show that the apprentice was not endowed with ordinary capacity. In the absence of such proof, the presumption is that he had such capacity, and that is all that is requisite to acquire, in twelve years' apprenticeship, ordinary skill in any common trade, such as

that of a tanner. If the defendant had any such excuse for the nonperformance of his covenant, it rested with him to prove it, and not with the other side to prove the absence of any such excuse." In the same case, the following instruction was held to have been properly refused: "If the jury believed from the evidence that the defendant afforded said Wheat a sufficient opportunity, and had given him sufficient instruction to enable him to learn the art of tanning, then, as to that part of the covenant they should find for the defendant, whether the said Wheat became a first-rate workman or not." The court said: "If this instruction imported nothing more than that the defendant was bound to impart only such instruction as the apprentice was capable of receiving, it would be free from exception. But the defendant might have done all that the instruction asked for implies that he should have done, and still have left undone an important part of his duty towards the apprentice. It was his duty, . . . furthermore, to have taken the proper measures to make the apprentice avail himself of that opportunity. He should not have been left, as the instruction imports the master had a right to leave him, to his own volition whether he would avail himself of that opportunity or not. We do not wish to be understood that the covenant binds the master in every event or situation to compel an apprentice of sufficient capacity, to learn his trade. We mean only that, when sued for a failure of his duty in this particular, he should satisfy the jury that he used the necessary and proper exertions to make him learn; that is, that he has acted towards him, in the matter of coercion, as an ordinarily prudent and sensible parent would act toward his own child."

¹³ *Goodbread v. Wells* (1837) 19 N. C. (2 Dev. & B. L.) 476.

of this duty it is a good defense that the obligatory instruction was in point of fact imparted in a proper manner, or that the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him;¹⁴ or that the master did instruct the apprentice until he ran away, and never returned.¹⁵

e. Master's liability for injuries caused by want of instruction.—For personal injuries received by an apprentice in consequence of his not having been properly instructed in the use of tools, machin-

¹⁴ *Raymond v. Minton* (1866) L. R. 1 Exch. 244, 4 Hurlst. & C. 371, 35 L. J. Exch. N. S. 153, 12 Jur. N. S. 435, 14 L. T. N. S. 367, 14 Week. Rep. 675 (plea of this tenor was held good).

In *Bell v. Walker* (1857) 50 N. C. (5 Jones, L.) 43, it was held that the obstinacy of a slave apprentice, and his unwillingness to learn, were no excuse for a breach of the master's covenant, because measures should have been taken to overcome those obstacles. It would seem that, even in the case of an ordinary apprentice, his recalcitrancy should not be regarded as a valid defense to an action for breach of the covenant to teach, unless the master can show that he made a full use of all the means of coercion which the law allows.

¹⁵ In *Hughes v. Humphreys* (1827) 9 Dowl. & R. 715, where a plea embodying the defense was held to be good, Bayley, J., said: "I fully concur in the principle that where a covenant is made that a stranger shall do or accept particular acts, that covenant must be performed at the peril and risk of the covenantor. But the first question in this case is, Have the defendants covenanted for the performance of those acts on the part of the apprentice, the nonperformance of which is assigned as a breach of covenant? That question can only be answered by looking at the nature of the instrument, the relation of the parties, and the language which they have adopted in the transaction. The declaration describes the instrument as an indenture of apprenticeship, made between the plaintiff of the first part, the apprentice of the second, and the defendants of the third; but the only covenant it sets out is one upon the part of the defendants to instruct and provide for the apprentice. Now it is usual, in indentures of apprenticeship, to find some third party who receives covenants for the benefit of the appren-

tice, and makes covenants for him. The case of *Branch v. Ewington* (1780) 2 Dougl. K. B. 518, shows what the character and situation of such third party are; that he is not a stranger to the apprentice, but in great degree identified with him. There the parties to the indenture were the master, the apprentice, and his father. They all entered into covenants,—the master to teach, the apprentice to serve, and the father to find clothing,—and each party bound himself to the other for the performance of all the covenants in the indenture. The apprentice having broken his covenant, the father was sued and held liable. Why? Might it not have been said in answer to that action, as it is said in support of this, that the master had impliedly covenanted to compel the apprentice to stay and serve, if that were the true meaning of the indenture? The argument would equally apply to both cases, but no such argument was urged there. The plea in this case is in substance this:—"I did perform my covenants so long as the apprentice gave me the opportunity of doing so." It therefore answers the alleged breaches of covenant up to the time of the apprentice quitting the service, and excuses them after that time. Then the question is, Who covenanted to compel the apprentice to remain and serve? If the masters so covenanted, the statement in their plea is no excuse; if they did not, it is. Upon this case, as disclosed upon the pleadings, I am of opinion that the masters did not so covenant, and that consequently they are not liable for the alleged nonperformance of their covenants to instruct and provide for the apprentice. Then if the plea is good, as I think it is, it follows that the subsequent pleadings are bad. The replication states a refusal by the defendants to take back the apprentice, and avers that they thereby wholly discharged him

ery, and other instrumentalities, the master is, of course, liable to the same extent as in the case of an ordinary hired servant.¹⁶

See generally chapter XLIX., *ante*.

2157. Supply of food, lodging, and other necessities.—a. Generally.

—Where it is intended that the apprentice shall become a member of the master's family, a clause obligating the master to furnish the former with suitable food and lodging and other necessities is usually inserted in the indenture.¹ It has been held that the omission of such a clause invalidates the indenture, even though its insertion has not been prescribed by statute.² But it would seem that

from their service. The defendants rejoin that the apprentice had contracted another relation, which disabled him from returning to their service. In answer to that, and in order to render the defendants liable for not taking the apprentice back, at all events an offer to return should have been alleged; but the sur-rejoinder contains no such allegation. For these reasons I am of opinion that the defendants are entitled to judgment." Littledale, J., said: "I am of the same opinion. The contract made by the defendants was that they would use their best endeavors to instruct the apprentice; and when the apprentice absented himself, he made it impossible for them to perform that contract. It is argued that the absence of the apprentice is no excuse, because he is a stranger to the contract. It is true there is no averment that he executed the indenture, and in some respects, therefore, he may be considered as a stranger, but not as regards the present question; and I think he is so far identified with the plaintiff that his default is the default of the plaintiff, and furnishes, therefore, an answer to the action."

¹⁶ *Eckberg v. American Locomotive Co.* (1908) — R. I. —, 68 Atl. 478.

¹ In an action for the wages payable under an indenture containing such a clause, the master is not entitled to set off the cost of clothes and washing supplied to the apprentice. A custom among masters who follow the trade or business in question, to deduct that cost from the stipulated wages, cannot be supported, as clothes and washing are "necessaries" in the ordinary sense of the word, and such a custom would consequently contravene the terms of

the deed. *Abbott v. Bates* (1875) 45 L. J. C. P. N. S. (C. A.) 117, affirming (1874) 30 L. T. N. S. 99. In the common pleas division the following remarks were made by Keating, J.: "It was admitted that 'necessaries' would ordinarily include clothing and washing, and it was a question whether evidence could be given to show that in this case they were excluded. The learned judge at the trial received evidence directed to this point. It is unnecessary to consider whether he was right in so doing, because I am of opinion that the evidence given did not establish such a custom as to bind the defendant. A custom, to be effectual in this way, should be a custom of trade, but with reference to the word under consideration here the evidence completely failed to show that. One witness said the word 'necessaries' was never used in the trade, and so there was and could be no custom as to the word in the trade. What the evidence went to show was that where there was a covenant in the indenture to give wages and 'necessaries,' it was on the footing that the wages were set off against the clothes and washing. This is no custom; or if it were a custom it would be one to contravene the terms of the indenture, which cannot be." In the court of appeal, Lord Cairns, said: "A usage that a master shall be entitled to charge for those things which he is bound by the terms of the contract to supply gratis is a usage inconsistent with the terms of the contract, and not within the cases which have allowed the reading in of a usage not at variance with the written instrument."

² *Com. v. Atkinson* (1871) 8 Phila. 375.

a master who receives an apprentice into his household may reasonably be regarded as having impliedly assumed the obligation of maintaining him, and that a contract which does not expressly impose that obligation may be supported on this ground. However this may be, it seems, at all events, quite clear that the omission of a covenant of this tenor is not fatal to the validity of an indenture under which no domestic relationship is created between the master and the apprentice, and the control exercised by the former over the latter has reference solely to his technical training, and begins and ends with certain working hours.³

It has been held that an indenture which provides that the apprentice is to work during certain months of the year only, and that for those months he is to receive wages in lieu of maintenance, should be treated as valid or invalid, according as the aggregate amount so stipulated is or is not adequate for his support during the entire year.⁴ A similar criterion has been applied in a case in

³ For so clear a doctrine no explicit authority would seem to be required. The only direct decision in point is one by an inferior court, *O'Connor v. Simonson* (1900) 24 Pa. Co. Ct. 576. There the quarter sessions refused to annul an indenture which did not stipulate for the maintenance of the apprentice, but provided that he should be paid a weekly stipend.

⁴ In *Com. ex rel. Gear v. Conrow* (1845) 2 Pa. St. 402, the indenture under review was thus discussed by Gibson, Ch. J.: "It was doubtless supposed by the legislature, when the statute of 1770 was enacted, that an apprentice bound pursuant to it would be an inmate of his master's house. In the country he is still a part of the family; and the penalties for desertion seem to have been provided on that basis. But it is not said in terms that he shall be so; and it is our duty to interpret statutes so as to fit them, as far as we may, to the business and the habits of the times. The covenants in this indenture are those into which every master bricklayer enters in this city, or perhaps elsewhere; and they differ from those in other indentures simply in not binding the master to provide the apprentice with meat, drink, washing, and lodging, but in binding him to pay, in lieu, a weekly allowance in order to enable the apprentice to provide them for himself. Even where the master

covenants to provide them, it follows not that he must furnish them in his family; for he may have more apprentices than could be accommodated in one house, and in such a case necessity would compel him to board them out. Besides, his business may carry him to a distance from home, as often happens in the country, and his apprentices must accompany. There is nothing, then, in the statute or the usages of the country to forbid such binding. But it is objected in this instance that the binding is not for the whole term, but for nine months in each year,—an allegation which is disproved by the express words of the indenture. Again, it is objected that the apprentice is left at large, without provision or control, for three months in the year. But the weekly stipend bargained for was thought by him and his father to be sufficient for the year, and, if frugally managed, would doubtless be so; and the authority of the master, in contemplation of law, endures throughout the term. It is his duty at all times to attend to the deportment of the apprentice, and restrain him from vicious courses; and if that were otherwise, the authority of the father or guardian would supervene. Nor does it follow that the interval must be lost; for it may be profitably employed at school, or in some other useful occupation."

which it was stipulated that board and lodging should be furnished for a portion of the year, and that a certain sum in money should also be paid annually.⁵ The correctness of this doctrine, however, would seem to be at least disputable, as it seems to involve the acceptance of the position that the law will not enforce a contract of which the sole consideration enuring to the apprentice is the instruction to be given by the master. There is, it is submitted, no satisfactory ground upon which the competency of the parties to place any value they may think proper upon the stipulated instruction can be denied. If they are so competent, a simple bargain for the barter of services in return for instruction must be unobjectionable. In fact it is notorious that indentures are constantly being executed which entitle the master not merely to the gratuitous services of the apprentice, but also to a large premium.

A provision made by a master in his will for the support of an apprentice, if it is adequate, having regard to the circumstances and condition of the apprentice, will be taken to be a satisfaction of his obligation to support him.⁶

b. Duty considered with reference to statutory provisions.—The statutes are divisible into the following categories:

(1) Those which contain no provision regarding the duty.

(2) Those which impose the duty by a provision of a general character.⁷

(3) Those which require that the performance of the covenant shall be provided for by a specific covenant.⁸

⁵ In *Com. v. Atkinson* (1871) 8 Phila. 375, one of the grounds upon which an indenture which stated that the apprentice was to be furnished with food and lodging by his master for about nine months in the year, and receive \$40 per annum in lieu of clothing, was held to be invalid, was that it did not provide for his support during a portion of the year. The case cited in note 4, *supra*, was distinguished on this ground. The court said: "Whilst it leaves the apprentice free to starve or steal, it forbids him to labor, if he could obtain employment, because it contains his covenant to give all his time, care and labor to the business and interests of his master."

⁶ *Petrie v. Voorhees* (1867) 18 N. J. Eq. 285.

⁷ *Georgia*.—Code 1895, § 2600 (1880).

Iowa.—Code 1907, § 3244.

Louisiana.—Rev. Civ. Code 1889, art. 169 (163). An implied condition of the contract entered into between the master and the bound servant or apprentice is that the master on his side binds himself to maintain the indented servant or apprentice during the same time.

Michigan.—Comp. Laws 1897, § 5560, applicable to minors bound by charitable institutions.

Mississippi.—Code 1892, § 3160.

New York.—Domestic relations law, § 121 (6).

Ontario.—Rev. Stat. 1897, chap. 161, § 12.

British Columbia.—Rev. Stat. 1897, chap. 8, § 13.

⁸ *Alabama*.—Code 1907, § 2900 (500) (1478) (1738) (master to give bond for performance of duty). In § 2901 this duty is also specified among those imposed in general terms.

c. Criminal liability of masters in respect of their duty.—At common law, the nonperformance of the duty of a master to provide his apprentice with proper food constitutes, under some circumstances, a criminal offense.⁹

In England the criminal liability of the master has been defined by two enactments:

Offenses against the person act, 24 & 25 Vict. 1861, chap. 100, § 26. Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, lodging, or clothing, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be injured, shall be guilty of a misdemeanor. (This provision is substantially a re-enactment of 14 & 15 Vict. chap. 11, § 1.)

Conspiracy and protection of property act, 38 & 39 Vict. 1875, chap. 86, § 6. A master, who, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, is declared liable either to pay a penalty or to be imprisoned.

Colorado.—Rev. Laws 1908, § 143.

Delaware.—Rev. Code 1893, chap. 79, § 5.

North Carolina.—Revisal 1905, § 204 (ordinary apprentices); § 194 (Sess. Laws 1889, chap. 169, § 4) (indigent children).

Texas.—Rev. Stat. 1895, *Apprentices*, art. 28.

⁹ In *Reg. v. Gold* (1705) 6 Mod. 164, it was held that an indictment lay against a master who refused to provide for a poor boy bound out as a parish apprentice. The *ratio decidendi* is shown by the following remark of the court: "When we allow them such power [the power of the justices to compel a man to take an apprentice], of necessary consequence we must allow an indictment for disobedience to their orders, either in not receiving or receiving and after turning off, or not providing for such apprentice."

In 1799 it was laid down that a master may be indicted for causing the death of an apprentice by wilfully violating the duty to supply him with sufficient food. Russell, *Crimes*, 6th ed. p. 151, citing an unreported case, *R. v. Squire*.

Three years later, at a meeting of all the judges except two, it was held (Chambre, J., dissenting) that it was "an indictable offense, as a misdemeanor, to refuse or neglect to provide sufficient food, bedding, etc., to any infant of tender years, unable to provide for and take care of itself, (whether such infant were child, apprentice, servant), whom a man was obliged by duty or contract to provide for, so as thereby to injure its health." *Rex v. Friend* (1802) Russ. & R. C. C. 20.

In the subsequent case of *Rex v. Ridley* (1811) 2 Campb. 650, the liability was restricted by Lawrence, J., to cases of children of tender years and under the dominion of the defendant.

See also the decisions relating to servants, which are reviewed in § 251, *b*, *ante*.

The criminal liability of a master for failure to provide a servant or apprentice with necessary food, clothing, or lodging is dealt with in Stephen's *Digest Crim. Law*, 6th ed. arts. 260 (d), 443 (c) (d).

Some provisions covering the subject have also been enacted in other jurisdictions.

South Carolina.—Gen. Stat. 1882, by § 2080 (Rev. Stat. § 2212). A master who, being legally liable to provide for a servant or apprentice, neglects to do so, is guilty of a misdemeanor.

Quebec.—Rev. Stat. 1888, § 5622 (44-45 Vict. chap. 15, § 7). Masters who are guilty of misusing their servants or apprentices, or of failing to supply them with sufficient wholesome food, or of treating them cruelly, are subjected to a penalty of \$20. (For an earlier provision relating to servants in country parts, see Consol. Stat. of Lower Canada, chap. 27, § 8.)

2158. General education.—*a. Generally.*—Clauses charging masters with the duty of seeing that their apprentices receive a certain amount of general education are frequently inserted in indentures. The position has been taken that an indenture which does not contain such a clause is invalid.¹

b. Under statutory provisions.—The statutes are divisible into three categories:

(1) Those in which no provision is made for the performance of the duty.

(2) Those which provide in general terms that the master shall see that the apprentice receives a certain amount of education.²

(3) Those which provide that a covenant for the performance of duty shall be entered into.³ The purport of most of these provisions

¹ In *Com. v. Atkinson* (1871) 8 Phila. 375, it was said to be the accepted doctrine in Pennsylvania that, "in order that the apprentice may become an intelligent workman and citizen, the master must covenant for his schooling. It is now well settled that, without this, the court will cancel an indenture unless it appear that the apprentice is sufficiently educated and intelligent not to require additional schooling." The earlier authorities for this doctrine are *Com. v. Bowen* (1863) 5 Phila. 220; *Com. ex rel. Irvin v. Penott* (1849) Brightly (Pa.) 189.

See also *O'Connor v. Simonson* (1900; Quarter Sess.) 24 Pa. Co. Ct. 576, where the court refused to annul an indenture, for the reason that, although it did not provide for schooling, the apprentice was of an age which warranted the presumption that he had been sufficiently educated at the common schools.

² *Florida.*—Rev. Stat. 1892, § 2114.

Georgia.—Code 1895, § 2600.

Iowa.—Code 1907, § 3244.

Louisiana.—Rev. Civ. Code, 1889, art. 169 (163).

Mississippi.—Code 1892, § 3160 (poor apprentices).

³ *Alabama.*—Code 1907, § 2900 (500) (1478) (1734). Master required to give a bond for the performance of the duty. In § 2901 this duty is also specified among those enumerated in general terms.

Arkansas.—Kirby's Dig. § 267.

Colorado.—Rev. Laws 1908, § 143.

Delaware.—Rev. Code 1893, chap. 79, § 5.

Illinois.—Starr & C. Anno. Stat. chap. 9, ¶ 10.

Indiana.—Burns's Anno. Stat. 1908, § 8389 (7307).

Kentucky.—Gen. Stat. 1888, chap. 74, § 6; Stat. 1908, § 2596.

Maine.—Rev. Stat. 1903, chap. 27, § 22 (poor apprentices).

Maryland.—Pub. Gen. Laws 1888, art. 6, § 15 (poor apprentices).

Massachusetts.—Rev. Laws 1902, chap. 155, § 4 (poor apprentices).

is that the apprentice shall be taught reading, writing, and arithmetic.⁴ By some of them the master is required to send the apprentice to a public or common school for a certain portion of each year. Irrespective of such a declaration, he would presumably be deemed to have satisfactorily fulfilled his duty if he had given his apprentice, either by sending him to such a school or in some other way, an opportunity of acquiring the same knowledge of the prescribed subjects as is ordinarily acquired by children who attend such a school. However this may be, it is clear that "the engagement to teach, or cause the apprentice to be taught, to read and write, is not an engagement that the apprentice will or shall learn to read and write. The legislature did not mean to make the master or mistress an insurer of these improvements of the mind of the apprentice. All that is required is a diligent and faithful exercise of the means necessary to effectuate the objects mentioned in the covenant. If the apprentice is incapacitated to acquire the knowledge of reading and writing, after due means have been taken to teach him, the covenant is not broken."⁵

If a provision of this character is so worded as to give the master

Michigan.—Comp. Laws 1897, 5560 (applicable to minors bound by charitable institutions).

Missouri.—Rev. Stat. 1899, § 4804 (378).

New Hampshire.—Pub. Stat. 1901, chap. 84, § 6 (poor apprentices).

New York.—Domestic relations law, § 121 (9) (poor apprentices). For the earlier provisions *in pari materia*, see 1 N. Y. Rev. Laws 1813, p. 135, § 7. Rev. Stat. (Banks' 7th ed. p. 2349), art. Master and Servant, § 10. For a special provision relative to the Catholic Protectorate Society, see N. Y. Laws 1863, chap. 448, § 6.

North Carolina.—Revisal 1905, § 194 (poor apprentices).

Ohio.—Bates's Anno. Stat. § 3122.

South Dakota.—Code 1908, § 170.

Texas.—Rev. Stat. 1895, *Apprentices*, art. 28.

Virginia.—Code 1887 and 1904, § 2585.

West Virginia.—Code 1899, chap. 81, § 4.

Wisconsin.—Sanborn & B. Anno. Stat. § 2379.

New Brunswick.—Rev. Stat. 1903, chap. 83, § 6.

Since the statute of 1843, the in-

denture of apprenticeship of a free colored person in Kentucky need not contain a covenant to teach the apprentice to read and spell. *Rachel v. Emerson*, (1845) 6 B. Mon. 280.

⁴ For cases in which the omission of provisions of the tenor was held to invalidate the contract, see *Butler v. Hubbard* (1827) 5 Pick. 250; *Reidell v. Congdon* (1834) 16 Pick. 44; *Harris v. Roulston* (1872) 14 N. B. 171.

In *Burnham v. Chapman* (1840) 17 Me. 385, it was held that the insertion of a covenant "to see that the minor is properly educated and instructed" was not a sufficient compliance with a statutory requirement (Me. acts 1821, chap. 122), that the indenture should embrace a covenant to the effect that the child should be "instructed to read, write, and cipher."

In *People ex rel. Heilbronner v. Hoster* (1873) Abb. Pr. N. S. 414, a stipulation to cause a child to be taught "to cipher" was held not to be sufficient, where the statute requires a stipulation to cause the apprentice to be "taught the general rules of arithmetic."

⁵ *Wyatt v. Morris* (1836) 19 N. C. (2 Dev. & B. L.) 108.

the option of paying a certain sum of money or educating the apprentice, he may make his election between these alternatives at any time before the expiration of the period covered by the indenture.⁶ But it is not a condition precedent to a recovery of the money, that an express stipulation respecting the payment should have been inserted in the indenture.⁷

2159. Medical attendance.—*a. Generally.*—Some American decisions embody the doctrine that it is a duty of the master, resulting from the relation of master and apprentice, to provide his apprentice with medical attendance.¹ This doctrine is in accord with the ruling of Patteson, J., in an English criminal case, to the effect that, during the illness of an apprentice, his master is bound to provide him with proper medicines.² But there is also authority for saying that, in the absence of a special contract, the master is not liable for the medical expenses of an apprentice, except when they are incurred under the master's roof.³

b. Under statutory provisions.—The duty of furnishing medical attendance is in some jurisdictions imposed by a general provision

⁶ *Strader v. Mardis* (1883) 4 Ky. L. Rep. 995.

⁷ *Sayers v. Downs* (1884) 5 Ky. L. Rep. 683.

¹ *Easley v. Craddock* (1826) 4 Rand. (Va.) 423. There it was held that the father of an apprentice was not liable for medical services, unless they had been rendered at his instance.

In *Rice v. Breheny* (1859) 2 Houst. (Del.) 74, the jury were charged as follows: "If the defendant had notice of the illness of his apprentice at the house of his brother, the plaintiff, and took no steps to have him removed to his own, or he was too unwell to be removed, and the attentions procured for him by the plaintiff were such as were necessary and proper under the circumstances and in the situation in which he was placed at the time, inasmuch as the law imposed an obligation on the master to take proper care of and to make the necessary provisions for his duly indentured apprentice in sickness as well as in health, it would imply a promise by the defendant to pay the plaintiff for the expenses and trouble incurred by him in the present instance."

² *Reg. v. Smith* (1837) 8 Car. & P. 153. There the defendant was indicted for manslaughter for failing to provide

his deceased apprentice with sufficient meat and drink, and the jury were told that they must render a verdict of acquittal if they thought the death was caused by want of proper medicines, inasmuch as there was no charge to that effect in the indictment.

³ *Percival v. Nevill* (1819) 1 Nott & M'C. 452 (Gantt J. dissenting). In this case the court relied upon the English cases, which deny that a master is liable for the medical expenses of ordinary servants, and also upon the consideration that, as the contract embraced no stipulation that the master was to be subject to such liability, the rule, *Expressio unius est exclusio alterius*, was controlling. Neither of these grounds seems to be quite satisfactory. The relation of master to an apprentice is so essentially different from that of a master to an ordinary servant that it is unsafe, if not absolutely improper, to use the decisions in regard to the latter relation as precedents indicative of the nature of the duties incident to the former relation. On the other hand, the maxim referred would plainly be irrelevant if the duty asserted to exist is one which arises out of the relation itself.

expressive of the master's obligation to perform it;⁴ in others by a provision which requires that a specific covenant for its performance shall be inserted in the indenture.⁵

2160. Personal treatment.—*a. Generally.*—At common law a master who treats his apprentice cruelly or inhumanly is deemed to be guilty of a breach of an implied duty, which renders him liable in every case to an action for damages, and in some aggravated circumstances justifies the apprentice in abandoning the service. See §§ 2183, 2184, *post*. In cases where the treatment complained of was incidental to the master's exercise of his right to chastise the apprentice, the question whether he was guilty of a breach of duty will obviously depend upon whether the chastisement was immoderate. See § 2151, *ante*.

b. Under statutory provisions.—In some jurisdictions the master is rendered liable by statute for the performance of this duty.¹

J. OBLIGATIONS OF MASTER IN RESPECT OF THE PAYMENT OF REMUNERATION.

2161. Recovery of remuneration under the stipulations of the indenture.—*a. Construction of specific provisions as to payment of wages.*—The decisions under the head have relation to the following points:—The basis upon which the amount payable is to be computed;¹—whether one of the stipulations of the contract was modi-

⁴ For an example of such a provision, see Georgia Code 1895, § 2600 (1880).

⁵ *Colorado.*—Rev. Laws 1908, § 143 (ordinary apprentices); § 159 (poor apprentices).

New York.—Domestic relations law § 121 (6) prescribes making of covenant to the effect that medical attendance shall be furnished *either* by the master, or the parent or guardian of the apprentice).

Texas.—Rev. Stat. 1895, *Apprentices*, art. 28. Master shall bind himself in writing to furnish medical attendance.

¹ *Alabama.*—Code 1907, § 2901 (501) (1479) (1735) (apprentice to be treated with kindness).

Texas.—Rev. Stat. 1895, *Apprentices*, art. 28 (apprentice to be treated humanely).

¹ In *Denver Engineering Works Co. v. Newman* (1908) 43 Colo. 417, 96 Pac. 175, the contract provided that the ap-

prentice should be taken thirty days on trial without pay, and that "300 days' work of ten hours each" shall constitute one year, the pay to be so much *per diem* in the first year, and increased until the fourth year. The contention of the defendant, that 3,000 hours was to constitute a year's work, irrespective of the time that he might take in supplying labor, was rejected, the conclusion arrived at being that the apprentice was required to work 300 days of ten hours each during the year; that where he was at the place of business of the master, ready and willing to perform the labor, during each of the years, he complied with his part of the contract, whether the master did or did not furnish work for him to do; and that where he was at the master's shops for four years and two months, there was ample time for him to perform the number of hours of labor agreed on. The court said that, if the defendant's

fied by an agreement made after the performance of the services began;²—whether the covenants with regard to the payment of wages and the performance of services were intended to be independent;³

construction were correct, he might, by limiting the number of hours during which the plaintiff might work in each year, compel him to remain in his employment an indefinite time before the sum stipulated to be paid at the expiration of the apprenticeship would become due.

In *Robeson v. Whitney* (1908) 76 N. J. L. 779, 71 Atl. 255, the agreement of apprenticeship bound the apprentice in the glass trade to serve for 1,200 actual working days, which throughout the indenture were referred to as a "term." Held, that such phrase meant that the service should continue through a definite period within which there were 1,200 days, exclusive of Sundays and holidays, and did not mean 1,200 days on which the apprentice should actually perform work for his master. The proof on the part of the plaintiff was that he had served under the agreement from January 24, 1902, to February 2, 1907, which period includes 1,282 actual working days, after a deduction for holidays and for the months of July and August in each year (which are not working days in the glass trade), but not deducting Saturdays. It was also in proof that the plaintiff did not work on each one of the above 1,282 days, being prevented sometimes by sickness (with regard to which no certificate of a physician was asked or demanded), sometimes by the closing down of a portion of the defendant's plant, and sometimes by lack of work, or other causes. The court said: "The phrase '1,200 actual working days' in the contract must be deemed to be a term or period. This number of days is referred to throughout the contract as constituting a term. Effect must also be given to the word 'actual,' but in my opinion that will not alter the above interpretation. As before said, it was proved that July and August by the custom of the glass trade were not days upon which employees performed work, and hence not actual working days in this trade. As popularly understood, working days, a familiar and well-understood expression, are all the days of the years except Sundays and holidays. This contract must

be construed by the known usage of the trade existing when the contract was made. Hence the word 'actual' limits 'working days' to those so known in this trade, as distinguished from 'working days' as they are generally understood; i. e., all days except Sundays and holidays. Actual working days, therefore, are not intended to mean days upon which work was actually performed by the plaintiff, but days upon which work is ordinarily done in this trade, as distinguished from those when it is not ordinarily done; i. e., Sundays and holidays and the months of July and August. The contract further specified that 'Saturdays will not count as lost time.' Does this sentence have the effect of changing the above construction of the contract? I think not; but rather to confirm it. If the agreement is construed to mean actual days' work, then this is superfluous, for the length of service, in that event, must be determined by the actual number of days upon which the apprentice shall have worked, and it can make no difference whether Saturdays are counted as lost time or not."

² In *Denver Engineering Works Co. v. Newman* (1908) 43 Colo. 417, 96 Pac. 175, the apprentice sued for an additional sum stipulated to be paid upon condition of his serving his full time and making good use of his opportunities. The evidence on the master's part was that an increase of wages which he had allowed in excess of the amount specified in the original contract was intended by him to be in lieu of the conditional payment provided for; but it was not shown that this intention had been communicated to the apprentice. Held, that an instruction that oral agreements might be made between the parties subsequent to the execution of the written agreement, and that, where oral agreements were entered into, the written agreement would be modified, etc., was not prejudicial to the master.

³ In *McLure v. Rush* (1839) 9 Dana, 64, the action was brought for instalments of wages that had fallen due on a covenant to the following effect: "Rush

—and whether a stipulation in the original contract regarding the retention of a certain percentage of the wages until the end of the term was superseded by a subsequent agreement.⁵

binds himself that Madison Mefford, his brother-in-law, and Willis Rush, his son, shall serve and work with and for the said McLure, at the carpenter's trade, three years from the date; he, said Rush, boarding and clothing said boys during the term; for which the said McLure binds himself to give the said Rush the sum of \$160 for the first year, and \$200 for each of the other two years, to be paid quarterly; . . . and if said Rush should take away, or cause that either or both of said boys quit before their time is out, he shall lose one half of the wages for the time worked by either or both, as the case may be." The course taken by the trial court in giving judgments for Rush, in each case, without requiring the proof of service, in part or whole and refusing to permit the introduction of evidence that Rush had taken away the boys, was held erroneous. The court said: "It appears clear that the instalments were to be paid for the prior quarterly services to be rendered by the boys, and the defendant below looked to the service, and not to the covenant to serve, as the consideration of the payments to be made. Rush covenants that they, the boys, shall serve and work with and for the said McLure, for which he is to pay the quarterly instalments. The relative 'which' may, most appropriately to carry out the intention of the parties, be made to refer to the services or work to be done. If so, then the work or service of the preceding quarter was looked to as the consideration of the instalment to be paid, and, being precedent in order of time to the payment, and the consideration thereof, it should have been proved. We also think that it was competent for the defendant below to prove that the plaintiff had taken away the boys before the term was out. The agreement 'to lose one half of the wages for the time worked, in case the boys are taken away,' is, in effect, an agreement that he, Rush, is to receive one half only of the amount for the quarter for which he sues, though the service for that quarter was rendered, and would entitle him to recover only one half. Beside, it is, in effect, an agreement to refund

the one half of the amount for the preceding quarters, in case he has received full pay for them, and might be relied on by McLure as a set-off against the half which Rush might be otherwise entitled to recover. And on this ground the proof was competent."

⁵In *Honesdale Glass Co. v. Storms* (1889) 125 Pa. 268, 17 Atl. 347, the contract alleged by the apprentice to have been by parol, and by the master to have been in writing, but to have been lost, provided that, if the apprentice failed in the proper performance of his duties, or left before his term closed, his "back pay" "was to be forfeited. The plaintiff contended that the term was for four years, beginning on October 1, 1881; the defendants contended that it was for four and one-half years and began March 1, 1882." On October 1, 1885, the plaintiff, alleging that his term was ended, quit his apprenticeship. The defendants, alleging that the term continued until four and one half years had elapsed from March 1, 1882, refused payment of the money which had been retained. On October 24, 1885, the parties made a sealed agreement, under which the plaintiff resumed work for the defendants and continued therein for the period agreed upon. The defendants then tendered \$43.69 as the amount due the plaintiff under the new agreement. This sum the plaintiff refused, claiming to be entitled also to the retained pay due under the original contract, amounting, at the date of his cessation of work, to \$531.82. The second agreement contained a recital that the plaintiff was an apprentice to the defendants for four and one half years from March 1, 1882, and that he had left the defendants' employment, and thus forfeited all claims on the defendants, and then proceeded to set forth a new contract for the plaintiff's re-employment for one year from November 1, 1885, upon certain terms mentioned. In reply to this contract, the plaintiff alleged he was induced to sign it by means of a positive promise, made to him immediately before he executed it, that if he would sign it he should be paid the whole amount of his back pay. Commenting upon the evidence thus

b. Wages for poor apprentices.—In England it has been held that the officials who bind out a poor child have no power to order the master to allow wages or any gratuity; they can only subject him to the obligation of maintaining it.⁶

c. Right of assignee of apprentice's wages to bring suit for them.—All the decisions bearing upon this subject have been cited in the sections which deal with actions by the assignee of the wages of hired servants. See §§ 653 *et seq.*, *ante*.

d. Wages as a preferential claim against the estate of an insolvent master.—In the absence of evidence showing that the apprentices of an insolvent company were discharged or released from their indentures prior to the act of insolvency, they are entitled to their wages without regard to the time when they were last actually laboring for the company. Their legal rights cannot be affected by the refusal or inability of the company to furnish them with employment. Accordingly, even if the wording of a statutory provision allowing a preference to wages is such as to restrict its application, so far as ordinary hired servants are concerned, to those who were in the employment of the company at the time when it became insolvent, its apprentices are entitled to claim a preference, irrespective of whether they were so employed or not.⁷ For a general discussion of the statutes declaring the wages of servants to be preferential claims, see chapter XXII., *ante*.

2162. Recovery on a quantum meruit. Rule in cases where there is a valid and subsisting contract.—Under the general doctrine explained in § 558, *ante*, it is manifest that an action on a *quantum meruit* cannot be maintained for services rendered by an apprentice with reference to a valid indenture.¹

presented, the court observed: "If that [*i. e.*, the second] contract prevails, the contention of the defendants is sustained, and the plaintiff could recover no part of the back pay. It is true, the facts which would defeat his right to recover the back pay are a mere matter of recital in this contract, but as they would be material to, and would, in fact, be a part of, the consideration of the new contract, they are an essential portion of it. If the promise was made, and by that means the plaintiff's signature was obtained, it was, of course, a fraud to set up the contract afterwards against his claim for back pay. In that aspect of the case it comes within the very numerous decisions of this court

which hold substantially that when the execution of an instrument has been obtained by means of a fraud, or where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed, parol evidence may be given to prove the fraud, though it contradict the instrument."

⁶ *Rex v. Wagstaff* (1714) Foley, 225, 1 Bott, Poor Law, 605.

⁷ *Bedford v. Newark Mach Co.* (1863) 16 N. J. Eq. 117 (decided under § 42 of the insolvency act of 1849).

¹ *Olney v. Myers* (1840) 3 Ill. 311. There the general rule was declared to

2163. —rule in cases where the contract as made was invalid.—

a. Action by apprentice.—In some jurisdictions it has been held that, when a contract not executed in compliance with the requirements of a statute relating to minor apprentices is terminated by either party, the apprentice is entitled to sue on a *quantum meruit* for the value of his service,¹ unless he ratified the contract after he became of age.² Under this doctrine the fact of the master's having fulfilled the covenants on his side does not operate as a valid defense to the action.³ A similar position has also been taken with regard to the liability of a master in cases where a contract which falls within the purview of the statute of frauds has been partially performed.⁴

Under another theory, which takes no account of the elements of minority and ratification, the right of recovery is denied upon the broad ground that, if it was the understanding of the parties that the services, while in course of performance, were being rendered with the reference to the assumed existence of the relationship of master and apprentice, it must also have been their understanding

be applicable, although the services were performed outside the state in which, under the terms of the indenture, they were to be rendered.

The mere fact that the father of an apprentice bound out as a poor child by the overseers of a town was relieved on his own application, without a previous order for that purpose, is not such an irregularity as will invalidate the indenture to such an extent that the master is precluded from using it as a defense in an action to recover the value of the services rendered by the apprentice. *Schermerhorn v. Hull* (1816) 13 Johns. 270.

¹ In *Tague v. Hayward* (1865) 25 Ind. 427, an answer which set up a contract of apprenticeship was held demurrable for the reason that it did not allege an agreement in writing, and no such agreement accompanied the complaint.

² *McDonald v. Sargent* (1898) 171 Mass. 492, 51 N. E. 17. There it was held (1) that a ratified agreement is competent evidence, although the answer contains a general denial, and alleges payment only; and (2) that the jury might consider the acts of the apprentice in receiving the money stipulated in the agreement, and all his other acts, as bearing upon the question of ratification.

³ *Hunsucker v. Elmore* (1876) 54 Ind. 209; *Kerwin v. Myers* (1880) 71 Ind. 359. In the latter case, where an answer setting up an invalid indenture, and alleging performance of the covenants, was held insufficient on demurrer, the court observed that the law applicable to the circumstances involved had been settled, so far as the apprentice was concerned, by the language used, *arguendo*, in *Kerwin v. Wright* (1877) 59 Ind. 369. See note 7, *infra*.

⁴ In *Baker v. Lauterbach* (1887) 68 Md. 64, 11 Atl. 703, it was held that the administratrix of the apprentice was entitled to recover the full value of his services, less such wages as he had received at the agreed rate. The parties to the void contract were regarded by the court as being in the same position as if they had entered into a parol contract for a period of more than one year; and the *ratio decidendi* was the rule that the statute of frauds cannot be made a ground of defense, any more than of a demand. The doctrine applied in the cases cited in the last two notes was not referred to; but it is to be observed that the Massachusetts decision was of later date.

that the services were being rendered in the terms normally incident to that relationship. In this point of view it will follow that, as an obligation to pay remuneration is not one of those terms, and is not imputed to the master in the absence of a stipulation, either expressly made or implied from a usage prevailing in his trade or business, the interruption of the performance of the contract does not, as in the case of an ordinary contract of hiring, remit the parties to the same position they would have occupied if no special contract had been made.⁵

The preponderance of authority, it will be seen, is clearly in favor of allowing a recovery for the services of the apprentice. But it is noteworthy that none of the courts by which this doctrine has been applied have adverted in their opinions to the consideration upon which the other doctrine is based, *viz.*, the presumed intention of the parties, as disclosed by the incidents of the relationship actually existing during the performance of the services. Until the juristic effect of this important element has been adequately discussed, the nature and extent of the master's liability may fairly be regarded as open to further discussion. The ultimate question in cases of this type is simply, What were the terms upon which the parties understood themselves to be rendering and accepting services after the performance of the invalid contract was commenced? It is impossible to avoid feeling some doubts regarding the correctness of a doctrine which virtually declares that this question should receive the same answer, irrespective of whether the primary object of the given contract was instruction or the earning of wages.

b. Action by parent of apprentice.—It is fully settled that an informal indenture, although it does not bind the apprentice, constitutes an effective bar to an action on a *quantum meruit* when brought by a parent who bound him out or assented to his binding. This rule has been referred both to the conception that, as against the parent, the fact of his having agreed that his child should live with the master in the capacity of an apprentice repels the presumption of a con-

⁵ In *Maltby v. Harwood* (1852) 12 Barb. 473, where the master had discharged the apprentice after discovering that the indentures were void because not executed by his father, the decision was referred to the conception that, "while the parties resided together, mutually performing the conditions of that contract, the relation of master and apprentice existed as really as if the in-

denture had been binding. Upon the termination of that relation, neither party would have any claim upon the other beyond the conditions of the contract."

Compare also the *ratio decidendi* in *Williams v. Finch* (1848) 2 Barb. 208 and *Mead v. Morrison* (1810) 3 N. J. L. 725 (note 6, *infra*).

tract for wages,⁶ and also to the conception that, as between the parent and the master, the indenture is a valid agreement, in so far as the parent has any right to contract for the services of his child.⁷

It is clear that no recovery can be had in an action for work and labor brought by the parent of an apprentice who, after having partially performed a contract invalid under the statute of frauds, was discharged, and paid *pro rata*, according to the terms of the contract.⁸

The extent to which the amount stipulated in an invalid contract is controlling in a suit by a servant on a *quantum meruit* is discussed in §§ 574a, 575, *ante*.

2164. —rule in cases where a contract valid at its inception becomes voidable before the expiration of the stipulated term.—*a. Services rendered prior to a judicial annulment on the ground of the master's breach of duty.*—In a case where a contract had previously been annulled by a court on the ground of the master's breach of duty, it was held that an action might be maintained for the value of the services rendered up to the date of the annulment.¹ But no doubt the preferable practice is to determine the master's liability for those services in the proceedings taken for annulment.

b. Services rendered after an invalid assignment.—In a case where indentures were assigned, with the consent of the apprentice, and he voluntarily continued thereafter to live with and work for the assignee during the term of the apprenticeship, it was held that a continuance of the apprenticeship with his own consent should be predicated; and consequently that he could not recover on an implied assumpsit for the services rendered to the assignee, even though the assignment was invalid.² Compare the cases discussed in §§ 541, a, 543, *ante*.

c. Services rendered after the master's death.—In one of the jurisdictions in which the statute provides that the death of the master shall discharge the contract, it has been held that an action on a *quantum meruit* does not lie for the recovery of remuneration in respect of services rendered after his death.³ This decision is in accord with the cases cited in §§ 541, a, 543, *ante*. But in another

⁶ *Mead v. Morrison* (1810) 3 N. J. L. 725. Compare case cited in note 8, *infra*.

⁷ *Kerwin v. Wright* (1877) 59 Ind. 369. The effect of the subsequent case in which the same master was sued by the apprentice himself is stated in note 3, *supra*.

⁸ *Fahlstedt v. Lake Shore Engine Works* (1905) 140 Mich. 290, 103 N. W. 588.

¹ *Barter v. Johnson*, Newfoundl. Rep. (1817-1828) 33.

² *Williams v. Finch* (1848) 2 Barb. 208.

³ *Phelps v. Culver* (1834) 6 Vt. 430.

state in which a similar enactment is in force, it has been held that such an action may be maintained.⁴ Whether recovery can be had at the rate originally stipulated will depend upon whether his personal representative has agreed to fulfil the covenants of the indenture. An agreement to that effect cannot be inferred from evidence which merely goes to show that, after his death, the apprentice continued to render services to his widow, in the belief, shared by her, that the contract was still binding.⁵

d. Services rendered after attainment of age of consent.—In a jurisdiction in which only minors below a certain age can be bound without their consent, it has been held that a child who, after having been originally apprenticed without his consent under a contract which did not stipulate for the payment of remuneration, continued to work after attaining the age when his consent was a prerequisite to the validity of the contract, could not maintain an action on a *quantum meruit* for his services.⁶ This decision is supported by the analogy of the cases cited in §§ 541, *a*, 543, *ante*.

2165. Right of action for extra work.—It has been held that an apprentice cannot recover for extra work, even though the master may have expressly promised to pay him for it.¹ As to the rule applicable to cases where the servant is the claimant, see § 457, *ante*.

⁴ *Hennessey v. Deland* (1872) 110 Mass. 145.

⁵ In *Hennessey v. Deland* (last note), the court thus stated its conclusions: "The agreed statement of facts finds that the defendant did not make any express agreement to perform them. . . . There was not a meeting of their minds in mutual promises necessary to constitute a contract. Nor does the law imply, from these facts, an agreement to perform the stipulations of the indenture. They are evidence from which, with other evidence, a jury might infer an agreement by the parties, but the law does not imply from them a contract by the defendant to pay the compensation fixed by the indenture. *Connor v. Hackley* (1841) 2 Met. 613. The facts therefore present the case of one person performing services for another without any agreement as to price. In such cases the law implies a contract by the employer to pay what the services are fairly worth. It follows that the plaintiff can claim of the defendant only the fair value of her services; and as the facts find that she has been paid this by the defendant, she is not enti-

tled to recover anything in this action."

⁶ *Hudson v. Worden* (1867) 39 Vt. 382.

¹ *Bailey v. King* (1835) 1 Whart. 113, 29 Am. Dec. 42. The court said: "It is conceded that extra work by an apprentice is not a consideration to raise an implied promise; but it is said to be sufficient to support an express one. But if the master be chargeable at all, why not on a common count, as in ordinary cases of work and labor done? It may perhaps be that, without an agreement to define the portion of the work which belongs to the master by force of the indentures, there could be no such thing as extra work. It is certain that an apprentice stands not on the ordinary footing of a servant; but for that very reason it becomes a question of grave concern, whether the enforcement of such an agreement, by legal means, be not forbidden by considerations of policy. In many respects the master is in the place of a parent. He is treated as such in the statutes to prevent the clandestine marriage of minors; and his relation to the apprentice, if not strictly parental, is at least

2166. Parties entitled to the remuneration.—*a. Apprentice.*—Under the general rule regarding the right of the father to appropriate the earnings of a minor child (see §§ 635, *ante*), he is presumptively entitled to any remuneration which may accrue to such a child for services rendered with reference to a contract of apprenticeship. But it is frequently stipulated in indentures that such remuneration shall be paid to the child himself.¹ Such payment is also provided for by some of the statutes. See next section.

b. Mother of apprentice.—An agreement by a minor apprentice for the payment of his wages to his mother, without any consideration moving from her, is not enforceable.²

c. Guardian.—A guardian has no right to appropriate the earn-

pupillary. Now these promises are but incitements to industry and those virtues which are ever found in its train. By the proofs in the cause, it appears that the conditions, by the observance of which the reward was to be gained, were not merely the performance of additional labor, but also regular attendance at church, and the keeping of regular hours at home,—matters intended to benefit not the mistress, for she was to pay for the increase of production, but the apprentice himself, in the preservation of his morals and the improvement of his professional skill. Can it be that these observances may be made the foundation of a legal demand? Declare them to be subjects of judicial cognizance, and all inducements to propose them will cease."

¹Where a father contracts for the apprenticeship of his minor son, stipulating that certain payments are to be made to the son by the master, a suit for the breach of the stipulation can be brought only by the son. *Ziegler v. Fallon* (1887) 28 Mo. App. 295.

As the Kentucky statute directs that payment shall be made to an apprentice in person, a settlement made by the master's widow with an apprentice is good, although he is not of age. *Cochran v. Davis* (1824) 5 Litt. (Ky.) 118.

²*Leech v. Agnew* (1847) 7 Pa. 21. There the apprentice had been bound with the assent of his guardian, signified by sealing the indenture, to the defendant, who covenanted to pay him \$10 a month for the first year, and half the wages of a journeyman for the rest of the term. He covenanted, also, to pay the plaintiff, his mother, for board-

ing him while the first fire should be out,—that is, the first intermission of the business, to prepare the furnace for the resumption of it,—provided she would send him to school during the interval. There was no other covenant for maintenance; but, appended to the indenture was something like a declaration of trust, sealed by the master, the apprentice, and the guardian, which imported that the wages coming to the apprentice were to be paid to his mother. The court said: "What operation had the apprentice's proper act to transfer the beneficial ownership of his earnings? When an infant's contract is in its nature beneficial to him, it binds him in infancy and at age; when prejudicial, it is absolutely void from the beginning. This is a rudimental principle: and what was the legal effect of this contract on the apprentice's interest? Neither his master nor his mother was bound to maintain him; the master, because he had not covenanted to do so; and the mother, because the law had not cast the burden of it on her. He had then, for all exigencies, his \$10 a month during the first year, and his half wages the rest of the term,—a provision barely sufficient for necessities. And he agreed to give it away for no appreciable consideration! The impulses of a mother would restrain the donee from turning him out of doors; but in the interpretation of contracts, we have to deal only with legal obligations. Had she added to the gift an engagement to maintain him, as an equivalent, the contract might have been deemed a beneficial one; but as she did not, it was void."

ings of his ward. He may assent to the ward's being apprenticed, but may not hire him out for his own personal benefit.³

2167. Enactments relative to the remuneration of the apprentice.—

a. Generally.—Many of the statutes contain clauses the substantial effect of which is that the money, property, or beneficial contracts which the master undertakes to pay, transfer, or perform in consideration of the services of the apprentice, shall be secured or reserved by the indenture to his sole use.¹ The requirements of a clause of this character are sufficiently complied with, where the indenture obligates the master to pay the stipulated sum "to the apprentice and his father,"² or "to the apprentice or his mother."³ Under such a stipulation the parent of the apprentice is deemed to be the agent of the child in respect of the application of the money.

A few of the enactments relative to the binding of minors by courts contain general provisions respecting the payment of wages.⁴

b. Presentation of articles of value at the end of the term.—Many of the enactments which relate to the binding of poor apprentices impose upon masters the obligation of presenting their apprentices with certain articles of value at the end of the stipulated term.⁵ In such enactments, mention is always made of a certain amount of suitable clothing. Some of them specify also a lump sum of money and a new Bible.

³ *Leech v. Agnew* (1847) 7 Pa. 21.

¹ Provisions of this character are in force in the following jurisdictions:

Illinois.—Starr & C. Anno. Stat. 1896, chap. 9, § 11.

Indiana.—Burns's Anno. Stat. 1908, 8390 (7308).

Maine.—Rev. Stat. 1903, chap. 64, § 5.

Massachusetts.—Act of 1794, 64, § 1; Rev. Laws 1902, chap. 155, § 7.

Michigan.—Comp. Laws, 1897, chap. 235, § 8755; How. Anno. Stat. 1882, § 6358.

Ohio.—Bates's Anno. Stat. 1900, § 3122.

Oregon.—Hill's Anno. Laws 1892, § 2920.

Vermont.—Pub. Stat. 1906, § 3259.

Virginia.—Code 1887 and 1904, §§ 2589, 2590.

West Virginia.—Code 1899, chap. 81, §§ 8, 9.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2380.

Nova Scotia.—Rev. Stat. 1900, chap. 117, § 6.

British Columbia.—Rev. Stat. 1897, chap. 8, § 10.

² *Dodge v. Hills* (1836) 13 Me. 151.

³ *Doane v. Covel* (1869) 56 Me. 527.

⁴ *North Carolina.*—Revisal 1905, § 194 (Sess. Laws 1889, chap. 169, § 4). The clerk of the court shall insert in the indenture of an indigent child the amount of money or other thing of value to be paid to the apprentice by his employer annually.

Virginia.—Code 1887 & 1904, § 2586. It is enacted that when a county court makes an order allowing a minor to be bound as apprentice, it shall inquire and direct whether the master shall, besides maintaining and teaching him, pay anything for his services. The writing by which the minor is bound shall bind the master to pay the sum directed, and for payment bond may be taken.

West Virginia.—Code 1899, chap. 81, § 5. Same as Va. Code § 2586.

⁵ For examples of such provisions, see the following:

Alabama.—Code 1907, § 2901 (501) (1479 (1735)).

c. Statutes relative to servants, how far applicable to apprentices. The provision in art. 2749 of the Louisiana Civil Code, by which an employer is required to pay to a "laborer" whom he sends away before the end of his term the whole of the salaries which he would have been entitled to receive had the full term of his service arrived (see § 859, *ante*), has been held to enure to the benefit of apprentices.⁶

By one of the inferior courts of Pennsylvania, it was held that an apprentice was entitled, as an "operative," to a preference under § 5 of the repealed United States bankruptcy act of 1841.⁷

K. OBLIGATIONS OF THE APPRENTICE AND OTHER PERSONS COVENANTING IN HIS BEHALF.

2168. Duty of apprentice to complete the term of service.—a. Generally.—An obligation on the part of the apprentice to continue the performance of the stipulated work during the whole of the agreed periods is obviously one of the essential incidents of the contract, whether it is or is not specifically mentioned in the indenture.¹ But such an instrument usually contains an explicit stipulation upon the subject. A stipulation of this tenor, although in terms absolute, is subject to an implied condition that the apprentice shall continue to be physically able to perform the contract.²

Colorado.—Rev. Laws 1908, § 143.

Delaware.—Rev. Code 1893, chap. 79, § 5.

Florida.—Rev. Stat. 1892, § 2114.

Illinois.—Starr & C. Anno. Stat. 1896, chap. 9, ¶ 10.

Mississippi.—Code 1892, § 3160.

Missouri.—Rev. Stat. 1899, § 4804 (378).

North Carolina.—Revisal 1905, § 194. Clothes, money, and Bible.

Ohio.—Bates's Anno. Stat. 1900, § 3122.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2379.

⁶ *Hand v. West* (1876) 28 La. Ann. 145. The court said: "An examination of the evidence satisfies us that defendant neglected and abused the minor, or permitted it to be done; that, instead of assigning him to service in the office, the minor was put to menial service in the family; that he was treated in the most cruel and shameful manner, and finally was driven from the house of defendant without proper cause. . . .

Defendant has wantonly violated his contract and rendered its execution on the part of the minor impossible. Shall he escape the penalty allowed to almost every employee for a fixed term and salary, a penalty which the most inferior plantation laborer could demand, simply because, in addition to the stipulated wages, defendant assumed relations of a higher character toward this minor boy,—relations of a parental character? We think not. These relations ought to have inspired a deeper determination to uphold the contract, and a greater reluctance to violate it."

⁷ *Ex parte Steiner* (1842) 1 Clark (Pa.) 134.

¹ This doctrine is embodied in Louisiana Civil Code 1889, art. 169 (163): An implied condition of the contract entered into between the master and bound servant or apprentice is that the latter bind himself to serve the former during all the time of his engagement.

² *Boast v. Firth* (1868) L. R. 4 C. P. 1. There it was held that to an action

b. Under statutes.—In some jurisdictions, the performance of this duty is secured by a statutory requirement to the effect that a bond with condition that the apprentice shall serve for the full term is entered into by his parent, guardian, or a responsible person in his behalf.³ In other jurisdictions it is enacted that the indenture shall contain an express stipulation to the effect that the minor shall not leave the master during the term.⁴

2169. Duty to obey orders.—*a. Generally.*—In cases where the indenture contains an express clause with respect to the duty of obedience, the question whether it has been violated must be determined with reference to the language employed by the parties.¹ In the absence of any such clause, the nature and extent of the apprentice's obligations will depend upon the character of the master's trade or business.²

b. Under statutes.—Some of the statutes provide in general terms that the apprentice shall obey all lawful commands.³

2170. Duty not to be absent from work.—*Generally.*—This duty, like the one mentioned in the preceding section, is implied by law as an incident of the contract. But ordinarily it forms the subject

for the breach of a covenant that the apprentice would honestly remain and serve the master for the time specified, it was a good plea that the apprentice was prevented by the act of God, to wit, by permanent illness, which arose after the making of the deed, and before breach. Montague Smith, J., said: "It seems to me that it must be taken to have been in the contemplation of the parties, when they entered into this covenant, that the prevention of performance by the act of God should be an excuse for its nonperformance."

³ *Massachusetts.*—Rev. Laws 1902, chap. 155, § 8.

⁴ *New York.*—Domestic relations law, § 121 (5). There was a similar provision in the repealed statute, Laws 1871, chap. 934, § 2.

North Carolina.—Revisal 1905, § 204 (2).

¹ In *McPeck v. Moore* (1878) 51 Vt. 269, plaintiff apprenticed himself to defendant for a term of years, "to learn the art and trade of finishing marble, but to do such other chores and labor, when required," as might be necessary to defendant, and covenanted to "serve his master faithfully, . . . obey his lawful commands," and behave himself

in all things as a faithful apprentice should. After the plaintiff had worked a while, defendant requested him to go into the cellar under the shop, and open and repair a drain, that the water might run off. Plaintiff refused, whereupon defendant declined to give him further work till he had done as requested, although plaintiff was willing and offered to continue. Plaintiff thereupon brought assumpsit on common counts. Held, that the service required came within the express terms of the contract, as it "pertained to the comfort and convenience of the shop," and was, besides, such service as might reasonably be required of an apprentice in the absence of express stipulation. Held, also, that the contract was entire, so that if wrongfully broken by plaintiff he could recover nothing, but if by defendant, he could recover compensatory damages.

² See *Phillips v. Innes* (1837) 4 Clark & F. 234, 2 Shaw & M. 465, reversing (1835) 5 Sc. Sess. Cas. 1st series, 659. § 2170, note 3, *post*.

³ *Ontario.*—Rev. Stat. 1897, chap. 161, § 13.

Manitoba.—Rev. Stat. 1902, chap. 79, § 6.

of an explicit provision in the indenture. Although such a stipulation is silent with regard to the effect of the apprentice's physical inability to work during a portion of the term, such inability is doubtless a valid excuse for his absence.¹ But it may be so worded as to subject him to some additional obligation which is only to come into operation in the event of his being compelled to absent himself for this cause.² However broad may be the terms in which it is expressed, Sunday is clearly to be regarded as being excluded from its scope in any jurisdiction in which work of the description covered by the contract cannot lawfully be performed that day.³

An absence which would otherwise constitute a violation of duty may, of course, be justified by showing that it was licensed by the master.⁴ It is not necessary that his license should be given in writing.⁵

¹ See the case cited in § 2168, note 2, *ante*.

² In *Behney v. R. Stoeve Foundry Co.* (1906) 30 Pa. Super. Ct. 625, an owner of a foundry entered into a contract with the father of a minor, by which the minor was to be employed in the foundry for the term of three years at stated wages. It was a rule of the foundry that minors accepted to learn the trade were not to be considered as indentured, but were to be under the control of their parents or guardians before and after working hours, and that their monthly wages were to be in lieu of board and clothing. The contract provided that apprentices at the expiration of the three years must "work out in addition the time they have lost during their apprenticeship." As security for the faithful performance of his duties by the apprentice, it was stipulated that the preceding six months of his pay should be withheld, to be forfeited if he left the establishment before his time had expired. The minor was absent during a considerable portion of his term, a part of the absence being occasioned by sickness. Held, that the minor was bound to make up the time during which he was sick, and that if he failed to do so a deduction could be made from the wages retained.

³ In *Phillips v. Innes* (1837) 4 Clark & F. 234, 2 Shaw & M. 465, reversing (1835) 5 Sc. Sess. Cas. 1st series, 659, an apprentice to a barber in Scotland, bound by his indenture "not to absent himself from his master's business on holidays or week days, late hours or

early, without leave," went away on Sunday without leave, and without shaving his master's customers. Held, that he could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, such a service not being within the statutory exception with regard to work of "necessity, charity, or mercy." An authority cited was *Learmouth v. Blackie* (1828) 6 Sc. Sess. Cas. 1st series, 536, where it was held not to be a breach of an indenture to be out on Sunday.

In *Wright v. Gihon* (1829) 3 Car. & P. 583, on the ground that the words of the indenture had reference to absence from business, it was held that the staying out by an apprentice on a Sunday evening beyond the time allowed him was not such an unlawful absenting of himself as would enable his master to maintain an action of covenant against a person who had become bound for the due performance of the indenture.

⁴ In the *nisi prius* case of *Russell v. Shinn* (1861) 2 Fost. & F. 395 (action against apprentice's father), it was ruled by Byles, J., that the mere fact that the master declined to have any trouble taken to find him, and described him as worthless, would not sustain a plea of leave and license, but that it might be material in mitigation of damages, and if it was proved, the jury could only give the real value of his services up to the time of action.

⁵ *Black v. Stevenson* (1846) 3 U. C. Q. B. 160 (ruling made on demurrer).

b. Under statutes.—By some statutes it is enacted in general terms that the apprentice shall not absent himself.⁶ The effect of the provisions which require him to make up for lost time after the expiration of the term is stated in § 2193b, *post*.

2171. Duty in respect of the performance of certain kinds of work.—

The general rule under this head is that an apprentice is under no obligation to perform for his master any work except such as is connected with the trade or business in respect of which he is to be instructed.¹

2172. Duty to work in other places in the same state or country.—

a. Rule apart from statutes.—Whether in a given instance the master's removal from the place with reference to which the contract was made, to another within the limits of the same state or country, is to be regarded as a breach of duty, is a question to be determined from a consideration of the various elements involved,—such as the provisions of the indenture, the incidents of the relationship contemplated by it, the nature of the business in respect of which the apprentice is to be instructed, and the distance between the two places. The accepted doctrine seems to be that an undertaking on the masters' part to remain during the entire term at the place where he was carrying on his business at the time when the indenture was executed, or at all events in the immediate neighborhood of that place, will always be implied, where it is stipulated that the parents of the apprentice shall supply him with board, lodging, and other necessities.¹ This doctrine may be referred solely to the consideration that such an arrangement clearly imports that they had in view

⁶ *Ontario*.—Rev. Stat. 1897, chap. 161, § 13.

Manitoba.—Rev. Stat. 1902, chap. 79, § 6.

¹ This is the effect of the following Scotch cases: *Cheisly v. Cuthbert* (1665) Morison's Dict. 9150; *Peter v. Terrol* (1818) 2 Mur. 28; *Ballantyne v. Kerr* (1811) 16 F. C. 357 (master printer was held to be entitled to require a person bound as a pressman to teach a younger apprentice in the same branch).

By one of the inferior courts of Pennsylvania it has been held that a master has no right to require the performance of menial duties by an apprentice bound for the purpose of learning a trade. *Com. v. Hemperley* (1850) 4 Clark (Pa.) 440.

¹ In *Eaton v. Western* (1882) L. R.

9, Q. B. Div. (C. A.) 636, the plaintiff was bound apprentice to the defendants and their partners and successors in business in the trade of an engineer; and his father covenanted to provide him with board, lodging, and other necessities. At the date of the indenture the business was carried on by the former defendants in London, where also the father of the apprentice resided, but there was no stipulation in the indenture as to the place where the business should be carried on. Before the term of the apprenticeships expired, the defendants' partnership was dissolved, and two firms established, one in London, consisting of two of the defendants, and the other at Derby, consisting of the other two; the manufacturing part of the old business being carried on at Derby, and the selling part in London.

a place which would be conveniently accessible. But in one case the point chiefly emphasized was the fact that, if the apprentice should be removed to the place proposed, the father of the apprentice would not be in a position to watch over his son's conduct.²

With regard to apprentices whose indentures provide that they are to live in the master's house, it has been intimated, but never decided, that there is no obligation on his part to remain in the same place.³ Under such circumstances, the consideration that, after the removal of the apprentice, his father could no longer exercise, constantly or at frequent intervals, supervision over his conduct, would quite commonly be a negligible factor, since a contract made upon this footing may ordinarily be taken as importing an intention that the function of supervision is to be intrusted to the master. But on general principles, it may perhaps be presumed that even an indoor apprentice is under no obligation to accompany his master to a place which is situated at such a considerable distance from his home that his father can seldom visit him, or which is distinctly unhealthy, or which is objectionable by reason of some other drawback so serious

The defendants called on the plaintiff to attend at the place of business at Derby. Held, that there was an implied stipulation that the contract was to be performed at the place where the business was carried on and the parties resided at the date of the indenture; and that the direction to the apprentice to go to Derby was an unreasonable command which he was not bound to obey. Lindley, L. J., remarked: "The apprentice here is not part of the family, but is to be boarded and lodged by his father, not by his masters, and he to attend daily at the place of business. I cannot say that it was a reasonable and lawful command that he should live more than a hundred miles from his father's place of residence." The decision in *Royce v. Charlton* (1881) L. R. 8 Q. B. Div. 1, was overruled on grounds thus stated by Jessel, M. R.: "In that case the parties were living at Mansfield, where the indentures were executed, and the appellant removed from Mansfield, and went to become the managing director of a house of business at Leicester [about 30 miles distant], and wanted the apprentice to follow him there. The objection made was that this was not within the contemplation of the parties when the indentures were executed. The mother of the ap-

prentice had to provide him with board and lodging, and was it to be supposed that she intended to do this everywhere? It merely was meant to be within a reasonable distance of her own residence. It is reasonable construction of the covenant that the master was not to require the apprentice to live at another part of England."

² In *Gravel v. Malo* (1888) Montreal L. Rep. 4 S. C. 43, a father who had engaged his minor son as an apprentice in the country town where he was residing with his family was held to be justified in withdrawing him from the apprenticeship, when the master expressed a wish to take him away to live in the city of Montreal, about 25 miles away. Compare the remarks quoted in § 2173, note 4, *post*, from the opinion of the court in *Walters v. Morrow* (1859) 1 Houst. (Del.) 527.

³ In *Eaton v. Western* (note 1, *supra*) Sir J. Hannen remarked: "There is a broad distinction between this case, and that of an apprentice taken into the house. In the latter case I am inclined to think that the master would be entitled to take the apprentice with him if he removed to another place, and that it would be beyond the power of the apprentice to refuse to go."

that, in all probability, neither he nor his father would have assented to the contract if it had been supposed that residence there would be required.

b. Effect of statutes.—The matter of removal has been regulated by express enactments in a few of the American states.⁴

2173. —in places in another state or country.—*a. Rule apart from statutes.*—It is fully settled that “an indenture of apprenticeship gives no authority to the master to transport the apprentice beyond the jurisdiction within which the contract was entered into, and with reference to the laws of which the parties contracted,”¹ unless the

⁴ *Texas.*—Rev. Stat. 1895, *Apprentices*, act 28 (6). The master is required to stipulate that he will not remove the apprentice out of the county without the leave of the court.

Virginia.—Code 1887 & 1904, § 2593. No minor shall reside out of the county or corporation in the office of which the writing by which he is bound is required to be filed, without leave of the court of that county or corporation. (Code 1849, chap. 126, § 13.)

West Virginia.—Code 1899, chap. 81, § 12. No apprentice bound by the county court shall live out of the county in which the judicial order binding him is made, without the leave of the court.

¹ *Coffin v. Bassett* (1824) 2 Pick. 357.

In *Covenry v. Woodhall* (1616) Hobart, 134, Brownl. & G. pt. 1, p. 67, where it was held that an action might be maintained against a surgeon for sending his apprentice on a ship to India, the court said: Generally no man can force his apprentice to go out of the kingdom, except it be so expressly agreed or the nature of his apprenticeship doth import it; as if he be bound apprentice to a merchant adventurer, or a sailor, or the like.

In *Loddell v. Allen* (1857) 9 Gray, 377 (action for breach of covenant against father of apprentice), the court thus discussed the contention of counsel that, although no particular place was stated in the indenture at which the service was to be performed, yet, by indentment of law, it was a contract for services to be performed in Massachusetts: We have no doubt such would be the construction to be given to an indenture under the Revised Statutes. We apprehend the same would be true of an indenture at common law, of the character of the one now before us, in

the absence of anything to control such presumption or waive the benefits of it. If it were not so held, the effect would be to authorize the party to whom such services were secured to require the minor to remove to California, or even Australia.

The removal by a master of his entire plant from the state in which the contract was made and intended to be performed, to another state, was held to be a breach of the contract. *W. B. Conkey Co. v. Goldman* (1905) 125 Ill. App. 161 (action for damages, held to be maintainable against the master).

In *Vickere v. Pierce* (1835) 12 Me. 315, it was held that no violation of a covenant that a minor apprenticed to a house carpenter in one of the United States should “well and faithfully serve” his master was predicable where the apprentice refused to accompany his master into Canada.

In *Com. v. Deacon* (1821) 6 Serg. & R. 526, where a minor apprenticed in England to a gold-beater was released on habeas corpus from a prison where he had been confined at his master's instance, the court reasoned thus: “When the law of any country permits an infant to bind himself to serve another, it is with a view to the infant's benefit and to the protection afforded him by the same law. Besides, the very nature of the contract shows that it never could have been intended to give power to the master to carry his apprentice to a foreign country; the health, the diet, the clothing, the protection of friends, as well as of laws, the local privileges and advantages derived from serving an apprenticeship,—all these are of importance to the infant, and all may be lost if he be carried abroad. Is it not monstrous to

power of removal is expressly conferred by the indenture, or may be implied from the nature of the business in respect of which the apprentice is to be instructed.² The reasons for applying the doctrine are deemed to be especially cogent when the apprentice was bound by a court.³ For the purposes of this doctrine, it is manifest that any element in the case which shows affirmatively that a continued residence in the same state or country was contemplated is, in an evidential point of view, merely corroborative. The most important and frequently presented element of this character is a stipulation to the effect that the apprentice is to live with his parents and be supported by them.⁴

At common law the mere intention of the master to remove to

think that a young man, bound apprentice, in a healthy country, where the society is civilized and well governed, should be torn from his friends and country, and carried to a bad climate, where the laws yield but feeble protection? It is very true that a removal from England to the United States of America might be for the advantage of many apprentices; but if the principle be just, they might be carried to any part of South America, of Africa, or the East Indies; and so might our own young men, bound in our own city, be carried to the same miserable places. The case is too plain to admit of much argument; we are struck with the truth as soon as the question is proposed."

² This obvious qualification was noticed by Brackenridge, J., in *Com. v. Edwards* (1813) 6 Binn. 202. See also the remarks of the court in *Coventry v. Woodhall*, note 1, *supra*.

³ In *Com. v. Edwards* (1813) 6 Binn. 202, where the apprentice was discharged in habeas corpus, the court said: "Although there is no express stipulation that the apprentice shall not be removed from Virginia, yet it is to be so understood from the nature of the case. It must be supposed that when the legislature of any state vests in its courts a power over the persons of orphans, that power is to be exercised, that the orphans shall not be withdrawn to places beyond the jurisdiction of the state, except those who are bound to the sea service, which must necessarily call them abroad. While within that jurisdiction they are sure of protection from the same laws which authorized their binding. But the moment they enter a

country where other laws prevail, they may receive treatment very different from what was contemplated by the court under whose authority they were bound. If it be permitted to remove this apprentice beyond the limits of Virginia, she may be carried to the West or East Indies. There is no medium. The service must either be restricted to Virginia, or not restricted at all. The consequence of a boundless license of removal would be monstrous. Instead of affording protection to orphans, the court which was intrusted with their superintendence might only be exposing them to hardship and ruin."

⁴ In *Lobdell v. Allen*, note 1, *supra*, the court made the following remarks with regard to this aspect of the contract: "In the present case, there is wanting not only any express stipulation looking to services elsewhere, but there are provisions in the indenture indicating quite the contrary. Such is the provision that the minor is to board with his father, as long as the father is disposed to board him for \$100 dollars per annum, to be paid in equal proportions monthly. This seems to give a locality to the services to be rendered by the minor." (Compare *Eaton v. Western*, § 2172, note 1, *ante*.)

In *Walters v. Morrow* (1858) 1 Houst. (Del.) 527 (covenant by father against master), the parents of a boy entered into an agreement under seal with a coachsmith, by which the boy was to stay with the latter as an apprentice until he attained full age, and the coachsmith was to teach the boy his trade, and pay the parents, whilst the boy remained with him, \$30 per annum

another state or country does not constitute a breach of the contract.⁵ But this rule has been altered by statute in some jurisdictions. See following subsection.

In any case where the removal is wrongful, redress may be ob-

for the boy's clothing, and allow them for his boarding, washing, and mending a certain sum per week. The parents resided in the same town in which the coachsmith had his place of business. The court said: "One of the main objects and motives of the defendant in entering into the agreement, probably, was to avoid the necessity of taking the boy into his own family, and of assuming that personal care, charge, and control of him, as well as the more stringent and imperative duties and obligations, which result from a regular indenture of apprenticeship, and are imposed by it upon the master. As the boy was at that time living in the family of his parents, and the parties were all residing in the city of Wilmington, the defendant there established in his trade and business of coachmaking or coachsmithing, and the parties of the first part there permanently settled by anticipation for the ensuing five years at least, it is not only fair to presume, under all these circumstances and from the fact that neither party saw proper to insert in the contract any stipulation or covenant in regard to a change of residence, or any change in their relation to each other in this respect in the meanwhile, that it was at that time the expectation and design of both parties that they would so continue to reside convenient to each other, and that the boy should continue to live in the family of, and be lodged and boarded by, his parents, or where they at least might have, without the necessity of removing from the state and changing their residence to another and distant city, at the will and pleasure of the defendant solely, the personal care, supervision, charge, and control over him, and the provision and supply of such necessities as were stipulated for him in the contract, at the prices stated, during his term of service. . . . It was, therefore, not allowable, nor in accordance with the obvious design of the parties, for the defendant, when by his own voluntary act he transferred his place of business beyond the limits of the state, and removed from the city of

Wilmington to the city of Baltimore, to insist on removing the minor with him, without the consent of the plaintiff, far away from the society of his family, and beyond their personal care, control, and supervision, to be lodged and boarded among strangers, and to deprive them of whatever benefit, advantage, or gratification might accrue to them from having him to remain with them during his term of service."

⁵ In *Coffin v. Bassett* (1824) 2 Pick. 357, an action for breach of a covenant that the apprentice should continue in the service of the plaintiff, the defendant pleaded that the plaintiff intended to remove to a distant state for the purpose of there carrying on his trade, and to carry the apprentice with him against the will of the apprentice and of the defendant, and that the plaintiff afterwards did actually remove thither; that if the apprentice had remained with him till he went, and had refused to accompany him, he would have been abandoned by him; whereupon the apprentice, to avoid being carried out of the commonwealth and to provide against being deserted, left the plaintiff's service. Discussing the defense thus offered, the court said: "The plea is also bad, for it alleges no act of the plaintiff which amounts to a breach of any covenant on his part, but merely an intention to do an act which might have that effect. This intention may never have been executed, and if it had been attempted, relief was open to the apprentice on habeas corpus, or some other process, or even by a forcible escape from the custody of the master, if he had seized the apprentice and confined him with a view to carry him out of the commonwealth. . . . Had the plea alleged an actual attempt to violate the personal liberty of the apprentice, as the cause of his leaving his master's service, it would have been good; so, perhaps, if it had been averred that the plaintiff had left the commonwealth with the intention to remain beyond its jurisdiction, and had continued absent down to the commencement of the suit, such facts would have

tained either in the courts of the jurisdiction in which the contract was made,⁶ or in those of the jurisdictions to which he has been removed.⁷

There are decisions to the effect that, in an action by the father of the apprentice against the master for a breach of contract in taking his son out of the country, parol evidence is admissible on the plea of not guilty, to prove that the plaintiff consented to the act;⁸ and that, in an action against the father of the apprentice for a breach of the covenant in respect of his continued services, the defendant will be estopped from setting up his removal as a defense, if the evidence shows that a portion of the agreement incompatible with the supposition that the master was invested with the right of removal had been waived or modified by the consent of the parties.⁹ On the other hand, it has been held that the mere fact of the apprentice's having accompanied his master voluntarily will not legalize his removal to a foreign jurisdiction.¹⁰ Perhaps the simplest and most reasonable rule is that the contract should or should not be enforced against the apprentice, according as it appears that, after having had an opportunity to acquaint himself with his environ-

made a good defense; but for aught which appears in the plea before us, the absence of the plaintiff may have been but temporary, without intention finally to abandon his business here, and there is shown no attempt to take the apprentice with him; and elopement therefore cannot be justified, though it may be a question for the jury on the subject of damages, how much should be deducted on account of the absence of the master under circumstances which gave him no right to control the person or the services of the apprentice."

⁶ *Coventry v. Woodhall*, note 1, supra; *Lobdell v. Allen* (1857) 9 Gray, 377; *W. B. Conkey Co. v. Goldman* (1905) 125 Ill. App. 161.

⁷ *United States v. Scholfield* (1805) 1 Cranch, C. C. 255, Fed. Cas. No. 16,231; *Gusty v. Diggs* (1820) 2 Cranch, C. C. 210, Fed. Cas. No. 5,878; *Com. v. Deacon* (1821) 6 Serg. & R. 526.

⁸ *Burden v. Skinner* (1808) 3 Day, 126.

⁹ *Lobdell v. Allen* (1857) 9 Gray, 377, where it had been agreed that the apprentice was to board with his father. See note 4, supra.

¹⁰ *Com. v. Deacon* (1821) 6 Serg. & R. 526. Discussing the contention that the apprentice (who had been bound with his guardian's consent) had consented to leave his own country, the court said: "There is, to be sure, that kind of negative consent which arises from the apprentice's making no complaint; but that has not much weight; an infant under the control of his master may easily be induced to acquiesce; a little coaxing, a little indulgence, a few fair promises, may persuade a young man so circumstanced to accompany his master. But that is not enough; we should have better evidence of his assent; and the proper evidence is a new contract made after the arrival of the master and apprentice in the United States, under the sanction of our own laws; this may always be done when there is fair dealing, and the apprentice is really willing to serve his master here; and where he is not willing, he should be at liberty either to return to his own country, or stay here and act as he thinks most for his interest."

ment, he was willing or unwilling to proceed with the performance of the contract.¹¹

With the cases discussed in this section those collected in § 289, *ante*, should be compared.

b. Effect of statutes.—Several statutes have been enacted, the purport of which, broadly speaking, is that the removal of apprentices cannot be legally effected except with their own consent and that of the other parties to the indenture.¹² If an apprentice is removed in violation of a statute of this character, the courts of the jurisdiction into which he is removed will grant him relief by discharging him from the contract.¹³

Other statutes provide that a specified court may, if there is good reason to suspect that a master designs to remove his apprentice, require from him a recognizance, to be forfeited in event of his carrying out his intention, and discharge the apprentice if he refuses to enter into such an obligation.¹⁴

By others the court designated is simply authorized to hear complaints of apprentices regarding their masters' intention to remove them, and to make such order as will relieve the injured party in the future.¹⁵

Colorado.—Rev. Laws 1908, § 146.

In some jurisdictions, provision has been made for an annulment of the contract by judicial proceedings, in the event of the master desiring to leave the state in which it was entered into.¹⁶

¹¹ This view is partially sustained by the decision in *Com. v. Hamilton* (1810) 6 Mass. 273, where a child had been bound in Upper Canada, and the master had removed with him into Massachusetts. The court refused to order the child to be delivered to her mother, who had married a second husband, and permitted her to remain in the family of the master, according to the request of the child. It was also ordered that neither the mother nor any other person should molest her in respect to her residence in the family of her master.

¹² *California.*—Civil Code 1909, § 269.

Colorado.—Rev. Laws 1908, § 154.

Illinois.—Starr & C. Anno. Stat. 1896, chap. 9, ¶ 16.

Indiana.—Burns's Anno. Stat. 1908, § 8393 (7311)

Kentucky.—Stat. 1903, § 2595.

Maine.—Rev. Stat. 1903, chap. 64, § 6.

Maryland.—Pub. Gen. Laws 1904, Act 6, § 6.

Missouri.—Rev. Stat. 1899, § 4819 (394).

North Carolina.—Laws 1889, chap. 169, § 14, Revisal 1905, § 196.

Texas.—Rev. Stat. 1895, *Apprentices*, Act 28.

New Brunswick.—Consol. Stat. chap. 83, § 4.

¹³ *United States v. Scholfield* (1805)

1 Cranch, C. C. 255, Fed. Cas. No. 16,231; *Gusty v. Diggs* (1820) 2 Cranch, C. C. 210, Fed. Cas. No. 5,878.

¹⁴ *Illinois.*—Starr & C. Anno. Stat. 1896, chap. 9, ¶ 16.

Maryland.—Pub. Gen. Laws 1904, art. 6.

¹⁵ *California.*—Civil Code 1909, § 271.

¹⁶ *California.*—Civil Code 1909, § 276.

Colorado.—Rev. Laws 1908, § 154.

Illinois.—Starr & C. Anno. Stat. 1896, chap. 9, ¶ 17.

2174. Duty not to marry.—There is specific authority for the doctrine that an action will lie for the marriage of an apprentice in contravention of an express covenant.¹ Whether in the absence of such a stipulation a breach of contract should be predicated is a question to which no general answer can be given. There would seem to be no valid reason why the marriage of a male apprentice living outside his master's household should be treated as a breach of contract.² On the other hand, if the indenture requires him to become a member of his master's family, his marriage might well be regarded as a ground for rescinding the contract, on the theory that the obligations incident to the status thus assumed are necessarily incompatible to some extent with those incident to the apprenticeship.³ In the case of a female apprentice, marriage would, it may be supposed, always be treated as a breach of duty, except in so far as her liability may have been modified by the operation of some statutory provision.⁴

For other authorities bearing on the subject of this section, see § 207, *ante*.

2175. Obligations assumed by parties covenanting for the apprentice's fulfilment of the contract.—The circumstances under which a person who joins in the execution of the indenture is regarded as having executed it as a covenantor for the due performance of the contract by the apprentice are discussed in § 2178, *post*. Where the covenant of such a person is absolute and unconditional, as is ordinarily the case, the only grounds on which he can escape liability for its nonperformance seem to be these: (1) That the master consented to his being discharged from his obligations; (2) that the

Missouri.—Rev. Stat. 1899, § 4819 (394).

North Carolina.—Revisal 1905, § 196, Laws 1889, chap. 169, § 14.

¹ *Townsend's Case* (1663) 1 Lev. 91.

² This view possibly finds some support in *Rea v. Tardebigg* (1753) Sayer, 100, a settlement case, in which it was held that the marriage of a male servant in husbandry neither operated *ipso facto* as a dissolution of the contract, nor constituted a legal ground for discharging him. But the report does not show where the pauper had been living.

³ This view receives some indirect support from the decision in *Stephenson v. Houlditch* (1704) 2 Vern. 492, where it was held that, if an apprentice in London marries, that will not justify his dismissal, the appropriate remedy of

the master being an action on the covenant. It seems to be implied that the dismissal of an apprentice who married was regarded as being warrantable in any place where the incidents of the contract were not controlled by the custom of London.

⁴ In *King v. Snedeker* (1894) 137 Ind. 503, 37 N. E. 396, the marriage of a female apprentice before the expiration of the term of service was held not to be an abandonment and violation of the apprenticeship articles, so as to prevent an action against the other party for a breach of the contract, under Burns's Ind. Rev. Stat. 1894, § 7299, which expressly provides that the marriage of a female shall annul her indentures.

master so acted as to disable himself from fulfilling his own covenants in the manner contemplated; (3) that the master was guilty of a breach of duty which warranted the rescission of the contract by the other parties thereto; (4) that the performance of the contract by the apprentice was rendered impossible by reason of his death or permanent physical incapacity (see § 2212, *post*). Except in these instances, the liability of the covenanter continues until the expiration of the stipulated term, even though the right of withdrawal from the service may have previously accrued to the apprentice. In this point of view a plea that the apprentice served faithfully until he became of age, and then avoided the indenture, is not a good answer to an action against the father for a breach of a covenant that he should serve for a specified number of years.¹

Where the covenant is qualified, the extent of his liability will depend upon the tenor of the qualifying clause.²

In the note below is stated the effect of some cases relating to the

¹ *Cuming v. Hill* (1819) 3 Barn. & Ald. 59. Bayley, J., said: "I may bind myself that A. B. shall do an act, although it is in his option whether he will do it or not. The father here binds himself that the son shall serve seven years. It is no answer in an action brought against the father for the breach of that covenant, for him to say that it was in the option of the son whether he would serve or not. If the son does not choose to do that which the father covenanted he should do, the covenant is then broken, and the father is liable."

² In *Van Dorn v. Young* (1852) 13 Barb. 286, the decision proceeded upon the ground that where the parties to an indenture bind themselves, "so far as it was in their power, to see the contract fulfilled," it must be deemed to have been their intention to limit their obligations to their legal ability. It was held in an action by the master against the father, for the apprentice's breach of the contract in abandoning the service, that the defendant was bound to do what he had the legal power to do, in order to effect the return of his son; and that an allegation in the complaint that he had not used any endeavors, and refused to do anything, sufficiently showed a breach of his obligation.

In *Wright v. Tuttle* (1810) 4 Day, 313, the master covenanted to instruct the apprentice, and to furnish him with

board and washing during the term; and also, in consideration of his having previously obtained some knowledge of the business, to allow him at the rate of \$110 a year, in cash or clothing, as it might be mutually thought his necessities required, "provided the said apprentice shall make good to his said master all time he may lose on account of sickness, or other account, and pay for all physic, or attendance of physicians and surgeons, that he may require during the term." The defendant contended that these words were only a qualification of the plaintiff's covenant; and that the true construction of the indenture was that the plaintiff was bound to pay at the specified rate for the services of the apprentice, on condition of his making up the time lost by sickness, etc., and that, if the apprentice did not so do, the plaintiff was not obliged to pay him anything. The plaintiff contended, that the proper construction was that the plaintiff was bound to pay the apprentice during the term at the specified rate, and that the defendant was bound to pay for loss of time by the apprentice, and the expenditures in physic, etc. The court, having expressed the opinion that the language of the contract showed clearly that "what was to be performed by the plaintiff was to be done during the term of the apprenticeship; for he was to pay at the rate of \$110 per year, and it was

obligations of sureties upon the fidelity bonds of apprentices.³ For a general discussion of the subject the reader is referred to general treatises on guaranty and suretyship.

As to the liability of one who becomes a covenantor for the performance of a contract which is, as regards the apprentice, void or voidable, see §§ 2129, 2134, *ante*.

L. COMMON-LAW REMEDIES OF THE MASTER FOR A BREACH OF THE CONTRACT.

2176. Rescission of the contract—*a. General rule.*—A contract of apprenticeship may be so worded as to invest the master with the right of discharging an apprentice on the ground of a breach of duty.¹

to be paid in cash or clothing, as the apprentice's necessities required, proceeded thus: "That there should be a mutual agreement between them during the apprenticeship is perfectly natural. But that there should be a mutual agreement respecting furnishing clothing for a man no longer his apprentice, or member of his family, is improbable. If, then, the covenant on the part of the plaintiff was to be performed during and at the end of the apprenticeship, his obligation did not depend upon the defendant's paying for loss of time, etc., but he was bound to perform before it could be known that the apprentice would or would not make up lost time, or pay for physicians," etc. The conclusion drawn was that the words, "provided the said apprentice," were not a qualification of the plaintiff's covenant, but an unconditional covenant of the defendant so to do, and that a demurrer to a declaration in an action against the apprentice's father for not "making good," etc., had been improperly sustained.

³ In *Shepherd v. Beecher* (1725) 2 P. Wms. 288, A, who had given a bond for the fidelity of his son, had paid B his master, a certain sum embezzled by his son, and at the same time desired B to trust his son no more with cash, or but very sparingly. About a year after, the apprentice embezzled another sum, but the misappropriation was not discovered for several years, when it was found that he had embezzled a much larger sum than that specified in the bond. Held, by Lord King, Ch., that A could not be compelled to pay more than the

amount of his bond in all, the first sum embezzled to be part of it.

In *Mountague v. Tidcombe* (1705) 2 Vern. 518, 1 Eq. Cas. Abr. 308, pl. 6, A put his son apprentice to B, and gave £1,000 bond for his fidelity, and at the same time B covenanted with A to see that the apprentice made up his cash once a month at least. Held, that the covenant of B imported that he would not only see that the figures were right, but also that the cash was actually made up; that consequently B's pretence that the apprentice had inserted banker's notes as remaining, when he had disposed of them, was no excuse; that the bond and the covenant were as one agreement to the effect that A would be answerable monthly, provided accounts were taken monthly; and that A was only liable, under the circumstances, for one month's embezzlement.

In *Baker v. Shelbury* (1666) 1 Ch. Cas. 70, upon the hearing of a bill for relief against an apprentice-bond and articles, it was ordered that the master should within a year bring his action, and go to trial thereupon for his damages, or in default thereof the bond and articles to be delivered up. The reason given for the interference of the court was that if it were at the master's choice to stay his action as long as he pleased, he would stay till the plaintiff's witnesses were dead.

¹ In *Westrick v. Theodor* (1875) L. R. 10 Q. B. 224, the declaration alleged that the defendant agreed with the plaintiff to take his son as an apprentice for three years, to learn the business of a tea broker, and, in considera-

Such a right may also be predicable on the ground of a special custom.² But cases which do not involve these special factors are regarded as being ordinarily determinable with reference to the doctrine that the covenants of an indenture are mutual and independent, not precedent and dependent. The necessary consequence of treating that doctrine as a controlling factor is to debar the master from rescinding the contract on the ground of its having been violated by the apprentice, and to restrict him to the remedies afforded by an action of covenant, or by the special proceedings, if any, which have been provided by statute. See §§ 2192 *et seq.*, *post.*³ In this re-

tion of £200, to teach him such business and pay him a salary, provided that he should obey all commands and give his services entirely to the business during office hours. Breach, that the defendant dismissed the son from his service. Plea, that the son misconducted himself in the service, by wilfully disobeying the orders of the defendant, and by habitually neglecting his duties and refusing to give his services during office hours, without just cause, wherefore the defendant discharged him. Held, on demurrer, that the proviso empowered the defendant to discharge the apprentice, and that the plea was good. Blackburn, J., said: "It is unnecessary to hear counsel in support of the plea. It is true that the consideration is paid for the whole service, and that in general misconduct on the part of the apprentice would not put an end to the contract. The cases referred to during the argument support that contention. But in *Winstone v. Linn* (1823) 1 Barn. & C. 468, 17 Eng. Rul. Cas. 186, Bayley, J., in his judgment, points out that if the contract in express terms gives the master a power to dismiss the apprentice, the case would be different. I think here the contract provides that if the apprentice misconducts himself the master may dismiss him. I do not say that upon a fair construction of the proviso that one act of disobedience would be a breach of the condition, but we must look at the plea, which must be taken to be true. The averment is that the plaintiff's son wilfully disobeyed the defendant's orders, and habitually neglected his duties. I cannot say what amount of disobedience would justify a dismissal; it is a question of degree, which would be for a jury; but I am of opinion that the plea is good."

In *Bradley v. Perkins* (1904) 138 Mich. 356, 101 N. W. 583, it was held that a provision to the effect that if, for any acts of disobedience of the apprentice, the master should deem it necessary to discharge him, then half the apprentice reserve fund should be forfeited to the master, did not give the master authority to determine what constitutes an act of disobedience, but merely to discharge in case of such an act. It was furthermore held that wilful disobedience, or such refusal to work, as would authorize the discharge of the apprentice, or the imposition of a penalty, was not established by evidence which showed that, on the foreman asking him to work extra hours at night, he said that he did not want to work, because it was cold, on account of which his feet were troubling him, and that he should take the work to some one nearer a stove, whereupon the foreman said nothing further, but got another man to do the work.

² In one case it was held that, by the custom of London, it is sufficient cause of dismissal that the apprentice frequents gaming houses. *Woodroffe v. Farnham* (1693) 2 Vern. 291. But in a later case it was laid down that, if an apprentice in London marries without his master's consent, that will not justify his dismissal. The master must sue on the covenant. *Stephenson v. Houlditch* (1704) 2 Vern. 492, the court made no reference to the special custom referred to in the previous decision. From the meager report it is impossible to ascertain the explanation of what appears to be a conflict of authority.

³ The leading case upon the subject is *Winstone v. Linn* (1823) 2 Dowl. & R. 465, 17 Eng. Rul. Cas. 186, an action against the master for a breach of his

spect, it should be observed, there is an essential difference between the incidents of contracts of apprenticeship and service. See § 311, *ante*.

covenant to maintain and instruct. The defendant pleaded that the apprentice was guilty of disobedience, and had absented and wholly withdrawn himself from the service of his master, declaring at the same time that he never intended to return. The replication was that after the son had been guilty of the acts of disobedience stated, he had voluntarily returned, and tendered and offered himself to serve and obey the defendant during the residue of the term, but the defendant refused to receive him. Discussing these pleadings, Bayley, J., said: "The question is whether the acts of disobedience on the part of the apprentice, set forth in the plea, entitle the master to cancel the indentures, or whether, if the apprentice offers to return to the service, he is not bound to receive him, it not being stated in any part of the pleadings that he had been absent for an unreasonable length of time. This is an action upon an indenture by which the father and the infant bind themselves that the latter shall serve the defendant for four years, and the master, on his part, covenants that he will, during that time, teach and maintain the infant. That is an absolute covenant on his part. Whether there are any other covenants on the part of the father and son does not appear upon this record. Covenants of this nature are not precedent and dependent, but mutual and independent. If the apprentice refuses to perform his covenants, the master has a right to claim compensation against the father for any damage sustained thereby; so if the master does not do his duty, he is also liable to an action at the suit of the father. . . . Now, does disobedience of orders, or do any of the other acts mentioned in the pleas, entitle the master to put an end to the contract? I think not. These are the acts of an infant. No consent on his part to put an end to the contract will be valid for that purpose. His consent will not be sufficient. If the apprentice has been guilty of disobedience of orders, temporary absence without leave, or other act of misconduct, these are matters for which provision

might have been made by covenants entered into at the time the indenture was executed. There is no case which says that the master, for such conduct, shall be entitled to put an end to the contract. Agreeing that we are at liberty to construe this contract independently of the statutes concerning apprentices, still I think the existence of those statutes evidently shows that, without the provisions therein contained, the parties could not of their own act dissolve such a contract. Upon the whole, it appears to me that mere misconduct on the part of the apprentice does not entitle the master at once to put an end to the indentures. One or two *nisi prius* cases have been pressed upon our consideration, but those refer to the ordinary relation of master and servant, which differs very materially from the case of master and apprentice. In general a premium is given with an apprentice to the master, in consideration of teaching and maintaining him during the term stipulated. But in the ordinary relation of master and servant there is a condition, implied from the very nature of the contract, that if no definite period is fixed it is to continue until there shall be a reasonable notice given, provided the party shall so long behave himself well. Such a condition is most reasonable, because the contract is to be a contract of service, and of service only, moving from the servant to the master. It would be most unjust to cast on the master the obligation of continuing under his roof, and paying wages to, a servant who will not continue to perform that duty which the master has stipulated that he shall perform. That, however, is not the case of a mutual and independent contract, such as an indenture of apprenticeship; and for these reasons it appears to me that these pleas are bad, and consequently that the plaintiff is entitled to judgment." Holroyd, J., said: "As to the general question, it appears to me that the cases which have been cited with reference to the contract between master and servant are not applicable to the present case. In contracts of that nature the

b. Qualifications of the general rule.—It has been held that the master is entitled to dismiss an apprentice who has stolen his prop-

servant is to perform his service, in consideration of which the master is to maintain and pay him wages. The performance of service in a due and proper manner is the consideration, and the sole consideration, for the master maintaining and paying him wages; and the moment he ceases to perform this obligation the consideration fails. If he misconducts himself he may be discharged, and the master may refuse to pay him his wages if he does not earn them. The case of master and apprentice is different. That is not a case where certain duties are to be performed by the servant, for which a compensation is to be paid by the master. An indenture of apprenticeship is a contract for the instruction of a young person in a trade or business,—a person who is to be protected against his own improvident acts, not being *sui juris*, and over whom the master has a higher control than over a servant. The case of master and apprentice, therefore, stands upon a very different footing; and at the same time it is to be observed that when an apprentice is placed out, a premium is usually paid to the master for instruction. Here a premium of £90 was paid with the apprentice. The master on his part enters into a covenant to instruct or cause him to be instructed. On the part of the master, it is also a covenant for protection during the period of the apprenticeship; it gives him a right of control over the youth, in order that his instruction may be effectual. The argument urged on behalf of the defendant, if effect were given to it, would leave the apprentice wholly unprotected, and, the moment he was bound, would leave him at liberty to do what he pleased, notwithstanding the indentures. I do not mean to say that the father might not be responsible for any breach of covenant to be performed by his son, but that the indenture is to be void for his misconduct is a proposition which I think cannot be maintained. The misconduct of the apprentice in not obeying the lawful commands of the master cannot itself be considered as putting an end to the indentures, and unless it is to have that effect by releasing the master from his covenants, the present

action is clearly maintainable. The statute of Elizabeth applies, I think, very strongly in argument upon the present occasion. I admit that this case is to be considered in the same way as if that act had not been passed; but it goes to show that, notwithstanding any misconduct on the one side or on the other, covenants of this description are good in point of law; and if so, they are good for the purpose of maintaining this action. The provisions of that statute enable the master or the apprentice to complain before a magistrate for misbehavior, or any cause of complaint, on the one side or the other, and authority is given to the magistrate to vacate the indenture if he thinks proper. That authority so vested in the magistrate shows what the idea of the legislature was in passing that statute, namely, that misconduct on the one side or on the other, stated generally, would not put an end to the indentures. I am therefore of opinion that this action is maintainable." Best, J., said: "It is argued that the apprentice having improperly conducted himself, and having gone away with a declaration that he would not return, he was from that moment put out of the protection of his master, and ceased to have any claim upon him for any portion of the £90, or to have any right to call upon him for any further instruction. If that were law, it would be the most unjust law ever propounded in a court of justice; but that is not the case. If the apprentice misconducts himself, the master has a remedy against the father in an action of covenant upon the indenture, and may recover a compensation in damage for any injury he has received; but the misconduct of the apprentice is not to be considered a dissolution of the contract. I agree with my Brother Holroyd, that if the argument which has been urged in this case be right, there would be no occasion for the jurisdiction which the legislature has vested in magistrates and chamberlains upon such subjects. I think the strongest argument is to be drawn from the jurisdiction thus given to magistrates, that the misconduct of the apprentice is not of itself sufficient to dissolve such a contract, because all

erty,⁴ or has been guilty of some grave breach of duty which is cal-

this care of the legislature upon the subject would have been unnecessary, if by an act of imprudence on the part of the apprentice his indentures were to become void. What would be the consequence of sanctioning the argument which has been urged in this case? If an absence of three days would be sufficient to vacate the indentures, an absence of a single hour would be sufficient; and if a boy of fifteen years of age is guilty of a single act of misconduct, the master would have a right to turn him away; and although the parents should pay with him a fee of £500, the master would have a right to keep the whole. To hold such a doctrine as that would produce the grossest injustice."

The above case was followed in *Wise v. Wilson* (1845) 1 Car. & K. 662 (Denman, Ch. J., in directing the jury, laid it down broadly that a person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves,—as, where he comes home intoxicated); *Powers v. Ware* (1824) 2 Pick. 451 (court observed, *arguendo*, that a master cannot dismiss an apprentice for stealing his goods, but has a remedy by complaint to the court of common pleas; but see note 4, *infra*); *Coker v. Browne* (1896) 7 Queensland L. J. 71 (mere casual disobedience not a valid ground for determining the relation).

In *Learmonth v. Blackie* (1828) 6 Sc. Sess. Cas. 1st series, 533, it was held that the fact of an apprentice's having, on a single occasion, absented himself without leave for five days, was not such a breach of the contract as would justify the master in canceling the indenture,—especially as the instrument expressly provided that he was to work two days at the end of his term for every day that he might be absent. Lord Meadowbank observed: "The master is not to expect from his apprentice, particularly if he is a boy, implicit and unexceptionable performance of the obligations in the indenture; but must overlook and pardon, though with proper censure, deviations and transgressions which do not amount to vice, or go the length of rendering the connection of the parties so disagreeable as to make it

impossible to continue the execution of their contract."

In *Orphan House Comrs. v. Magill* (1840) Cheves, L. 56, the assignment of the indentures of a child bound by the commissioners of an orphan house contained a covenant by the assignee to pay the sum of \$60 in case of the dismissal of the apprentice before the end of the term. The apprentice having been dismissed on account of immoral behavior, it was held that the commissioners could recover the \$60. The court said that the literal covenant of the assignee was to pay that sum if the apprentice was dismissed; that the consideration of the covenant was not that the apprentice should conduct herself orderly, the true consideration being that the assignee was made master of the apprentice, with all the rights, duties, and advantages of a master, and that it was the duty of every master to persevere, and strive to correct and improve an apprentice throughout the whole term of the service; and that, when the assignee dismissed his unruly apprentice, he himself failed in his primary undertaking, and disappointed the end and motive of the commissioners. The proper course of the master was to complain to the justices.

In *Cockran v. State* (1871) 46 Ala. 714, it was held that the master could not relieve himself from his obligations, without leave of the court in proceedings taken under Rev. Code 1867, § 1460.

⁴In *Sheppherd v. Maidstone* (1713) 10 Mod. 144, it was stated, *arguendo*, that embezzlement is a forfeiture of the indenture. This assertion is directly opposed to the remark of the court in *Powers v. Ware*, note 3, *supra*.

In *Cox v. Mathews* (1861) 2 Fost. & F. 397. Byles, J., ruled at nisi prius, in an action by an apprentice against his master for not teaching him, that, "If the plaintiff was in the habit of stealing, as the defendant alleges, the defendant would not be bound to have him in his shop to instruct him, as there was gold lying about, and constant opportunities of stealing."

In *Maxwell v. Buchanan* (1770) Morr. Dec. (Sc.) p. 593, it was held that theft from the master was a good cause for dismissal.

culated to injure seriously his master's business,⁵ or has been frequently in default with regard to his obligations.⁶ That the general doctrine explained in the preceding subsection should be qualified to some extent in the direction suggested by these decisions is a conclusion strongly, if not decisively, indicated by a consideration of the nature of the relationship existing between the parties.⁷ Admitting that, in view of the peculiar incidents of apprenticeship, much injustice would result from treating a simple breach of duty on the part of the apprentice as a valid ground for a total rescission of the contract, there would seem to be no valid objection to a rule which would entitle the master to send away from his household or business establishment an apprentice who had committed a criminal act, or had been guilty of exceptionally gross misconduct, or had by extreme incompetence or frequently repeated acts of negligence inflicted serious injury upon the master's interests or property. Any larger right than that of protecting himself temporarily in this manner the master cannot reasonably demand. If he desires to secure himself permanently, and the other parties refuse to release him from the indenture, it is open to him to make application to a court for its cancellation.⁸ The scope of the analogous rule, which ordinarily pre-

⁵In a *nisi prius* case Denman, Ch. J., ruled that the discharge of the "pupil and assistant" of a surgeon was warrantable, where he had employed a shop-boy to compound medicines, and so occasioned real danger to the surgeon's practice. *Wise v. Wilson* (1845) 1 Car. & K. 662.

In *Mallack v. Duffy* (1882) 19 Scotch L. R. 697, it was held that a master is justified in dismissing an apprentice who solicits business from his master's customers. The only authority, however, which was cited was *Dieringer v. Meyer* (1877) 42 Wis. 311, 24 Am. Rep. 415, a case involving the dismissal of a *servant* for engaging in a business which brought him into direct competition with his master. The distinction between contracts of service and apprenticeship, and the English decisions cited above, were not called to the attention of the court.

⁶*Stewart v. Crichton* (1835) 9 Sc. Sess. Cas. 2d. series, 1042 (irregularity in attendance, and repeated insolence and untruthfulness).

The Scotch law, according to a standard treatise, is that misconduct must be continued and repeated, and the ap-

prentice must be corrected and remonstrated with, before dismissal is resorted to. Fraser, Mast. & S. pp. 351-353.

⁷Mr. Austin in his work on Apprentices, p. 70, makes the following remarks. "To hold that a master shall be debarred (in the absence of any express provision to that effect in the contract) from dismissing his apprentice for the grossest act of negligence is certainly hard law. But such has been, and still appears to be, the law. Should the point hereafter arise, no doubt this doctrine will be considered, and, it may be, somewhat modified; and a master may be held justified in dismissing his apprentice where he is guilty of continued acts of an extraordinary gross character, showing him to be utterly incorrigible, and thereby making it an impossibility for the master to instruct him or carry on his business with profit."

⁸Under the new Wisconsin apprentice act, Sess. Laws, 1911, chap. 347, § 2, it is provided by the section substituted for § 2385 of Sanb. & B. Stats. that nothing therein shall be construed as precluding the master from dismissing

cludes an apprentice from abandoning the service on the ground of the master's breach of duty is considered in § 2183, *post*.

Where an indenture purporting to bind the apprentice beyond his majority is made in a jurisdiction in which such a binding is illegal, and the apprentice continues to perform the stipulated work after reaching full age, he is deemed to perform the work in the capacity of a servant. But the stipulations of the indenture as to the character of the services to be rendered, and as to payment of wages, instruction, etc., are regarded as being still in force. The master, therefore, is entitled to discharge the apprentice for a violation of any of the duties created by those stipulations, and is not obliged to resort to the statutory proceedings which must be pursued in cases where it is desired to terminate a subsisting contract of apprenticeship.⁹

2177. Action of covenant against apprentice.—*a. Common-law doctrine.*—The accepted doctrine of the common law is that, except by virtue of a special custom,¹ an action for a breach of the covenants of an indenture cannot be maintained against an infant apprentice.²

any apprentice who has violated the rules applicable to all workmen.

⁹ *Walton v. Atchison, T. & S. F. R. Co.* (1906) 131 Iowa, 423, 101 N. W. 506.

¹ By the custom of London an infant might bind himself in an indenture of apprenticeship so as to be subject to an action, even in the superior courts at Westminster. *Stanton's Case* (1583) F. Moore, 135; *Horn v. Chandler* (1670) 1 Mod. 271, cited in Chitty, Contr. 13th ed. p. 177, note (u).

In *Walker v. Nicholson* (1599) Cro. Eliz. pt. 2, p. 653, it was held that, notwithstanding the custom of London, an infant was not bound by a collateral covenant. What the covenant in question was the report does not state.

That an infant may bind himself apprentice by custom in other cities besides London is stated in Comyns's Dig. title, *Justices of Peace* (B 55).

The custom of London does not entitle the assignee of an apprentice duly assigned to maintain covenant. *Barker v. Beardwell* (1690) 1 Shower, K. B. 4.

² Although it was enacted by § 43 of 5 Eliz. chap. 4, that minor apprentices bound under that statute should be bound to serve as if they were of full age, the courts appear to have very soon taken the position that this provision was not to be construed as ren-

dering such apprentices liable to be sued in covenant.

In *Jennings v. Pitman* (1624) Hutton, 63, the decision went no further than to declare that the apprentice was not liable for the performance of collateral duties. But in a case decided a few years earlier, *Whittingham v. Hill* (1619) Cro. Jac. 494, we find a dictum to the effect that the covenants were not binding on a minor apprentice except by virtue of a special custom. This doctrine was laid down formally in *Gylbert v. Fletcher* (1629) Cro. Car. 179, which has ever since been regarded as the leading case upon the point, and has been followed in many subsequent decisions, both English and American. *Farnham v. Atkins* (1671) 1 Sid. 446; *Lylly's Case* (1702) 7 Mod. 15; *Whitley v. Loftus* (1714) 8 Mod. 190; *De Francesco v. Barnum* (1889) L. R. 43 Ch. Div. 165 (1890) L. R. 45 Ch. Div. 165; *Haley v. Taylor* (1835) 3 Dana, 221; *Blunt v. Melcher* (1806) 2 Mass. 228; *McNight v. Hogg* (1812) 1 Treadway, Const. 117, (1812) 3 Brev. 44; *Frazier v. Rowan* (1806) 2 Brev. 47; *Kingwood v. Bethlehem* (1832) 13 N. J. L. 221.

In *Walter v. Everard* (1891) 2 Q. B. (C. A.) 369, Lopes, L. J., remarked that the decision which was being rendered,

In any jurisdiction in which special remedies have been provided by statute for the purpose of enabling masters to compel apprentices to perform their contracts, this rule may be regarded as being based partially upon the consideration that those remedies are intended to be exclusive of all others.³ It does not, however, operate so as to exempt an apprentice from liability upon a covenant which merely binds him to do something which is obligatory apart from any express stipulation upon the subject.⁴

b. Common-law doctrine as modified by statutes.—In some of the American states the common-law doctrine has been altered by legislation.⁵

viz., that the apprentice was liable for the premium stipulated, did not in any way conflict with the cases in which it had been held that an action could not be maintained for the breach of an infant's covenant to serve his master as an apprentice.

In *Woodruff v. Logan* (1845) 6 Ark. 276, 42 Am. Dec. 695, it was held that an action may be maintained against an infant for a breach of the contract. This decision is certainly bad law.

In *Frazier v. Rowan* (1806) 2 Brev. 47, the inference that the court was of the opinion that the master might have maintained assumpsit against the apprentice for refusing to serve would seem to be indicated by the circumstance that the right of action was denied solely upon the ground that the indenture was voidable by him as not having been made in conformity to the statute. If this was the theory entertained, it was clearly erroneous.

Reference may, in the present connection, be made to the rule that a minor apprentice cannot be charged by a writ of account in respect of money received by him. Viner, Abr. title, *Apprentices*, E, citing *Fitzh. Nat. Brev.* 119 D; *Fincham v. Hobbs* (1678) Finch, 370 (plea of statute of limitations in an equitable suit for an account of goods and money intrusted to an apprentice, held valid as to goods and money received during his apprenticeship and until he was free, but rejected as to the remainder).

In *Trueman v. Hurst* (1785) 1 T. R. 40, it was laid down that assumpsit does not lie against an infant on an account stated, even though for necessities, *viz.*, board, lodging, and instruction in a business.

³ In *Gylbert v. Fletcher*, note 2, *supra*, the court laid stress upon the fact that, if a minor apprentice misbehave himself, the master may correct him, or complain to a justice, and have him punished.

⁴ In *Bennet v. Belfield* (1617) 3 Bulstr. 179, an apprentice was held to be liable on a bond to deliver up a true and just account of all wares delivered to him to trade with. The *ratio decidendi* was that the bond, being for the making of a just account, was outside of the purview of 5 Eliz. § 41, which provided that "all indentures, covenants, promises, and bargains, of or for the having, taking, and keeping of, any apprentice, etc.," should be void. Haughton, J., said: "This bond here is entered into for the performance of a collateral thing, and of such a thing as of common right ought to be done, and therefore the same is out of this statute." Dodderidge, J., said: "This bond is not for the retaining, nor for the having, of an apprentice. Here the contract to make him his apprentice is void by this statute; but as to the wares to him delivered, the bond here is taken of him to render a just account of these. This is a good bond, and out of this statute."

⁵ See, for example, the following provisions:

California.—Civil Code 1909, § 274. Apprentice liable for the breach of any covenant.

Kentucky.—Stat. 1903, § 2600. Deserting apprentice liable to the master for all damages resulting from the desertion.

Connecticut.—Rev. Stat. 1902, § 4690. Absconding apprentice, when of age, is responsible for the consequent damages.

Missouri.—Rev. Stat. 1899, § 4815 (390). Apprentice liable in damages,

2178. Action against parties covenanting on behalf of apprentice.—

It is clear that in respect of a breach of duty by the apprentice, an action may be maintained against any person, whether parent, guardian, or next friend, who, by the specific terms of the indenture, has covenanted that the duty in question shall be performed.¹ The general rule applicable in this connection is that "no precise or formal words are necessary to constitute a covenant, more than any other agreement. The inquiry always is, What was the intention of the parties?"² The decisions collected in the subjoined note will show the manner in which this rule has been applied.³

provided there is no other person liable on the indenture therefor.

New Jersey.—Gen. Stat. 1895, *Apprentices*, § 9. Master may have an action on the case against an apprentice who absents himself or absconds, for damage resulting therefrom.

Ohio.—Bates's Anno. Stat. 1900, § 3133. Apprentice who is found guilty of dissoluteness in summary proceedings, or runs away, may be sued for damages.

Vermont.—Pub. Stat. 1906, 3251. Damages for breach of duty by apprentice may be recovered against him, if there is no other person liable on the indenture therefor.

Virginia.—Code 1887 & 1904, § 2595. Apprentice liable for damages caused by his desertion. (Code 1849, chap. 126, § 14.)

Under Kansas Gen. Stat. 1899, § 318, an apprentice who absents himself or runs away may be sued, *after he reaches full age*, for damages resulting from his absence.

¹ *Lyon v. Whitmore* (1811) 3 N. J. L. 846, and the cases cited in the following notes.

That the covenant of a guardian that his ward shall perform a contract of apprenticeship is a personal covenant was laid down broadly in *Berry v. Wallace* (1834) Wright (Ohio) 657 (apprentice had absented himself).

An indenture of apprenticeship stipulating that "A., by his attorney B., hath put his negro slave C. as an apprentice to D.," was sealed and signed "B., agent of A." Held, that it was the deed of A., and not that of B., and that an action thereon should be brought against A., and not against B. *Rantin v. Robertson* (1846) 2 Strobb. L. 366.

² *Bull v. Follett* (1825) 5 Cow. 170.

But in Ohio it is provided by Bates's Anno. Stat. 1904, § 3134, that no parent, guardian, or trustee shall be liable on any covenant, unless the indenture contains an express covenant that the said parent, etc., is made individually liable.

³ (a) *Cases in which an intention to become a covenantor was inferred*.—In *Whitley v. Loftus* (1724) 8 Mod. 190, where it was held that an action lay against the apprentice's father for a breach of the son's covenant to account faithfully for all the goods of the master that should come to his hands, the court observed: "The very end of binding the father was to answer the wrong which might be done by the son to his master; therefore the father must be obliged for his son's true performance of the articles. It is true at the end of the articles the covenant is in the singular number, 'that each of them did bind himself;' and it must be so where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively, 'that each of the covenantors should perform his part.'" For another English decision to the same general effect, see *Branch v. Ewington* (1780) 2 Dougl. K. B. 518 (apprentice absented himself).

In *Mead v. Billings* (1813) 10 Johns. 99, there was no specification of the parties in the introductory part of the indenture, but it began by stating that the son (naming him) put himself, with the consent of his father (naming him), an apprentice to the plaintiff below (naming him), and after stating the duties and obligations of the apprentice, and the corresponding duties and obligations of the master, it concluded thus:

A person whose assent to the binding of a minor is a statutory prerequisite to its validity is liable for the performance of such cove-

"For the true performance of all and singular the covenants and agreements aforesaid, the said parties bind themselves, each unto the other. In witness, etc., interchangeably set their hands and seals, etc." It was executed by the master, the father, and the apprentice. Held, that the father was liable in an action of covenant for the son's departure from the service before the expiration of the term."

In *Bull v. Follett* (1825) 5 Cow. 170, an indenture made by a ward and his guardian and the master, after declaring the duties of the apprentice in the usual form, concluded thus: "For the true performance of all and singular the said covenants and agreements the said master, apprentice, and guardian have hereunto interchangeably set their hands and seals." Held, that the guardian was bound to see that the apprentice fulfilled all his duties. The omission of the words, "bind themselves each unto the other," did not, in the opinion of the court, alter the construction or legal effect of the instrument.

In *Woodrow v. Coleman* (1804) 1 Cranch, C. C. 171, Fed. Cas. No. 17,982, where the operative words were, "said parties bind themselves each to the other," the father was held liable on the indenture.

That a guardian is bound by covenants in indentures made by his advice and consent and executed by him was laid down in *Paddock v. Higgins* (1796) 2 Root, 482; *Clement v. Wheeler* (1796) 2 Root, 466; *Hewit v. Morgan* (1796) 2 Root, 363. These rulings were made with reference to a general statute to the effect: "No person under the government of a parent, guardian, or master shall be capable to make any contract or bargain which in the law shall be accounted valid, unless the said person be authorized or allowed so to contract or bargain by his or her parent, guardian, or master; in which case, such parent, guardian, or master shall be bound thereby."

(b) *Cases in which an intention to become a covenantor was negatived.*—In *Blunt v. Melcher* (1806) 2 Mass. 228, the conclusions of the court were thus stated: "The question for our determination is whether the defendant is

bound, by the covenants in this indenture, for the apprentice's good conduct. My opinion is, decidedly, that he is not bound. He is not mentioned as a party to those or any other covenants contained in the instrument. The intent of all the parties, in making this indenture, appears from the instrument itself. The apprentice binds himself, with the consent of his guardian. To express that consent, and, in my opinion, with no other intent and for no other purpose, the guardian signs and seals the instrument. It is objected to this, that great inconveniences and mischiefs will arise from this construction of this species of indenture. But to guard against these, the guardian may enter into covenants explicitly with the master, and there is no doubt such covenants will be valid, and binding upon him."

In *Holbrook v. Bullard* (1830) 10 Pick. 68, the indenture of apprenticeship stated that a mother, as guardian by nature of her son, who was then over fourteen years of age, bound him to the plaintiff, and declared that "the apprentice his master faithfully should" serve, etc.,—enumerating the duties usually required of apprentices by their indentures. Then followed a covenant by the master to instruct and support the apprentice. The indenture concluded, "In testimony whereof the parties have to this indenture set their hands and seals," and it was signed and sealed by the plaintiff, the mother, and the apprentice. Held, that the mother was not liable to an action of covenant for a breach of duty by the apprentice. The court said: "Doubtless she was at liberty to superadd personal covenants, which might bind her; but the question is whether there are any such covenants contained in the deed. No express words of covenant are used on her part, but the language of the indenture is such as may be considered as amounting to a covenant for the faithful services of the apprentice, or only as pointing out and declaring his duties; and considering the relative situation of the parties and the object of the contract, we are of opinion that the latter is the true construction. . . . It matters not,

nants as he makes in his own name; ⁴ but the mere fact of his having attested his assent by signing and sealing the indenture does not render him responsible for a breach of the covenants of the apprentice. ⁵

The right of a master to resort to the remedy of an action on the covenants is not excluded by a special statute which provides for the adjustment of controversies between masters and apprentices. ⁶ The enactments of this description are discussed in subtitle M, *post*.

2179. Same subject. When the right of action accrues.—A master is entitled to bring an action for breach of contract at any time after

in regard to the construction of the language of the deed in question, whether the minor undertakes to bind himself with the consent of his parent or guardian, as was done in those cases; or is bound by his parent, as in the present case. If this difference in the form of the indenture has any bearing, the binding by the parent according to the statute, which provides a remedy for the master in case the apprentice absconds or misbehaves himself, would seem the most favorable to the construction we have adopted. The cases cited in which a different construction was given to indentures of apprenticeship are distinguished from those already noticed by an additional clause, by which the parties expressly bind themselves to the performance of all the stipulations in the indenture. This distinction seems to reconcile all the cases."

In *Ackley v. Hoskins* (1817) 14 Johns. 374, the indenture, in the introductory part, stated that A., by and with the consent of B., his guardian, had bound himself apprentice unto C., and, after stating the respective duties and obligations of the master and apprentice, concluded: "In witness whereof the said parties have hereunto set their hands and seals." Held, that the guardian was not liable to an action of covenant. The court said: "In the case before us there are no words importing any covenant or agreement on the part of the defendant. He has done no more than is made necessary by the statute in order to make the indenture binding on the apprentice. The statute (1 N. Y. Rev. Laws 1813, 135, chap. 11, § 2) requires that the consent of the father or guardian should be expressed in the indenture, and signified by such parent or guardian sealing and signing the said

indenture. That is all the defendant has done. He might be willing to consent to the binding, yet not be willing to be bound himself for the performance of all the stipulations contained in the indenture. In this, as in all other covenants, we should endeavor to find out the intention of the parties; and when we can account for the defendant's signing, and becoming, thus far, a party to the indenture, within the requirements of the statute, without making him a party to the covenants, we ought so to consider his meaning and intention, unless the language of the indenture will fairly warrant a more extended construction."

The three preceding cases were followed in *Chapman v. Crane* (1841) 20 Me. 172, where the consenting party was a guardian.

In *Campbell v. Criss* (1819) Tappan (Ohio) 289, the indenture was signed and sealed by father and son, reciting that the son, "by and with the consent of" the father, binds himself apprentice. Held, that the father was not personally liable on the indenture for a breach thereof by the son.

⁴ *Woodruff v. Corry* (1809) 3 N. J. L. 540 (covenant by guardian to provide clothes for apprentice).

⁵ In *McAdams v. Stilwell* (1850) 13 Pa. 90, this was declared to be the rule settled by the decisions in *Velde v. Levering* (1830) 2 Rawle, 269 (words of indenture were, "for the true performance of all the covenants aforesaid the said parties bind themselves each unto the other"), and in *Leech v. Agnew* (1847) 7 Pa. 21 (following earlier case, but not explicitly referring to the rule).

⁶ *M'Grath v. Herndon* (1825) 2 T. B. Mon. 82.

an apprentice has unlawfully departed,¹ or been withdrawn from his service.²

2180. Defenses to actions for breach of covenant.—The cases under this head have had reference to the relevancy of the following defenses: (1) That there was no obligation on the part of the apprentice to perform the covenant as alleged;¹ that the defendant, a surety for an absconding apprentice, had offered within a few days to send him back;² that the master had condoned the alleged breach of duty;³ that the master had consented to the act of the apprentice which was alleged as a breach of covenant;⁴ that the covenant alleged to have been broken had been replaced by a new arrangement

¹ In *Horn v. Chandler* (1670) 1 Mod. 271, upon demurrer to a declaration in covenant against an apprentice for leaving his service, whereby the plaintiff lost his service for the said term, which was not then expired, it was held by Twysden, J.: "Though it had been naught after verdict, yet being on demurrer it may be helped, for the plaintiff may take damages for the departure from the service only, and not for the loss of service during the term, and then it will be well enough." That case was followed in *Bruce v. Mathers* (1811) 2 Bibb, 294, where the court observed: "Had the plaintiff in this case declared for the loss of service for the whole term, the verdict, being for damages generally, would be erroneous." *Hambleton v. Veeres* (1671) 2 Wms' Saund. 169, Id. 171, note 1. But although there is some ambiguity in the manner of assigning the breach of the covenant, the better construction seems to be that the breach intended to be complained of is for the departure from the service only, for there is no averment of the loss of service for the whole term, nor for any given length of time."

² *Trigg v. Northcut* (1821) Litt. Sel. Cas. (Ky.) 414.

¹ In *Popham v. Jones* (1853) 13 C. B. 225, an action against a surety on an indenture of apprenticeship of A. to serve B. and C. faithfully, the defendant pleaded that there never were or was any services or service for A. to perform to or for the plaintiffs jointly. To this plea the plaintiffs—setting out the indenture, whereby the defendant covenanted for the service of A. as apprentice to B., of, etc., surgeon, and C., of, etc., surgeon and apothecary—replied

that, at the time of the execution of the indenture, the plaintiffs were not in partnership, nor did they carry on business jointly or on the same premises, but that they carried on business wholly separate and apart from and independent of each other, which the defendant at the time of executing the indenture well knew, and that the plaintiffs never represented to the defendant that they should carry on business in partnership. Held, that this replication was bad in substance. Maule, J., said: "Supposing the plaintiffs to be right in their construction of the indenture, it may be that a service of one of the masters would be a service of both. The proper course would seem to be to take issue on the plea. I think the plaintiffs should amend."

² This was held to be a good defense in the Scotch case, *Malvennis v. Hepburn* (1886) Morr. Dec. p. 583. A common-law court would perhaps hold that such an offer is not an absolute defense, for the reason that a complete right of action accrues to the master immediately upon the abandonment of the service by the apprentice.

³ In *Wright v. Gihon* (1829) 3 Car. & P. 583, where an apprentice had been taken back after having absented himself, it was held that the taking back would, if specially pleaded, be available as a defense to an action for his breach of duty.

⁴ In *Lewis v. Wildman* (1803) 1 Day, 153, an action for the unlawful departure of the apprentice, it was held to be a good defense that he departed with the leave and license of the master. To the same effect, see *Black v. Stevenson* (1846) 3 U. C. Q. B. 160.

between the parties; ⁵ that the master had by his own act incapacitated himself from performing the contract according to its terms; ⁶

⁵In *Blackburne v. Davis* (1843) 1 Car. & K. 167, it was ruled at nisi prius by Cresswell, J., that an action against the father of an apprentice for a breach of a covenant to supply him with certain articles during the term could not be maintained, because it appeared that after the execution of the indenture the master accepted a proposal of the father that his son should receive a certain sum per annum, and out of it pay the master for supplying him with the articles in question.

⁶In *Ellen v. Topp* (1851) 6 Exch. 424, Pollock, C. B., thus reasoned with reference to the facts involved: "The breach complained of is that the apprentice did not nor would serve the plaintiff according to the tenor and effect and true intent and meaning of the indenture. Now, looking to the indenture, we see that the real engagement was this,—the son Richard, with the consent of the defendant, his father, 'put himself apprentice to the plaintiff,' described in the indenture as "auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve;" and then the defendant, at the end of the deed, bound himself to the plaintiff for the due performance of that engagement. What, then, was it which the defendant covenanted that his son should do? To become the plaintiff's apprentice to learn his art, *i. e.*, the art of an auctioneer, appraiser, and corn-factor, and to serve with him after the manner of an apprentice. Now, service with a man after the manner of an apprentice imports, according to the meaning of those words as ordinarily understood, that the party served should be carrying on the trade which the apprentice is to learn; otherwise the one is teaching and the other learning the trade, not as master and apprentice, but as instructor and pupil. When, therefore, the one party ceases to carry on the trade, he by his act makes it impossible for the other to serve him after the manner of an apprentice; and he cannot be heard to complain that the other party has not done that which he has wilfully made it impossible that he should do." The contention of counsel, that the carrying on all the three trades was not a condition

precedent to the plaintiff's right to recover, but that his omission or refusal to carry on any one must be the subject of a cross action, was rejected. After quoting the rule as to dependent covenants in 1 Wms' Saund. 320, note c, the learned judge proceeded thus: "Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us: but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable *in futuro*, yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice: and if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another."

In *Hiatt v. Gilmer* (1846) 28 N. C. (6 Ired. L.) 450, where it was held that the members of a partnership could not maintain an action against the father of their apprentice for taking him home after the dissolution of the firm, the court argued thus: "The boy was not partnership effects to be divided. The plaintiffs offered no evidence that they jointly were in a situation to instruct the boy after the dissolution of the firm. They failed to prove an essential part of their declaration, to wit, that they

that the master had been guilty of so serious a breach of duty that the apprentice was justified in departing from the service;⁷ that the apprentice was prevented by physical incapacity from performing the stipulated services.⁸

were at all times ready and willing to instruct the boy. This was a condition precedent in the special contract, which, it behooves the plaintiffs to make out satisfactorily to the jury, had been by them performed, or that they had been always ready to perform. Where was the *quid pro quo* for damages ulterior to the dissolution? There was no consideration for such ulterior damages. And the jury would not probably have given them, if the court had left them uninstructed on this point. There is no rule of law or ethics, that we know of, that could authorize the court to tell the jury that the plaintiffs were entitled to recover damages for the loss of the services of the boy during the time they, the plaintiffs, were unable by their own act to teach and instruct him in the business of saddle and harness making. If the plaintiffs had produced evidence that they jointly were at all times ready and willing to instruct the boy notwithstanding the dissolution of the firm, the verdict might then be right."

In a case where a master carrier had ceased to take out the license required by statute, it was held that he was not entitled to enforce the penalty in the indenture of the apprentice who was alleged to have violated his agreement. *Watson v. Grundlay* (1826) 5 Sc. Sess. Cas. 1st series, 3.

⁷The circumstances under which a departure is deemed to be warrantable are discussed in § 2183, *post*.

⁸*Boast v. Firth* (1868) L. R. 4 C. P. 1. There the defendant (the father) pleaded that the apprentice "was and is prevented by the act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all the said term." Held, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action. Smith, J., said: "The substance of the plea is that the apprentice was prevented from performing the service covenanted for by permanent ill-

ness which was the act of God; and the main question argued was whether such illness so caused is an answer to an absolute and unconditional covenant for personal service. I think it is. The covenant is of a personal character, depending on the personal service and attendance of the apprentice. Such service might be prevented by the permanent illness or death of the apprentice, both of which would be the act of God. It seems to me that it must be taken to have been in the contemplation of the parties when they entered into this covenant, that the prevention of performance by the act of God should be an excuse for its nonperformance. If the matter had been quite barren of authorities, I should have come to that conclusion. The service stipulated for was something which the party contracting to render it only could perform, and that, provided he should live and continue in a state of health to enable him to do so. It must, therefore, necessarily be implied from the nature of the contract that the continued existence of the apprentice in a state to perform his part of it was understood by the parties; and that, if prevented by the act of God, the performance was to be excused. The case, however, is not without authority. The case of *Taylor v. Caldwell* (1863) 3 Best & S. 826, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, seems to me to have decided in principle that, in such a case as this, where the parties are contracting for personal services, it is an implied condition that the performance of the contract shall not be rendered impossible by the act of God." Brett, J., said: "In support of the demurrer in this case, it has been argued with much force that the covenant is absolute and unconditional, and therefore that, though the apprentice was prevented by the act of God from performing the stipulated services, still the defendant is bound to pay damages. If the first proposition could be sustained, the second, I apprehend, would follow. But the first is denied on the part of the defendant. It is said that, where the

The misconduct of the master may always be proved in mitigation of damage, even though it may not have been so serious as to justify the abandonment of the service by the apprentice.⁹

2181. Assessment of damages.—Damages for the unlawful departure of an apprentice can be recovered only up to the time when the action is brought.¹

2182. Specific enforcement of the apprentice's obligations.—In one case where an apprentice had absented himself, without the master's consent and without any lawful excuse, for 150 days, the court decreed that he should compensate his master for the loss of his services by serving for the same number of working days, and that, if he should refuse to obey this decree the master might apply for an attachment of contempt or other process to enforce it.¹ So far as the report shows, this decree was made without reference to any provision similar to those tabulated in § 2193b, *post*. That no modern court would, in the absence of an express statutory authorization, exercise such a jurisdiction, seems reasonably certain. It is material to observe that the case in question was decided before the current of judicial opinion had begun to set so strongly as it has done within the last half century against the specific enforcement of contracts of service. See generally, §§ 322 *et seq.*, *ante*.

The supreme court of New York has taken the position that a suit to compel specific performance of an indenture by an apprentice, and to restrain him from serving any person other than the master, cannot be maintained.²

contract is for personal services, and both parties must have known and contemplated at the time of entering into it that the performance of the services was dependent on the servant's continuing in a condition of health to make it possible for him to render them, and a disability arises from the act of God, the nonperformance of the contract is excused; and that this is a contract of that nature. I agree with both those propositions. I think permanent illness by the act of God is an exception by way of excuse out of the contract."

⁹ *Berry v. Wallace* (1834) Wright (Ohio) 657. The action was brought against the guardian of an apprentice who had run away after having been cowed. In modern times such treatment would doubtless be considered a complete defense.

¹ *Lewis v. Peachey* (1862) 1 Hurlst. & C. 518, 31 L. J. Exch. N. S. 496 10

Week. Rep. 797; *Russell v. Shinn* (1861) 2 Fost. & F. 395 (where Byles, J., in a nisi prius case treated the rule as one deducible from the consideration that the action does not operate so as to dissolve the contract).

Compare the similar rule applied in actions for a breach of the contract by the master, § 2189, *post*.

¹ *Easby v. Fletcher* (1841) 1 Hay. & H. 35, Fed. Cas. No. 4,250.

² *Thomas v. Baird* (1905) 47 Misc. 412, 94 N. Y. Supp. 47. The decision proceeded both upon the general principle that the enforcement of contracts of service should not be undertaken by a court of equity (*De Francesco v. Barnum* [1889] L. R. 43 Ch. Div. 165, was cited); and also on the ground that the special remedies given by Code Crim. Proc. §§ 927-930, were intended to be exclusive.

M. COMMON-LAW REMEDIES OF APPRENTICE FOR A BREACH OF THE CONTRACT.

2183. Rescission of the contract.— If the theory respecting the independence of the covenants in a contract of apprenticeship (see § 2176, *ante*) is to be regarded as one which is controlling under all circumstances, it is clear that a violation of the contract by the master can never be a valid ground for the apprentice's departure from the service. The language used in some cases seems to betoken an adoption of this extreme view, the rationale of which is that an adequate remedy is always available to an aggrieved apprentice, either in the form of an action for damages, or by a resort to such special proceedings as may have been prescribed by the legislature for the adjustment of disputes between him and his master.¹ But the preponderance of authority is in favor of the doctrine that an abandonment of the service is justifiable in cases where the master is guilty of a serious breach of duty.² This doctrine seems to have been more clearly and definitely indorsed by judicial opinion than the analogous one which accords to the master the right of dismissing an apprentice for certain kinds of misconduct. See § 2176, *b*, *ante*.

¹In *Com. v. Linker* (1870) 8 Phila. 455, the court, advertg to the fact that the act of 1770 had prescribed the remedy both for master and apprentice, in case the one or the other should be in default, observed. "The law will not sustain or sanction an apprentice in absconding whenever he may fancy he is ill treated, or that his master has not complied with his part of the contract. This is not the way to seek redress or settle differences."

See also *Cockran v. State* (1871) 46 Ala. 714, where it was held that the mere abandonment of the service by the apprentice does not avoid the apprenticeship. (The provision referred to was Ala. Code 1907, § 2903 (503) (1481) (1740) (1457), regarding the arrest, etc., of apprentices.)

²In *Viner's Abr. Master and Servant*, (U) 2 (citing *Br. Laborers*, pl. 35, which rests on 39 Edw. III. 22), it is laid down that a battery by the master is a good cause for an apprentice's departure. The general terms in which this statement is expressed would seem to be suggestive of a position inconsistent with the theory respecting the independence of the covenants. However

this may be, the doctrine, as formulated clearly needs some qualification in order to bring it into conformity with that which accords to the master the right of chastising the apprentice.

In *Halliwell v. Counsell* (1878) 38 L. T. N. S. 176, the abandonment of the service was held to be justified by evidence which showed that the apprentice, in consequence of his master's having assaulted him and inflicted personal injury upon him, and threatened to do him grievous bodily harm, had conceived a reasonable fear that he would suffer such harm. The original statement of defense had alleged that the apprentice "feared" that grievous bodily harm would be inflicted upon him. The court directed it to be amended by adding an allegation that he had "reasonable ground" for such fear.

In *Fletcher v. Buzolich* (1881) 7 Viet. L. R. (L.) 348, an action by the master against a surety for an apprentice to recover a penal sum for which he was alleged to be liable by reason of the apprentice's having absented himself from the service, it was held that the master's failure to teach the apprentice for three years out of five was so sub-

2184. Action for breach of covenant.—An action for the breach of covenant is the usual, and, speaking generally (see last section), the only, civil remedy at common law for a breach of the master's obligations.¹

stantial a breach of his obligations as to go to the root of the consideration, and constituted a legal excuse for the departure of the apprentice. Higginbotham, J., said: "Performance by either party is not a condition precedent to his right of action against the other party for a breach of any of his covenants, wherever the plaintiff's covenant forms only a part of the consideration, and the residue of the consideration, being the substantial part of the contract, has been accepted by the defendant. In all such cases, each party must seek a remedy for any previous breach of covenant by the other party by means of a cross action. On the other hand, it is undoubtedly true that a party to a contract of apprenticeship, when suing the other party for a breach, must show that the contract was in existence, and that he himself was at that time able and willing to perform it on his part." Williams, J.: "To ascertain whether he was excused or not, we must look into the contract, and inquire what was its real object and its nature. Its primary and natural object, I think, was the instruction of the apprentice. . . . That being so, I think it obvious that, if the master does not substantially teach, or is unable to teach, that which was the main consideration of the contract disappeared; the purpose for which it was agreed that the apprentice should enter into and continue in the service has failed, and, the substance of the contract being gone, the apprentice is entitled to absent himself. . . . It was argued that the apprentice could have been compensated for his loss of instruction, by damages obtained in a cross action; but I think the proper answer to that is that no damages could compensate a young man for loss of instruction during such a long and important period of his life."

In *M'Grath v. Herndon* (1825) 2 T. B. Mon. 82 S. C. (1827) 4 T. B. Mon. 481, a plea alleging that the master had been guilty of cruel and inhuman treatment was held to be a good answer to his action against the father of the apprentice.

In *Warner v. Smith* (1830) 8 Conn. 14, an action for damages caused by the desertion of the apprentice, it was held to be a good defense that the plaintiff had neglected to instruct the apprentice in his trade, and had unnecessarily obliged him to work on the Sabbath. Peters, J., said: "The covenants in this indenture are mutual and dependent. Neither party could sustain an action upon it until he had fulfilled the stipulations on his part. A total failure or prevention by one party discharges the other. 1 Chitty, Pl. 310. By express covenant the master was bound to instruct the apprentice in his art or mystery, and to feed and clothe him. As a master stands *in loco parentis*, he is under a higher obligation to instruct him in the principles of morality and religion. But instead of performing this paramount duty, this master compelled his apprentice, unnecessarily, to work on the Lord's Day. From such an apprenticeship it was right,—it was the duty of the ward to escape, and of the guardian to receive him. The defendant, as guardian, having transferred to the plaintiff the powers, and the law, the duties, of a parent over his ward, he was bound to see them executed, and would have been liable to a removal if he had neglected to snatch him from this school of corruption, and check his career in the road to ruin."

¹An action of covenant will not, it seems, lie for the breach of a judicial order directing that the apprentice be bound for a specified period. *Mass v. Rogers* (1823) 6 Harr. & J. 492. The court did not deliver any opinion, but the grounds of the decision may be inferred from the arguments relied upon by counsel, *viz.*, (1) That an action of covenant cannot be maintained on a record, and (2) that the court which made the order was one of limited jurisdiction.

Under Iowa Code, 1907, § 3240, proceedings with a view to discharge are not a bar to the bringing of an action for damages, nor for compensation for serv-

2185. Proper parties plaintiff in actions of covenant.—*a. Father of apprentice.*—The father of an apprentice is entitled to sue upon the indenture if he is an actual party thereto, and his intention to bind himself as covenantor is inferable from the language used.¹

b. Mother of apprentice.—Where a mother, acting in the exercise of her legal power in that regard, binds out a minor child, she is clearly entitled to maintain an action upon the covenants of the indenture. After her child has performed the stipulated services, she may bring such an action, although the child did not join in the contract, and it was consequently not obligatory, so far as he was concerned.²

c. Apprentice.—The general rule that a person cannot sue on a deed executed by two other persons, although it purports to be made for his sole advantage, and contains an express covenant to perform an act for his benefit,³ has furnished the *ratio decidendi* in some cases involving the question whether the apprentice was a proper party plaintiff.⁴

In one of the jurisdictions in which provision is made for the binding of minors with the consent of their parents or other specified persons, it has been held that an apprentice who has duly ful-

ices. (Code 1873, § 2293; Rev. Code § 2586.)

¹ In *Buzolich v. Fletcher* (1881) 7 Vict. L. R. 356, a father who had executed the indenture merely as a surety, and was not described as a party, was held not to be entitled to sue upon it.

In *Sacket v. Johnson* (1832) 3 Blackf. 61, the indenture began: "This indenture made, etc., between B. and C., his father, of the one part, and A. of the other part, witnesseth that the said B. hath by his own free will, and with the consent of the said C., his father, . . . put himself apprentice," etc. In the body of the instrument the apprentice covenanted for the performance of certain duties, and it concluded with the words: "In testimony whereof, the parties have hereunto set their hands and seals the date above mentioned." There were no covenants inserted on the part of C. Beach assigned that the apprentice had absented himself. Held, that the father's execution of the indenture was a mere expression of his assent to it, as required by the statute, and that, as he had entered into no covenants, the action could not be sustained. The court observed: "The apprentice

and the master respectively covenant, and it is only when we reach the conclusion of the instrument that the father again appears."

² *Austin v. McCluney* (1850) 5 Strobh. L. 104 (action for value of house and clothes which master had covenanted to give at the end of the term).

³ 1 Chitty, Pl. 3.

⁴ In *Connell v. Owen* (1853) 3 U. C. C. P. 249, by an instrument under seal made between A. B. and C. D., father and son, of the one part, and E. F. and G. H. partners of the other part, the son, with the consent of his father, bound himself apprentice. The clause securing performance was to the effect that the said A. B., and C. D., E. F., G. H., do bind themselves unto each other in the sum of, etc. Held, that all defendant's covenants were with the son, and not the plaintiff, and that the son should have been joined.

In *Poindexter v. Wilton* (1812) 3 Munf. 183, it was held that the overseers of the poor who had bound out the apprentice could not maintain an action for a breach of the covenants of the indenture. The report does not show the principle upon which the

filled his agreement until his majority is reached may bring suit in his own name,⁵ even though he was so young at the time when the contract was made that he was incapable of joining in the execution of the indenture.⁶ In another jurisdiction, in which the effect of the statute is to empower the fathers of minors to bind them out, it has been held that an apprentice may, upon attaining his majority and at the end of the term, pursue his remedy for a breach of the contract in any form of action applicable to his claim, although the covenants are not in terms with himself.⁷

d. Guardian.—An action for a breach of covenant by the master may be brought by a guardian who has bound his ward as apprentice.⁸ On the other hand such an action cannot be maintained by a guardian who signs and seals the indenture merely for the purpose of attesting his assent thereto, in compliance with a specific statutory requirement.⁹

e. Public officials.—The effect of some decisions bearing upon the question whether an action upon the indenture of a child bound by overseers of the poor is properly brought in his or in their name has been stated in subsec. *c*, *supra*. See also the following subsection.

f. Specific statutory provisions.—In some jurisdictions the parties by whom the action is to be brought have been designated by the legislature.¹⁰

court proceeded; but in *Bullock v. Sebrell* (1835) 6 Leigh, 560, where it was held that covenant would not lie in the name of the apprentice in an indenture entered into by the overseers without any previous order of the court for binding out the child, the court based its decision upon the ground that the deed in question was not a statutory one, as in the earlier case. The distinction thus taken seems to be somewhat arbitrary, and it seems preferable to treat all cases of this type as being controlled by the rule referred to in the text.

In *Hager v. Phillips* (1852) 14 Ill. 260, it was laid down without any qualification, that where a poor apprentice was bound by an indenture to which only the overseers and the masters were parties, an action upon the deed could be brought only by the overseers.

⁵ *McAdams v. Stilwell* (1850) 13 Pa. 90.

⁶ *McGunigal v. Mong* (1847) 5 Pa.

269, holding that, under such circumstances, case was the proper form of action.

⁷ *Cann v. Williams* (1864) 3 Houst. (Del.) 78 (suit for breach of a promise to pay a certain sum when apprentice became of age).

⁸ In *Learoyd v. Brook* [1891] 1 Q. B. 431, 60 L. J. Q. B. N. S. 373, 64 L. T. N. S. 458, 39 Week. Rep. 480, 55 J. P. 265, this was taken for granted.

⁹ *Leech v. Agnew* (1847) 7 Pa. 21; *Brock v. Parker* (1854) 5 Ind. 538.

¹⁰ By Mass. Rev. Laws 1902, chap. 155, § 14, it is declared that an action for a breach of covenant by the master shall be brought by the parent of the minor, or his executor or administrator, or by the guardian of the poor (in the case of a poor apprentice), or in the name of the minor by his guardian or next friend, or by himself after the expiration of the term.

In *Waddell v. Creech* (1887) 98 N. C. 155, 3 S. E. 814, it was held with reference to § 10 of N. C. Code 1883, that an action upon an apprentice's bond exe-

2186. When the right of action on an indenture accrues.—An action for a breach of a covenant may be brought immediately after it has been broken. The apprentice, or the party suing in his behalf, is not obliged to defer the assertion of his remedial rights until the term has expired or the contract been terminated by the judgment of a court.¹

2187. Pleading.—An action cannot be maintained on an indenture unless it is set out verbatim or in substance, so as to show the parties thereto and the nature of the liability alleged.¹ In one case decided under common-law rules, a declaration was held to be fatally defective, even after verdict, where one of the breaches assigned was in respect of a covenant which was not specified among those set forth.² But presumably this strict doctrine would not be applied in any jurisdiction in which the modern system of pleading has been

cut in 1873, to M., "Judge of Probate and his successors in office," was properly brought in the name of the clerk of the superior court.

¹In *Stokes v. Hatcher* (1818) 4 N. J. L. 84, an action by the apprentice's mother for failure to teach him and provide food and clothes, Kirkpatrick, Ch. J., thus discussed the arguments in behalf of the defendant: "It is said that the defendant may yet teach the apprentice the trade, so as to make him complete master thereof; and that as to the meat, drink, and apparel, if these were withholden, there ought to have been an application to the justices to discharge him first; for if this were allowed, an action might be brought every week during the term, which would be too vexatious, and cannot be law. But it would be hard indeed, if an apprentice were to go without his meat until the termination of an apprenticeship like this. It is of the nature of all covenants, that as soon as they are broken an action will lie, and so *toties quoties* for every breach. To keep the boy employed in other business than that of a wheelwright, as was alleged in this case, would not be using his utmost endeavors to teach him that trade, and therefore would be a breach; so not to furnish him with food, etc.; and these breaches would afford good ground of action. It would be so, especially in this case, because the boy being no party to the indenture, it is not, strictly speaking, an indenture of apprenticeship, and therefore could not

be vacated or set aside, nor the boy be discharged by the justices in the usual manner. The mother, therefore, has this remedy by action, and this only." It was held, however, that the judgment against the master could not be supported in so far as it rested upon his failure to give the apprentice a year's schooling at a time still in the future.

¹In *Sayre v. Rose* (1811) 3 N. J. L. 743, a demurrer was sustained to a complaint which merely alleged that "S. was indebted to him for not paying him the freedom due in the indenture."

In *Chicago Stove Works v. Lally* (1891) 41 Ill. App. 249 (action for not teaching apprentice), there was held to be a variance where the declaration alleged that A. and B., father and son, apprenticed B. to C., while the actual contract was that A. apprenticed B. to C. The declaration having been amended so as to leave B. as sole plaintiff, it was held that there was still a variance.

²*Pumeroy v. Bruce* (1825) 13 Serg. & R. 186, where the omitted covenant related to teaching, the court said: "The inference of law is irresistible that, from the covenants of the apprentice and his service, the master's covenant was to teach him the trade, for that was the very consideration of his service; and even though the indenture omitted this in terms, yet it was the spirit, effect, and substance of the contract, and might have been so laid in the declaration, notwithstanding the omission of the words; the court would so have construed the instru-

adopted. At most, the omission would justify a demand for an amendment.

Where an apprentice has been placed in the custody of his master, the presumption is that he so remained during the stipulated term. Accordingly, in declaring against the master for failing to teach him, it is not necessary to aver, as the performance of a condition precedent, that he did so remain. If, by absconding, or otherwise, he prevented the master from teaching him, the master must plead and prove such prevention.³

2188. Defenses to actions on the covenants.—*a. Breach of duty by apprentice.*—Under the doctrine respecting the independence of covenants it is manifest that the defaults of the apprentice cannot, generally speaking, be pleaded by the master in bar of an action on a covenant.¹ An exception to this rule is admitted where the

ment if the declaration had so alleged it. But it sets forth other covenants contained in the indenture, and totally omits this most important covenant, the moving consideration of the whole contract.”

³ *Barger v. Caldwell* (1834) 2 Dana, 129.

¹ In *Winstone v. Linn* (1823) 1 Barn. & C. 460, 2 Dowl. & R. 465, 1 L. J. K. B. 126, 17 Eng. Rul. Cas. 186 (see § 2176, note 3, *ante*), Bayley, J., observed, *arguendo*, that acts of misconduct on the part of the apprentice do not affect the master's liability on his covenants to instruct and maintain.

In *Phillips v. Clift* (1859) 4 Hurlst. & N. 168, an action for not instructing the apprentice and providing him with food and lodging, the defendant pleaded that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant, so that it became unsafe for the defendant to continue him in his service, whereupon the defendant dismissed him. Held, on demurrer, that the covenants in the indenture were independent covenants, and consequently the plea was bad. Watson, B., said: “It has long been considered that the covenants in a deed of apprenticeship are independent covenants. There are several decisions to that effect; and if we look at the terms of the indenture, it is obvious that it must be so. The master, on the one hand, is to teach the apprentice and *de die in diem* to provide him with food;

on the other hand, certain covenants are entered into by the friends of the apprentice. In the simple relation of master and servant, the servant is bound to obey all the lawful commands of his master, and if he commits any unlawful act the master may dismiss him. But if an apprentice misbehaves himself, the master has the power of correcting him by personal chastisement, provided it be moderate; and the whole control, as regards his morals, is also with the master. Here the plea alleges that the apprentice defrauded and robbed the defendant, so that it was unsafe for the defendant to keep him any longer. I do not know what that means. The apprentice may have taken sweetmeats from a jar, or a shilling from the till, for which offenses he might be corrected by personal chastisement or kept in confinement, but the master has no right to dissolve the contract.” Pollock, C. B., said: “We are all of opinion that the plea is bad. I do not think it necessary to express any opinion as to what would be the effect of an allegation in the plea, that the apprentice had been guilty of a felonious stealing, or had been actually convicted and suffered punishment, for this plea alleges neither the one nor the other. The plea certainly does not allege a felonious taking, for although it states that the apprentice ‘defrauded and robbed’ the defendant, that does not necessarily import a felony.”

In *Clancy v. Overman* (1835) 18 N. C. (1 Dev. & B. L. L.) 402, the fact that

defaults were such as to render it impossible for the master to perform the covenant in question,² or to render his dismissal justifiable. See § 2176, *b*, *ante*. Nor, of course, does the rule preclude the master from pleading the defaults as a defense *pro tanto*.

b. Release.—In one case the court, while it declined to express any definite opinion regarding the question whether a father or guardian who had joined in the indenture would have power to release the master from a covenant beneficial to the apprentice, held that a guardian is not authorized to release the master from his covenant of payment to the ward, in settlement of a claim against himself for deceit, grounded on the ward's alleged incapacity of performing his covenants of service.³

c. Statute of limitations.—In some jurisdictions statutes have been enacted to the effect that actions against masters for breaches of covenant must be brought within a specified period after the expiration of the term.⁴ In the absence of such provisions the rights of the parties are controlled by the general statutes of limitations.

a slave apprentice had frequently been intoxicated and absented himself from work was held not to be a bar to an action for failure to teach him.

In *Tague v. Hayward* (1865) 25 Ind. 427, an action by the apprentice's next friend for work and labor, it was held that a demurrer should have been sustained to an answer alleging that the plaintiff had run away and abandoned the employment, and that the defendant had sustained damages by reason of this failure on the part of the plaintiff to perform the contract.

² In *Winstone v. Linn* (1823) 2 Dowl. & R. 465, 478, 17 Eng. Rul. Cas. 85, Best, J., thus commented upon the contention that the absence of the apprentice prevented the master from teaching him: "If the boy had been so long away that the master could not teach him, and an action were brought against the master, then he would have good reason for saying, 'I would have taught your son, but he absented himself so long, and so misconducted himself, that it was impossible for me to do my duty.' In such a case as that, the master would have a good defense to the action; but that is not the present case." For the actual point decided in this case, see § 2176, note 3, *ante*.

In *Raymond v. Minton* (1866) L. R. 1 Exch. 244, 4 Hurlst. & S. 371, 35 L. J. Exch. N. S. 153, 12 Jur. N. S. 435,

14 L. T. N. S. 367, 14 Week. Rep. 675, an action for damages for not teaching the apprentice, a plea that he would not be taught, and by his own wilful acts hindered the defendant from teaching him, was held good. This case was one of the authorities relied upon in *Learoyd v. Brook* [1891] 1 Q. B. 431, 60 L. J. Q. B. N. S. 373, 64 L. T. N. S. 458, 39 Week. Rep. 480, 55 J. P. 265, where it was held by A. L. Smith, J. (sitting alone), that to an action for a breach of a covenant in an apprenticeship deed by the master to keep, teach, and maintain his apprentice, it is a good defense that the apprentice, while in his master's service, was an habitual thief.

³ *Dunten v. Richards* (1763) Quincy (Mass.) 67.

⁴ In *Johnson v. Gibbs* (1885) 140 Mass. 186, 3 N. E. 17, it was held that the provision in Mass. Gen. Stat. 1860, chap. 111, § 16, that no action against the master of a poor apprentice should be maintained, "unless commenced during the term of apprenticeship or services, or within two years after the expiration thereof," was applicable to actions upon indentures by inspectors of the state almshouses, binding as apprentices state paupers, although, standing by itself, the provision might, by its literal construction, refer only to actions commenced by parents, guardians, or overseers of the poor,—the

2189. Assessment of damages.—a. Generally.—The apprentice is entitled to recover for all the damages flowing naturally from the breach of the particular covenant upon which the action is founded.¹

b. Measure of damages where an apprentice is dismissed without a due observance of a stipulation reserving to the master the right of terminating the contract.—The general effect of the decisions under this head may, as it seems, be stated thus: Although a master may, by an express stipulation, have reserved the right of rescinding the contract upon certain terms or under certain circumstances, yet if it appears that he did not, when dismissing an apprentice, act formally and avowedly with reference to that stipulation, and it is also shown that the dismissal was wrongful, the apprentice is entitled to recover damages on the same footing as if no such stipulation had been inserted in the indenture.²

actions previously mentioned in the chapter on "Master, Apprentice, and Servants." The court said: "We cannot doubt that it was the intention of the legislature to put state paupers, bound as apprentices by the inspectors of the state almshouses, upon the same footing as town paupers bound by the overseers of the poor, and to give to the inspectors the same powers, with the same limitations and incidents, as those vested in the overseers. It has been the policy of the legislature, from its earliest history, to exempt indentures by public officers binding paupers, whether state or town paupers, as apprentices, from the operation of the general statutes of limitations, by which an action upon a sealed instrument may be brought at any time within twenty years after a breach, and to require an action upon such indenture to be brought within two years after its term expires. Stat. 1793, chap. 59, § 5; Rev. Stat. 1836, chap. 80, § 17; Gen. Stat. 1860, chap. 111, § 16; Pub. Stat. 1882, chap. 149, § 17."

For other instances of limiting provisions, see:

Michigan.—How. Anno. Stat. 1882, § 6366; Comp. Laws 1897, § 8763.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2386.

Massachusetts.—Rev. Stat. 1836, chap. 80, § 17; Rev. Laws 1902, chap. 155, § 16.

¹ *Maw v. Jones* (1890) L. R. 25 Q. B. Div. 107, 59 L. J. Q. B. N. S. 542, 63 L. T. N. S. 347, 38 Week. Rep. 718, 54

J. P. 727; *Parker v. Cathcart* (1866) 17 Ir. C. L. Rep. 778; *Darling v. Vulcan Iron Works* (1894) 26 Or. 405, 38 Pac. 342; *Kuhlman v. Blow* (1869) 31 Tex. 628 (verdict awarding an amount based on the value of the apprentice's services during the last six years of his minority was sustained in an action for the failure of the master to perform his covenant as to teaching).

In *Waddell v. Creech* (1887) 98 N. C. 155, 3 S. E. 814, an action upon an apprentice bond, evidence was offered tending to prove that the health of the apprentice had been impaired by the master's improper treatment, but no evidence was produced showing the extent of the damage. Held, that it was not error to instruct the jury that they might inquire if there was damage from that cause, and fix the amount thereof. The court treated the case as an exception to the general rule that, where no actual damages are shown, only nominal damages can be awarded.

² In *Maw v. Jones* (1890) L. R. 25 Q. B. Div. 107, 59 L. J. Q. B. N. S. 542, 63 L. T. N. S. 347, 38 Week. Rep. 718, 54 J. P. 727, it was provided by the indenture that if, during the term, the apprentice showed a want of interest in his work, it should be lawful to cancel the deed upon giving him a week's notice. Subsequently he was summarily dismissed on the ground that he had been guilty of frequent acts of insubordination and going out late at night without permission. In an action for wrongful dismissal, the jury found that he had not been guilty

c. Period in respect of which damages are assessable in respect of a wrongful dismissal.—In an earlier chapter (see § 363), it has been shown that, according to one of the accepted theories, a servant who has been wrongfully dismissed is entitled to recover damages not merely in respect of the period between his dismissal and the time of the trial, but also in respect of the period between the time of the trial and the end of the term. In two of the jurisdictions in which this view prevails, the doctrine has been enounced that the damages for the wrongful dismissal of an apprentice are assessable only in respect of the period preceding the institution of the action, and that damages in respect of the residue of the term must be sought in subsequent actions.³

of the misconduct imputed, and that no grounds existed justifying dismissal without notice, but that grounds did exist which justified the master in dismissing him with notice. Held, that the trial judge had properly told the jury that, in assessing the damages, although they might take into consideration, as an element in the case, the fact that the defendant would have been justified in dismissing him with a week's notice, they were not bound to limit the damages to the value of the week's notice which he had lost.

In *Darling v. Vulcan Iron Works* (1894) 26 Or. 405, 38 Pac. 342, the contract provided that the master should retain until the end of the term a certain percentage of the wages of the apprentice, as security for the faithful performance of his duty, and that his engagement might be terminated at any time upon payment of the arrears due to him. Held, that, as the master had dismissed him arbitrarily, and without acting upon the clause regarding termination, he was entitled to recover not only whatever remuneration might then be due and payable, and the accumulated amount of the sums retained as security, but also such damages as he might have sustained by reason of his dismissal. The court said: "It will be observed that the contract does not provide for the discharge of the plaintiff at the will of the defendant, but only that it may, on the performance of a certain condition, terminate and put an end to the relationship of master and apprentice. It did not avail itself of this option, or, in discharging the plaintiff, act under this clause of the contract, but

wrongfully and without cause dismissed him; and, in our opinion, it is no defense that it had the option to terminate the contract at any time upon the performance of a certain condition which it did not even endeavor to comply with." *Maw v. Jones*, *supra*, was relied upon.

³ *Addams v. Carter* (1862) 6 L. T. N. S. 130 (so ruled by Byles, J., in a *nisi prius* case); *Parker v. Cathcart* (1866) 17 Ir. C. L. Rep. 778.

In *Powers v. Ware* (1826) 4 Pick. 106, the conclusion of the court that, in an action by the overseers of the poor for the dismissal of a poor apprentice, damages were recoverable only to the date of the writ, was sustained by the following arguments: "The cases are decisive that by the common law the plaintiffs can recover damages only to the time of bringing the action [see *Leffingwell v. Elliott* (1830) 10 Pick. 204. In an action to recover damages for carrying on a particular business in violation of a contract between the parties, no damages can be assessed for any violation subsequent to the commencement of the action. *Pierce v. Woodward* (1828) 6 Pick. 206], unless there be a distinction in this respect between covenant and tort. It seems to us, however, that no such distinction can exist; and there is one case of covenant cited in the note to *Saunders*, where this principle was applied. Whether another action can be maintained by the plaintiffs for a future breach of the same covenant is immaterial to the present question. Then as to the statute, we do not see any reason for thinking that the legislature

d. Consequential damages to personal or business reputation.—On the ground that the measure of damages in an action for the wrongful dismissal of an apprentice is the loss which he has actually sustained by reason of the particular breach of covenant complained of, up to the time of action brought, it has been held that the possible injury which his character may sustain as a result of the dismissal cannot be considered by the jury, because damages of this description are not such as, in the ordinary course of things, flow from the breach.⁴ But this doctrine seems to be, strictly speaking, applicable only in cases where the declaration simply demands damages generally. As pointed out in § 378, *ante*, there are apparently sufficient grounds for asserting that, except in so far as the rules of pleading may be an obstacle to such a joinder of claims, a servant may, by introducing a specific averment of injury to reputation, recover damages in respect of this element. The reader is also referred to the section cited for some comments upon a case in which it was laid down that, among the elements of damage, the difficulty which an apprentice discharged on the ground of his alleged misconduct may have in obtaining employment may be taken into account.⁵

e. Assessment of damages for breach of covenant by master of poor apprentice.—The effect of one case is that the amount of damages which a poor child apprenticed by the overseers of the poor is entitled to recover in respect of a breach of the contract by the master is a matter which the courts of law are alone competent to decide; that the right of the overseers to determine the amount cannot be implied from the fact that they are empowered by statute to institute proceedings in behalf of the child; that a payment made to them will not, unless its amount had been settled in a suit at law, bar a claim against the master, made by the apprentice after coming of age; and that a note given by the master, and made payable to the treasurer of the town, upon an adjustment made by the overseers in discharge of such a claim, is without consideration.⁶

meant to alter the common-law rule of damages. And, further, from the provision giving a right of action to the apprentice himself, it seems to be intended that, notwithstanding a judgment in favor of the overseers, the covenant shall continue in force. We certainly cannot look forward six years, and give damages for a supposed continuance of the breach, when, for aught we know, the defendant may be ready to

perform his covenant in future, and when, if the boy should die, the defendant would be discharged."

⁴ *Parker v. Cathcart* (1866) 17 Ir. C. L. Rep. 778.

⁵ *Maw v. Jones* (1890) L. R. 25 Q. B. Div. 107, 59 L. J. Q. B. N. S. 542, 63 L. T. N. S. 347, 54 J. P. 727, 38 Week. Rep. 718.

⁶ *Vinalhaven v. Ames* (1850) 32 Me. 299.

f. Disposition of damage for benefit of apprentice.—In several jurisdictions it has been enacted that the damages recovered in actions for breaches of covenant by the master shall become the property of the apprentice.⁷ But his right to such damages would seem to be clear, even in the absence of such a provision.⁸

2190. Specific enforcement of the master's obligations.—In a case where the plaintiff had been taken on trial by the defendant for a month, and had continued to work for more than a year after the expiration of the month, relying upon the defendant's assurance that he would execute the indenture, a bill praying that he might be ordered to execute it, and take the plaintiff into the employment and teach him, was dismissed on the ground that the plaintiff was shown to have been idle, and to have also miscondacted himself in other respects.¹ The necessary inference from this case seems to be that if the apprentice had been free from fault, the execution of the indenture would have been decreed. If so, an exception to the general rule that equity will not interfere between masters and apprentices (see § 322, notes 1, 2, *ante*) will be predicable in respect of the circumstances involved. In a case where an apprentice had left his employer on account of a reduction of wages, and had been discharged by a subsequent employer when the original one claimed him as an apprentice, his petition for an injunction restraining his first employer from interfering with him again in the same manner was denied on the ground that there was an adequate remedy at law.² For a discussion of the general rule that courts of equity will not enforce contracts of service, see § 322, *ante*.

2191. Criminal action against public officer by whom poor apprentice was bound out.—A public officer whose function it is to bind out poor children may, in some circumstances, be held criminally liable for negligence, either in respect to binding out a child to an improper

⁷ *Maine*.—Rev. Stat. 1903, chap. 27, § 24 (relates solely to suits brought by overseers of the poor in behalf of minors bound out by them).

Massachusetts.—Rev. Laws 1902, cl. 155, § 13.

Michigan.—How. Anno. Stat. 1882, § 6365; Comp. Laws 1897, § 8762.

Missouri.—Rev. Stat. 1899, § 4810 (385).

Texas.—Rev. Stat. 1895, "Apprentices," Art. 44.

Vermont.—Pub. Stat. 1906, § 3255.

⁸ In *Jordan v. Barry* (1817) 4 Hayw.

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(Tenn.) 102, where the chairman of the county court which had bound the apprentice brought an action on a bond given by the master for the benefit of the apprentice, it was held that the money received by the plaintiff after judgment belonged to the apprentice, and that a receipt therefor given by his attorney was a good discharge.

¹ *Brown v. Banks* (1861) 3 Giff. 190, 7 Jur. N. S. 1273, 4 L. T. N. S. 698.

² *Dougherty v. Bement* (1864) 5 Phila. 458.

person, or in respect of failing to see that the master selected duly performed his covenants.¹

N. SPECIAL STATUTORY REMEDIES FOR BREACHES OF THE CONTRACT.

2192. English enactments.—*a. Provisions applicable to apprentices generally.*—It will be advisable, in the first place, to give a *résumé* of the English enactments, since these constitute, in one or the other of the forms in which they have at different periods been cast, the original upon which all the provisions regarding remedies for breaches of the contract of apprenticeship have been more or less closely modeled.

5 Eliz. chap. 4, § 35. Minors who, being required to serve as the apprentices of persons belonging to the classes covered by the act, refused to serve, were declared liable, if the justice, etc., to whom complaint was made, thought fit, to be committed to prison until they consented to serve according to the intent of the act. It was also provided that, if a master misused or evil entreated his apprentice, or the apprentice had any just cause to complain, the apprentice might repair to a justice, who was to "take such order and direction between the master and his apprentice as the equity of the case should require;" if the justice could not compound the matter, he was to bind them over to appear at the next sessions, at which, if it was thought fit, the apprentice might be discharged.

20 Geo. III. chap. 19, § 3. Two or more justices of the peace, upon any complaint or application by any apprentice put out by the parish, or any other apprentice, upon whose binding no larger a sum than £5 was paid, touching any "misusage, refusal of necessary provision, cruelty, or other ill treatment" of such apprentice by his master, were empowered to summon the master to appear, and, upon proof thereof made to their satisfaction, to discharge the apprentice.

Sec. 4. Two justices of the peace, "upon application or complaint made upon oath by any master against any apprentice, touching any misdemeanor, mis-carriage, or ill behavior in his service," were authorized to hear, examine, and determine the same, and to "punish the offender by commitment to the house of

¹ In *Com. v. Coyle* (1894) 160 Pa. 36, 24 L.R.A. 552, 40 Am. St. Rep. 708, 28 Atl. 576, 634, where an indictment for permitting the child to be cruelly treated was sustained, the court said: "It is culpable negligence in an officer representing the district charged with their support to bind an infant pauper to service with a person whose parsimony and cruelty in the treatment of poor children committed to his care were well known in the neighborhood in which he lived. Inquiry in respect to the character of the master is a duty.

and where he resides in a county outside of the district in which the pauper is settled, and is personally a stranger to the officer, the nonobservance of it is a misdemeanor. It seems to us also that it is his duty, after the child is bound to service, to see that the covenants of the master are substantially complied with, and, if these are wilfully and persistently violated to the injury of the child's health, to institute the necessary proceedings to set aside the indenture."

correction, there to be corrected and held to hard labor for a time not exceeding one month, or otherwise by discharging the apprentice."

6 Geo. III. chap. 25, § 1. The justices were empowered to oblige an apprentice who absented himself from his master's service to serve out, after the expiration of his term, such time of absence as to make satisfaction for it, and, in default of such satisfaction, to commit the apprentice.¹

4 Geo. IV. chap. 34, § 1. Two magistrates, "upon application or complaint made upon oath, by any master against any apprentice," and in respect of any "misdemeanor, misconduct, or ill behavior, or if such apprentice had absconded," were authorized to issue a warrant for his arrest, and to punish the offender by abating the whole or any part of his wages, or by committing him to the house of correction for a period not exceeding one month.²

Sec. 3. The magistrates were empowered to make orders for the payment of wages up to the amount of £10, and to enforce the order by distress and sale of the master's goods.

Master and servant act 1867 (30 & 31 Vict. chap. 141). By one of the definition clauses in § 2, the expression "contract of service" was declared to include any indenture or contract of apprenticeship. The special remedies applicable in the case of apprentices were therefore the same as those already mentioned in the section relating to servants. See § 314, *ante*. But the statute has been repealed.

Employers and workmen act 1875, chap. 90, § 5. Any dispute between an apprentice to whom that act applies, and his master, arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this act), may be heard and determined by a court of summary jurisdiction.

Sec. 6. In a proceeding before a court of summary jurisdiction in relation to a dispute under this act, between a master and an apprentice, the court shall have the same power as if the dispute were between an employer and a workman, and the master were the employer and the apprentice the workman, and the instrument of apprenticeship a contract between an employer and a workman, and shall also have the following powers:

(1) It may make an order directing the apprentice to perform his duties under the apprenticeship; and—

(2) If it rescind the instrument of apprenticeship it may, if it think it just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid.

Where an order is made directing an apprentice to perform his duties under the apprenticeship, the court may, from time to time, if satisfied, after the expiration of not less than one month from the date of the order, that the apprentice has failed to comply therewith, order him to be imprisoned for a period not exceeding fourteen days.

¹ In *Gray v. Cookson* (1812) 16 East, 13, it was held that this enactment did repeal the provision in 20 Geo. II. chap. 19, § 4, the remedy given by the later statute being cumulative to the punishment given by the earlier one for the offense of the apprentice.

² In *Frame v. Campbell* (1836) 5 Sc.

Sess. Cas. 1st series, 1176, 1178, a law agent who had taken proceedings against an apprentice under § 2 of the act, which relates to servants only, was held liable to indemnify his principal for the damages recovered against the principal in consequence of his mistake in not proceeding under § 1.

Sec. 12. This act, in so far as it relates to apprentices, shall apply only to an apprentice to the business of a workman as defined by this act, upon whose binding either no premium is paid, or the premium (if any) paid does not exceed £25, and to an apprentice bound under the provisions of the acts relating to the relief of the poor.

Apprentices under sixteen years of age fall within the scope of the prevention of cruelty to children act, 4 Edw. VII. chap. 15.

b. Provisions specially applicable to poor apprentices.—32 Geo. III. chap. 57, § 6. Justice may order the necessary sums for maintenance and clothing of parish apprentices to be levied by distress upon the personal estate of the master.

7 & 8 Vict. chap. 101, § 10. The guardians of the poor may prosecute the master of a poor apprentice for breach of the conditions of the indentures.

14 & 15 Vict. chap. 11, § 4. It is provided that the relieving office of the guardians of the poor shall twice a year visit young persons bound out as pauper apprentices from workhouses, and report any failure on the master's part to supply food or to perform other duties.

24 & 25 Vict. chap. 100, § 73. Guardians of poor may prosecute master of apprentice against whom the offenses specified in § 26 of the act have been committed.

By § 12 of the poor law amendment act 1844, justices are empowered to enforce against a master, by fine of £20, the performance of his duties as prescribed by them; and by art. 73 of the general consolidated orders, every indenture has to be made subject to a proviso that the guardians may determine it if the master is found guilty of a breach of any of the specified covenants.

2193. American and colonial enactments providing for the release of master or apprentice.—The subjoined summary statements of the purport of various provisions will sufficiently exemplify the different forms which legislation of this type has assumed.

Alabama.—Code 1907, § 2904 (504) (1482) (1741). Probate court may release master for a satisfactory cause.

Sec. 2906 (506) (1484) (1736). Probate court may revoke a poor apprentice's indenture for a good cause.

Arkansas.—Kirby's Dig. 1904, §§ 273, 274. Similar to Cal. Civ. Code, 1909, § 271.

California.—Civil Code, 1909, § 271. The superior court may make such order as will relieve apprentices complaining of undeserved or immoderate correction, insufficient allowance of food, raiment, or lodging, want of instruction in the different branches of their trade or calling, or danger of being removed out of the state, or any violation of the indenture.

Sec. 272. Superior court has power, where circumstances require it, to discharge an apprentice from his apprenticeship.

Sec. 274. Discharge provided for, where apprentice is guilty of any gross misbehavior, or refusal to do his duty, or wilful neglect thereof.

Colorado.—Rev. Laws, §§ 151, 152. Master may be discharged from the contract, where his apprentice is guilty of any gross misbehavior, refusal to do his duty, or wilful neglect thereof.

Sec. 146. The county court shall hear complaints of the apprentices as to breaches of duty on the part of their masters.

Sec. 147. If the apprentice leaves the service, the county court may make such order in the premises as may be just and proper.

Sec. 148. County court may discharge apprentice when circumstances require it.

Delaware.—Code 1893, chap. 79, § 16. Apprentice may be released by superior court on account of master's cruelty, ill usage, breach of contract, or other sufficient matter.

Georgia.—Civil Code 1895, § 2607 (1882). County court may dissolve the contract for cruelty in the master, or for his failure to furnish food, clothing, medicine, or medical attendance, or jeopardy to the good morals of the apprentice by reason of the master's depraved conduct. The contract may also be dissolved when the apprentice is guilty of gross misconduct.

Illinois.—Starr & C. Anno. Stat. 1885, chap. 9, ¶ 15. Discharge of apprentice by circuit or county court if it is thought proper.

Indiana.—Burns's Anno. Stat. 1908, § 8391 (7309). The probate court may, upon the complaint of any party to the indenture, annul it for misconduct on the part of the master.

Iowa.—Code 1897, § 3243. Master may be released for the refusal of apprentice to serve, or for any gross misbehavior. (Code 1873, §§ 2298, 2299; Rev. Code 1860, §§ 2591-2.)

Secs. 3241-42. Upon the hearing of a complaint by a master against the apprentice for refusing to serve, the apprentice may be discharged, if he shows sufficient cause. (Code 1873, §§ 2294-2297; Rev. Code 1860, §§ 2587-2590.)

Secs. 3236-38. Upon hearing of complaint by minor or any other person, that the master is ill treating the apprentice, or violating his duty in any other manner, a judge of the district court may, if the facts are deemed to justify it, discharge the apprentice. (Code 1873, §§ 2288-2291, Rev. Code 1860, §§ 2580-2584.)

Kansas.—Gen. Stat. 1899, §§ 306, 307. These provisions are the same as Cal. Civ. Code 1909, §§ 271, 272.

Louisiana.—Civil Code 1889, art. 170 (164).—Bound servants and apprentices and their masters may be compelled to the specific performance of their respective engagements, but these engagements may be rescinded before the time fixed by the contract, either at the suit of such bound servants or apprentices respectively, or at the demand of the master, if they have a just cause to claim such rescission.

Art. 171 (165). "If any master shall abuse or cruelly or evilly treat his bound servant or apprentice, or shall not discharge his duty toward him, or if the bound servant or apprentice shall abscond or absent himself from the service of his master without leave, or shall not discharge his duty to his master, in any of these cases, there will be a sufficient cause to release the aggrieved party from his engagement, or to grant him such other redress as the equity and the nature of the case may require, at the discretion of the judge."

Maine.—Rev. Stat. 1903, chap. 27, § 23. Poor apprentice may, at the instance of the overseers of the poor, be discharged on account of the abuse, ill treatment, or neglect on the master's part.

Sec. 27. Any apprentice guilty of gross misbehavior may be judicially discharged on the complaint of his master.

Maryland.—Pub. Gen. Laws 1904, art. 6, § 1 (Acts 1842, chap. 25). Authority is given to the orphans' court to hear and determine all matters in dispute between masters and apprentices; to release apprentices previously bound; to rebind apprentices that may be released for cause or otherwise; and to do all other acts in relation to masters and apprentices that could be done by the county courts.

Sec. 25 (Acts of 1793, chap. 45). In case the contract, whether defective in form or not, hath been partly executed, the said county or criminal court may award and compel the terms, or any part of the terms, to be performed by the master or mistress, or by the apprentice, as justice and equity may require; and the master or mistress of any apprentice may detain the said apprentice in his or her service till discharged by the court aforesaid.

Massachusetts.—Rev. Laws 1902, chap. 155, § 11. Complaints by parents, guardians, selectmen, and overseers for misconduct or neglect of the master, and by the master for gross misbehavior of the apprentice, or wilful neglect to do his duty, may be filed in the probate court. The court shall have jurisdiction in equity to hear and determine the complaint. It may enter a judgment that either apprentice or master shall be discharged. [This provision has been substituted for the similar clauses in the original act (Laws 1794, chap. 64; Rev. Stat. 1836, chap. 80, §§ 22, 23). The clause in that act with regard to the arrest and imprisonment of a defaulting apprentice has been repealed.]

Michigan.—Comp. Laws 1897, chap. 235, §§ 8758, 8759; How. Anno. Stat. 1882, chap. 241, §§ 6361, 6362. Similar to Massachusetts enactment as to proceedings against the master.

Secs. 8769, 8770; How. Anno. Stat. 1882, chap. 241, §§ 6372, 6373. Master may be discharged from contract by probate court, where apprentice is guilty of gross misbehavior, refusal to do his duty, or wilful neglect thereof.

Missouri.—Rev. Stat. 1899, § 4809 (384). Probate court empowered to discharge the apprentice when circumstances require it.

Sec. 4813 (388). Probate court may discharge master from the contract for any gross misbehavior on the part of the apprentice, or refusal to do his duty, or wilful neglect thereof.

New Hampshire.—Pub. Stat. 1901, chap. 180, §§ 7, 8. Similar to Massachusetts provisions as to proceedings against the master.

Sec. 9. Justice may discharge master from contract, where apprentice is guilty of gross misbehavior, wilful neglect, or refusal of duty.

New Jersey.—Gen. Stat. 1895, *Apprentices*, § 5. If any master or mistress shall be guilty of any misuse, refusal of necessary provision or clothing, unreasonable correction, cruelty, or other ill treatment, so that the apprentice shall have any just cause to complain; or if the apprentice shall absent himself from service, or be guilty of any misdemeanor, miscarriage, or ill behavior, or not do his duty,—complaint shall be made to a justice, and if he cannot compound the matter, he shall call to his assistance two other justices, and the three to-

gether shall form a court which shall have authority to discharge the apprentice. [This provision is modeled on the latter portion of 5 Eliz. chap. 4, § 35.]

New York.—Code Crim. Proc. 1912, § 927. Discharge of apprentice may be ordered upon complaint of master against him for absence from work, refusing to serve, misdemeanor, or ill behavior.

Sec. 931. Apprentice may complain against master for cruelty, misuse, or violation of duty.

Sec. 932. Complaint may be dismissed, or apprentice discharged.

The provisions relative to cancelation, in Laws 1871, chap. 934, §§ 4, 5, were repealed, together with the rest of that enactment, by the domestic relations law.

North Carolina.—Revisal 1905, § 191. Upon complaint of an apprentice bound by the court, that the master is guilty of cruelty or ill usage, or refuses him the necessary provisions, the clerk of the court may cancel the indenture.

Sec. 205. If an apprentice still refuses to return, after having been imprisoned for unlawful departure, the indenture may be canceled, and he shall forfeit all back pay and claims against the master.

Ohio.—Bates's Anno. Stat. 1904, §§ 3126, 3127. Where a justice of the peace to whom complaint is made against the master cannot reconcile the parties, he is to make such order as the justice of the case requires, and have damages assessed by five disinterested persons.

Sec. 3129. If the conduct and habits of the apprentice become immoral and dissolute, in disregard of the commands of his master, and he cannot be reformed, a justice may impanel a jury of five, and if they are satisfied that the master should be discharged, they shall certify that fact to the justice, and the indenture shall thereupon be void.

Pennsylvania.—Brightly's Dig. *Apprentices*, § 9 (act of Sept. 29, 1770, § 2). If any master shall misuse, abuse, evilly treat, or shall not discharge his duty towards apprentice according to the covenants of the indenture, or if the apprentice shall abscond or absent himself from his master's service without leave, or shall not discharge his duty according to his covenants, the master or apprentice may apply to one justice of the peace, who shall take such order and direction between the master or apprentice as the equity and justice of the case shall require; and if the justice is not able to accommodate the dispute, through a want of conformity in one or other of the parties, he shall bind over that party to appear and answer the complaint of the other at the quarter sessions, or if the party not conforming is the apprentice, he may commit him, for want of surety, to the common jail or workhouse. If upon the appearance of the parties the court of sessions shall see fit to discharge the apprentice, they shall do so; but if the default be found in the apprentice, the court is empowered to imprison him at hard labor, if they shall think his offense shall deserve it. [This provision is also modeled on 5 Eliz. chap. 4, § 35.]

Rhode Island.—Gen. Laws 1909, chap. 249, §§ 9, 10, 11. Similar to Massachusetts provision as to proceedings against the master.

Secs. 17, 18. The master of an apprentice guilty of gross behavior, wilful neglect, or refusal of his duty, may upon complaint be discharged from the contract by the court of common pleas.

South Carolina.—Gen. Stat. 1882, § 2079; Rev. Stat. 1894, § 2214. On complaint made before two trial justices by an apprentice charging his master

with misuse, or by the master against the apprentice, it shall be the duty of such justices to make such order as the equity and justice of the case may require.¹

Tennessee.—Code 1883, § 3437. If a minor apprenticed by the court is ill used, or not instructed in the specified trade, the court shall remove or bind him to another person.

Texas.—Rev. Stat. *Apprentices*, art. 38. If upon investigation the county court finds that an absconding apprentice had good cause for running away, he shall be discharged.

Art. 39. If the county judge upon the hearing of a complaint against the master is satisfied that the master is incompetent to control the minor, or has in any material respect violated his statutory obligations, he may discharge the minor.

Art. 40. The master may at any time, upon good cause shown to the county judge, be released from future liability on his obligation.

Utah.—Comp. Laws 1907, § 78. Apprentice may be discharged if master ill treats him or fails in performance of his duties.

Vermont.—Pub. Stat. 1906, §§ 3248, 3249. Upon complaint of master against apprentice for gross misbehavior, or refusal to do his duty, or wilful neglect thereof, the county court may discharge the master from the contract.

Secs. 3252, 3253. Upon hearing of a complaint against the master for cruelty, ill treatment, refusal of necessary food or clothing, or other violation of the indenture, the county court may discharge the apprentice from his indenture.

Virginia.—Code 1887 and 1904, § 2592. The court of the county or corporation in which the minor resides may receive the complaints, either of the apprentice or the master, for breaches of the contract, and determine the same in a summary way. Code 1849, chap. 126, § 12.

West Virginia.—Code 1899, chap. 81, § 11. Same as Va. Code, 1904, § 2592.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2384. It was provided that a county court might hear complaints regarding ill treatment or neglect of apprentices, and, if complaint was sustained, discharge them.

Sec. 2390. It was provided that upon complaint of master against apprentice for gross misbehavior or refusal to do his duty, or neglect thereof, the county court might discharge the master from the contract.

But these provisions have been repealed by Sess. Laws 1911, chap. 347. The substituted § 2385 simply provides that any court of competent jurisdiction may in its discretion annul the indenture. But it is also enacted that the employer may dismiss any apprentice who has wilfully violated the rules applicable to all workmen.

British Columbia.—Rev. Stat. 1897, chap. 8, § 15. Indenture may be annulled by county court or police magistrate for the master's gross misconduct or breach of duty.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 9. Upon complaint of apprentice a justice may make an order for his discharge or other relief, on the

¹ In *Belcher v. Orphan House* (1822) 2 M'Cord, L. 23, this provision was held not to be unconstitutional.

ground of the master's nonperformance of the agreement, or cruel or hard usage.

Nova Scotia.—Rev. Stat. 1900, chap. 117, §§ 8, 9. Upon complaint of the apprentice he may be discharged by justices of the peace on the ground of the master's misconduct.

Ontario.—Rev. Stat. 1897, chap. 161, § 14. A judge of the county court or a police mag., upon complaint of either party, annul the indenture upon proof of "gross misconduct or neglect of duty."

Quebec.—44 & 45 Vict. chap. 15, § 9. Justices may annul contract where either party is guilty of "continued misconduct or misusage, and of repeated violation of their ordinary and established duties."

New South Wales.—Apprentices act 1901, § 17. Court of petty sessions may cancel the indenture, where either master or apprentice is guilty of misconduct.

Upon hearing of complaint by either party, two justices may make such order upon the dispute as in their discretion equity requires, and may impose a fine not exceeding £10 upon either party as a penalty for any proved breach of contract, or they may discharge the apprentice.

Victoria.—Master and apprentice act, 1890, No. 1117, § 14. In case of any difference arising between a master and his apprentice, two justices may, upon hearing the complaint of the aggrieved party, make such order as the equity of the case shall require; and may, upon proof of ill usage or neglect of duty by the master, discharge the apprentice.

The above provisions are apparently superseded by 55 Vict. No. 1219, §§ 5–8, under which the powers of justices in dealing with disputes between masters and apprentices are the same as those given by the English employers and workmen act, 1875. See § 2192, *ante*.

2193a. American and colonial enactments providing for the punishment of the master or apprentice.—The tendency of legislation is toward the abolition of enactments of this type, at least in so far as the imprisonment of the apprentice is concerned. But they still subsist in a large number of jurisdictions.

Alabama.—Code 1907, § 2903 (503) (1481) (1740). The master may arrest an apprentice who leaves without his consent, and bring him before a justice, who must remand him, and, if he refuses to return, commit him to prison. If it is found that his abandonment was without a cause, he may be punished under the vagrant laws; if for good cause he may be discharged.

Delaware.—Code 1893, chap. 79, § 15. Runaway apprentice may be imprisoned upon a warrant issued by a justice.

Indiana.—Burns's Anno. Stat. 1908, § 8392 (7310). Probate court may, upon the application of the master, cause an absconding apprentice to return to the master or, if he refuses, may commit him to jail.

Kansas.—Gen. Stat. 1899, § 308. Probate court may hear and determine complaints of masters against their apprentices for desertion without good cause, misconduct, or ill behavior, and may punish an apprentice according to the nature of the offense.

Kentucky.—Stat. 1903, § 2604. Apprentice who runs away may be arrested and imprisoned.

Maine.—Rev. Stat. 1903, chap. 27, § 26. Apprentice who departs without leave may be arrested and imprisoned.

Michigan.—Comp. Laws 1897, chap. 235, §§ 8765, 8766; How. Anno. Stat. 1882, chap. 241, §§ 6368, 6369. Apprentice who unlawfully departs may be apprehended upon warrant issued by a justice of the peace, and, if complaint be supported, he may be committed to jail for a period not exceeding twenty days.

New Hampshire.—Pub. Stat. 1901, chap. 180, § 11. If the apprentice leave the service without sufficient cause, the master may empower any person to apprehend and return him.

New York.—Code Crim. Proc. 1912, § 930. If a complaint of master against apprentice for absence from work, refusing to serve, misdemeanor, or ill behavior, be well founded, the magistrate must commit the defendant to gaol for a term not exceeding one month at hard labor.

The provision regarding the imprisonment of defaulting apprentices, in Laws 1871, chap. 934, § 4, was repealed, together with the rest of that enactment by the domestic relations law.

North Carolina.—Revisal 1908, chap. 4, § 192. If an apprentice bound by the court refuses to serve, the clerk of the court may, upon the application of the master, summon him to appear, and, if he persists in the refusal, may commit him to jail.

Sec. 205. Any apprentice who leaves without his master's consent, or without sufficient cause, and refuses to return, may be arrested upon complaint of the employer, and committed to jail by a justice until he consent to return, but not for more than thirty days.

Pennsylvania.—Brightly's Purdon's Dig. *Apprentices*, § 10. An absconding apprentice may be apprehended upon the warrant of a justice of the peace, and if default be found in him, he may be committed by the justice to the common jail, unless he will consent to return home, or shall find surety to appear at the next sessions and answer the master's complaint.

Rhode Island.—Gen. Stat. 1896, chap. 198, §§ 14, 15. Absconding apprentice may be apprehended and ordered to return home, or be committed to prison.

Texas.—Rev. Stat. 1895, *Apprentices*, art 37. Any apprentice who runs away may be recaptured by his master, and brought before the county court, which, if satisfied that he ran away without good cause, may order him to return to his work, and, upon his failure or refusal to do so, may punish him as for contempt of court.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, §§ 2387, 2388. It was provided that a justice of peace might issue warrant for the arrest of absconding apprentice, and, if complaint of master was supported, order the apprentice to be returned to his master, or commit him to prison for not more than twenty days.

But this section has been repealed by Wis. Sess. Laws 1911, chap. 347. The substituted § 2385 provides that, if either party to an indenture shall fail to perform any of the stipulations, he shall forfeit not less than \$10 nor more than \$50 on complaint, the collection of which may be made by one of certain specified officials.

British Columbia.—Rev. Stat. 1897, chap. 8, § 20. Apprentice may, for any improper conduct, be committed to gaol for not more than one month (framed on the lines of the English statute, 20 Geo. II. chap. 19, § 4; 4 Geo. IV. chap. 34, § 1).

Manitoba.—Rev. Stat. 1902, chap. 108, § 8. An apprentice may for various breaches of duty be fined, and, in default of payment, imprisoned.

Sec. 16. A master may be fined for refusing necessary provisions, or for misusage, cruelty, or ill treatment, and in default of payment he may be imprisoned.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 13. Justices may, upon complaint of master, cause apprentice to be apprehended, and commit him to prison for absenting himself, or any miscarriage, or ill behavior. (Rev. Stat. chap. 134, § 15.)

Nova Scotia.—Rev. Stat. 1900, chap. 117, § 12. Apprentice who unlawfully departs, or is guilty of any gross misbehavior, or refusal to do his duty, or wilful neglect thereof, may be apprehended and imprisoned.

Ontario.—The provisions in §§ 17, 18, of 38 Vict. chap. 19, with regard to the finding of the master and the imprisonment of the apprentice for certain breaches of duty, have now been repealed, and are not found in Rev. Stat. 1897, chap. 161.

Quebec.—Master and servants' act, 44 & 45 Vict. chap. 15, § 1 (general statute applicable to all parts of the Province except the cities of Montreal and Quebec). Penalty may be imposed on an apprentice who is guilty of the various breaches of duty enumerated.

Sec. 7. Penalty may be imposed upon a master for misusage of his apprentice.

Sec. 8. Party contravening statute may be condemned by justices to pay penalty imposed for the offense, and, in default of payment, may be committed to gaol.

Code Civile, art. 1670: note to Beauchamp's Annotated Edition. Under the by-laws of the cities of Montreal and Quebec in relation to masters and apprentices, a fine may be imposed upon apprentices who absent themselves without leave, or are guilty of certain other kinds of misconduct. Masters are also liable to a fine for misusage of apprentices, cruelty, etc. In Quebec they may be either fined or imprisoned. In that city there is also a provision allowing the annulment of the contract by the recorder if the apprentice is incapable or unfit to fulfil his duties.

New South Wales.—Apprentices act 1901, § 17. Court of petty sessions may hear complaints by either party, and make such order upon the dispute as equity and right require, and may fine either master or apprentice for any proved misconduct or breach of contract, or cancel the indenture.

Sec. 19. The master is liable to penalty if he puts away an apprentice except with his consent or by virtue of an order of the justices.

Victoria.—Master and apprentices' act 1890, No. 1117, § 15. A master convicted of ill treating or neglecting his duty may be fined.

Sec. 16. Two justices of the peace may, upon the complaint of the master concerning any breach of duty, disobedience, or ill behavior, punish the offender by imprisonment.

[These two provisions are apparently superseded by the act of 55 Vict. No.

1219, which assimilates the remedies of the parties to those given by the English employers' and workmen's act 1875.]

Sec. 17. Same provision as in Ontario with regard to compelling an apprentice who absents himself, to serve or give satisfaction.

2193b. American and colonial enactments as to the making up of lost time by the apprentice.—Provisions of a tenor more or less similar to that of the English statute 6 Geo. III. chap. 25, § 1 (see § 2192, *ante*), have been adopted in the following jurisdictions:

Arkansas.—Kirby's Dig. 1904, § 275. For loss occasioned by an improper desertion, the county court may compel the apprentice to make compensation by further services after the expiration of his apprenticeship.

Delaware.—Code 1893, chap. 79, § 11. Apprentice who runs away or absents himself without leave shall make compensation by serving after the expiration of his term.

Kansas.—Gen. Stat. 1899, § 308. If apprentice is guilty of the offense of wilful desertion without cause, the court may, in addition to other punishment, order him to make restitution of a sum not exceeding \$10 for each month he may be absent.

New Jersey.—Gen. Stat. 1895, *Apprentices*, § 8. Absconding apprentice may be apprehended, and adjudged by a justice to serve any term not more than double the time of his absence, besides paying or serving for all damages caused by his absence.

South Dakota.—Code 1908, § 177. Apprentice who wilfully absents himself may be compelled to serve double the time of his absence unless he makes satisfaction; but such additional term cannot extend more than three years beyond the original term.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2389. It was provided that all time wilfully or unlawfully lost by the apprentice must be made up by him after the expiration of the term; otherwise he is to be liable for damages caused by his default. But this provision has been repealed by Wis. Laws 1911, chap. 347, § 2, which contains no corresponding section.

British Columbia.—Rev. Stat. 1897, chap. 8, §§ 21, 22. Same provision as in Ontario.

Manitoba.—Secs. 11, 12. Same provision as in Ontario with regard to making up time.

Ontario.—Rev. Stat. 1897, chap. 161, § 18 (38 Vict. chap. 19, § 19). In case an apprentice absents himself from his master's service before the expiration of his term, he may at any time thereafter be compelled to serve his master for so long a time as he so absented himself, unless he makes satisfaction to his master for the loss sustained by such absence.

Secs. 19, 20. In case the apprentice refuses to serve or make satisfaction, he

¹ In *Reg. v. Walker* (1877) 41 U. C. Q. preceding section, and that a complaint B. 568, it was held that this provision under it could only be made after the was applicable solely to cases in which expiration of the term. Accordingly a the conduct of the apprentice had conviction or complaint made during the brought him within the scope of the currency of the term was quashed.

may be summoned to appear before a justice, or apprehended, and if he does not make the satisfaction required, or give security, he may be committed to prison.¹

New South Wales.—Apprentices act 1901, § 18. Provision similar to that of Ontario.

2193c. American and colonial enactments as to proceedings taken for the protection of poor apprentices.—In many jurisdictions the parties by whom minors are bound out are subjected to the duty of keeping themselves informed with regard to the manner in which the minors are treated by their masters.

Massachusetts.—Rev. Laws 1902, chap. 155, § 10. Parents, guardians, selectmen, and overseers shall inquire into the treatment of all children bound by them or with their approval, or by their predecessors in office, or with their approval, and shall defend such children from cruelty, neglect, or breach of contract on the part of their master.

New York.—Labor law, § 67. The commissioner of labor shall enforce the provisions of the domestic relations law, relative to indenture of apprentices, and prosecute employers for a failure to comply with the provisions of such indentures and of such law in relation thereto.

There are also provisions of a similar tenor in the following jurisdictions:

California.—Civil Code 1909, § 270.

Colorado.—Rev. Laws 1908, § 145.

Connecticut.—Gen. Stat. 1902, § 4689 (Rev. Stat. 1888, § 1743).

Indiana.—Burns's Anno. Stat. 1908, § 9776 (8165-2.)

Maine.—Rev. Stat. 1903, chap. 27, § 23.

Michigan.—How. Anno. Stat. 1882, chap. 241, § 6356; Comp. Laws 1897, chap. 235, § 8753.

New Hampshire.—Pub. Stat. 1891, chap. 180, §§ 7, 8.

Ohio.—Gen. Code 1910, § 8013 (Bates's Anno. Stat. 1904, § 3126).

Texas.—Rev. Stat. 1895, *Apprentices*, act 41 (inquiry to be made by county judge.)

Vermont.—Pub. Stat. 1906, § 3260.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2383.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 14.

Nova Scotia.—Rev. Stat. 1900, chap. 117, § 7.

Proceedings taken under an enactment by which a justice of the peace before whom a complaint is laid regarding the treatment of an apprentice is authorized to bind the master over to appear before a superior court with a view to the cancelation of the indenture, in the event of the master's being found guilty of cruelty, have been held to be civil, not criminal.¹ In the case cited it was also laid down that the selectmen of a town had no power to institute such proceedings in cases where the apprentice was bound out by the parent

¹*Fenn v. Bancroft* (1881) 49 Conn. 216.

or guardian, nor in cases where he was bound out by the selectmen of another town.

2194. Remedies available under these enactments.—The enactments tabulated in §§ 2192-2193c, *ante*, differ considerably in respect of the nature and extent of the remedies provided by them. But, broadly speaking, they may be said to be directed to three objects:

(1) The enforcement of a specific performance of the contract by the defaulting party.¹

¹ For cases in which the enforceability of provisions of this tenor was involved or referred to, see *Meakin v. Morris* (1884) L. R. 12 Q. B. Div. 352, 53 L. J. Mag. Cas. N. S. 72, 32 Week. Rep. 661, 48 J. P. 344 (refusal of court to compel apprentice to return was based on the ground that the contract was disadvantageous to the minor, and therefore invalid); *Corn v. Matthews* [1893] 1 Q. B. (C. A.) 310, 62 L. J. Mag. Cas. N. S. 61, 4 Reports, 240, 68 L. T. N. S. 480, 41 Week. Rep. 262, 57 J. P. 407 (similar decision); *Green v. Thompson* [1899] 2 Q. B. 1, 68 L. J. Q. B. N. S. 719, 80 L. T. N. S. 691, 48 Week. Rep. 31, 63 J. P. 486 (contract enforced as being valid); *Harvie v. M'Intyre* (1829) 7 Sc. Sess. Cas. 1st series, 561 (absconding apprentice ordered to return); *Day v. Everett* (1810) 7 Mass. 145 (absconding apprentice may be compelled to return); *M'Knight v. Hogg* (1812) 3 Brev. 44 (master may coerce obedience). With reference to N. C. Rev. Code, 1855 chap. 5, § 4, it was held that a county court should, in a proper case, upon application by the master to whom the court had bound an apprentice, restore such apprentice to his possession if he had run away. *Beard v. Hudson* (1867) 61 N. C. (Phill. L.) 180. The following passage may be quoted from the opinion: "It will be seen that the contract of binding, the indentures, is not between the master and the apprentice, but between the master and the court. . . . It cannot be doubted that just as the obligations of master and apprentice are mutual, and as the court has the supervision of the relations between them, so it is within the power, and it is the duty, of the court to interfere at the instance of either against the other, whenever a proper case is presented. The master contracts with the court, in the inden-

tures, that he will perform his duties as master, and the court will at all times see that he does so. And, in consideration thereof, the court contracts with the master that the apprentice shall serve him faithfully. And while the court compels the master to a strict compliance with his part of the contract, it would be bad faith if the court should fail to comply with its part of the contract; *i. e.*, that the apprentice should serve the master. The power of the court over orphans does not cease when they are bound out. It is a continuing power, and the indentures with the master are continuing obligations. While the ordinary relations of master and apprentice exist, the court ought not to interfere. It is then a domestic relation, subject to ordinary domestic regulations; but when the relation is wantonly broken, or grossly abused, it becomes the duty of the court to interfere."

Under the Scotch sheriff courts act, 1876, § 6, an application may be made for the apprehension of an apprentice *in meditatione fugae*, and for his detention until he finds security. *M'Dermott v. Ramsay* (1876) 4 Sc. Sess. Cas. 4th series, 217.

In one of the older English cases it was intimated that, if a master who is bound to keep an apprentice turns him out, so that he is likely to become chargeable to the parish, the justices may order the master to take him again. *Anonymous* (1698) Comb. 405. The question whether a master can, in any other circumstances than those there adverted to, be compelled to take back an apprentice, does not seem to have been considered. So far as the present writer has been able to ascer-

(2) The punishment of the defaulting party, either by committing him to gaol or by imposing upon him a fine.² The appropriate method of obtaining the release of an apprentice who has been unlawfully committed to prison is by a writ of habeas corpus.³

(3) The dissolution of the contract. In construing the statute 5 Eliz. chap. 4, the courts took the position that the provision authorizing the magistrates to punish a defaulting apprentice did not operate as a restriction upon the powers conferred by the provision authorizing them to cancel the contract. It was accordingly held to be competent for them to discharge the indentures at the instance either of the master or the apprentice.⁴

The master of a defaulting apprentice has the option either of resorting to the special remedy provided by statute, or of bringing an action against the parent or other party who has covenanted for the due performance of the contract.⁵

2195. Prerequisites to the right to obtain relief.—A judicial order made with reference to these statutes cannot be supported unless the following facts are proved or conceded:

(1) That a valid contract was formed between the plaintiff and

tain, all the other authorities bearing upon the specific enforcement of the contract relate to its enforcement against the apprentice.

² See *Cooper v. Simmons* (1862) 7 Hurlst. & N. 707, 31 L. J. Mag. Cas. N. S. 138, 8 Jur. N. S. 81, 5 L. T. N. S. 712, 10 Week. Rep. 270 (conviction of minor upheld on the ground that his contract was beneficial and therefore binding, so as to render him amenable to punishment); *Day v. Everett* (1810) 7 Mass. 145 (absconding apprentice may be imprisoned); *Com. v. Atkinson* (1871) 8 Phila. 375 (master who ill treats his apprentice may be arrested and bound over, or committed by a justice of the peace); *M'Knight v. Hogg* (1812) 3 Brev. 44 (defaulting apprentice may be punished); *Ex parte Erwin* (1854) Legge's Rep. (New South Wales) 816 (commitment for absence from work held bad, as it did not follow the terms of the act); *Ex parte Paynter* (1862) 2 New South Wales S. C. R. 189 (commitment sustained on the ground that the binding was valid).

In *Shea v. Choat* (1846) 2 U. C. Q. B. 211 (action by apprentice for false imprisonment), it was doubted whether

§§ 3, 4 of the English statute, 20 Geo. II. chap. 19, were in force in Upper Canada; but it was held that, even if the special remedies given by those provisions were available, the magistrates, although they might commit an apprentice to prison after hearing the master's complaint, could not order him to be arrested before it was heard. By express enactment those remedies are available in British Columbia. See § 2193a, *ante*.

As to the imprisonment of an apprentice who refuses either to serve for time lost by his absence, or to give satisfaction, see *Reg. v. Walker* (1877) 41 U. C. Q. B. 568, § 2193b, note 1, *ante*.

³ *Rea v. Taylor* (1826) 7 Dowl. & R. 622; *Ex parte Irwin* (1854) Legge's Rep. (New South Wales) 816.

⁴ *Hawkesworth and Hillary's Case* (1670) 1 Wms' Saund. 315, 1 Mod. 2; *Watkins v. Edwards* (1671) 1 Mod. 286, 2 Vent. 175; *Rea v. Gately* (1696) 5 Mod. 139.

⁵ *Clement v. Wheeler* (1796) 2 Root, 466 (a ruling with reference to an enactment which required every absconding servant or apprentice to serve treble the time of their absence).

the defendant, and was still in force at the time when the conditions supervened, or the events occurred, to which the application has reference. This prerequisite to relief is considered in subtitles B, C, and D, *ante*.

(2) That the conditions or events relied upon as a ground for the application were such as to warrant the making of the given order. Clauses specifying in more or less definite phraseology the defaults which will warrant a court in granting relief are usually inserted in the statutes. The essential question, therefore, to be determined in dealing with an application for relief, is whether the defendant was guilty of an act of omission or commission which comes within the letter or spirit of the given enactment. According as it may appear that there was or was not in this sense a sufficient ground for dissolving the contract or for imposing a penalty, an order releasing the complainant or punishing the defaulting party will be treated as valid or invalid.¹

¹ (a) *Discharge upon the master's application*.—In *Rea v. Davis* (1726) 1 Strange, 704, 1 Bott, Poor Law, 574, 1 Sess. Cas. 283, where the master complained of the apprentice having unlawfully absented himself from work, the discharge of the indenture was quashed, the only ground assigned for the discharge being that the master had declared in open court that he would not take the apprentice back again.

In *Rea v. Heaseman* (1735) Annelley's Rep. 101, 1 Bott, Poor Law, 575, a similar decision was rendered. As to the other point decided, see *infra*, this note.

For other cases in which the indentures were discharged, see *Hawkesworth and Hillary's Case* (1670) 1 Wms' Saund. 315, 1 Mod. 2 (several misdemeanors committed by apprentice); *Watkins v. Edwards* (1671) 1 Mod. 286, 2 Vent, 175 (disorderly living).

(b) *Discharge on the application of the apprentice*.—*Com. v. St. German* (1807; Ct. of Sess.) 1 Browne (Pa.) 24 (ill treatment); *Com. v. Linker* (1870) 8 Phila. 455 (court authorized to discharge apprentice on the ground of ill treatment or breach of a covenant); *Cannon v. Davis* (1807) 1 Cranch, C. C. 457, Fed. Cas. No. 2,385 (cruelty); *Day v. Everett* (1810) 7 Mass. 145 (cruelty stated, *arguendo*, to be a good ground for discharging apprentice); *Baxter v. Johnson*, New-

foundl. Rep. (1817–1828) 33 (master did not employ apprentice in line of business in which he was to receive instruction).

In one case it was held that using "unkindly" was not "misusing" in the sense of Stat. 5 Eliz, chap. 4. *Rea v. Heaseman* (1735) Annelley's Rep. 101, 1 Bott, Poor Law, 575.

In *Smart v. Gams* (1794) Hume, 18, where an apprentice had misconducted himself and deserted the employment, the court refused to order him to return to his service, because the master had acted towards him in a cruel, intemperate, and violent manner.

In *Owens v. Chaplain* (1856) 48 N. C. (3 Jones, L.) 323, the indenture was held to have been properly canceled on the ground that the master had been absent from the state for seven months, and that the conclusion arrived at would be the same, whether his absence was voluntary or involuntary.

In *Baker v. Lebeau* (1884) 7 Legal News (Montreal Q. B.) 299, the contract was held to have been properly annulled on the ground that the apprentice had not had a fair opportunity of acquiring proficiency in the art which the master had engaged to teach him.

(c) *Punishment of apprentice*.—In *Com. v. Linker* (1870) 8 Phila. 455, the power of the court of quarter sessions under the Pennsylvania act of 1770, to punish a defaulting apprentice

From the few authorities which bear upon the subject it is perhaps warrantable to deduce the rule that, if a request for a cancellation of the contract is made upon the ground of a breach of its obligations, an order allowing cancellation should be made only in cases where the breach established is one of a serious character.² In this point of view the fact that the defaulting party was guilty of misconduct of a description which, if a contract of hiring and service had been involved, would have warranted the aggrieved party in terminating it, does not necessarily constitute a justification for such an order. Apart, however, from the question of a breach of the obligations of the contract, it is clear, on general principles, that a proper case for a judicial cancellation is presented whenever it is impossible, owing to causes beyond the control of the parties, to perform the obligations of the contract.³

(3) That the jurisdictional prerequisites to the validity of the proceedings and the order made were duly satisfied. The decisions under this head have turned upon the following questions: Whether the given tribunal was competent to take cognizance of proceedings of the description contemplated by the enactment with reference to which they were instituted; ⁴ whether the complainant and the de-

with imprisonment, at hard labor, if necessary, was adverted to.

The fact that an apprentice refused to make up, after the expiration of his contract, the time which he had lost through sickness, does not constitute an offense under the master's and servant's act of Quebec. *David v. Colletterte* (1875) 19 Lower Can. Jur. (S. C.) 111.

In *Reg. v. Harris* (1848) 6 N. B. 100, one of the grounds upon which the conviction of an apprentice for absconding and engaging in business within a specified area, contrary to a restrictive stipulation, was reversed, was that there had been no absconding on his part, because it was agreed that he might leave after a certain time, provided that he did not engage in business.

In *Harris v. Roulston* (1872) 14 N. B. 171, the apprentice was held not to be liable to imprisonment, for the reason that the indenture did not contain the covenants into which the master was required to enter.

² See cases cited in subd. a and b of preceding note.

³ That the indentures of a poor apprentice who had turned out to be a natural idiot might be canceled was

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held in *Anonymous* (1684) Skinner, 114, 1 Bott, Poor Law, 570.

⁴ According to the English practice under the Stat. of 5 Eliz. chap. 4, the sessions of the place where the parties lived had jurisdiction to discharge the indentures. *Rex v. Collingburne* (1726) 1 Strange, 663. This jurisdiction could be exercised only at the general sessions. *Anonymous* (1684) Skinner, 98, 1 Bott, Poor Law, 570.

In construing that act, the courts at first held that the general sessions had no power to discharge an apprentice by an original order, this doctrine being based on the consideration that the act required that application should first be made to a justice, who, if he could not compound the matter, was to bind over the master to appear at the general sessions. *Rex v. Gately* (1692) Carth. 198; *Rex v. Cherry* (1694) Comb. 203. But afterwards the doctrine prevailed that an original jurisdiction was vested in that tribunal. *Rex v. Heaseman* (1735) Annelley's Rep. 101, 1 Bott, Poor Law, 575.

In New Jersey it is still held that the courts of quarter sessions have no original jurisdiction to discharge an ap-

fendant were persons within the scope of that enactment;⁵ whether the complaint satisfied the formal requisites as prescribed;⁶ whether

prentice. *Ackerman v. Taylor* (1827) 9 N. J. L. 65.

A court which is merely empowered to bind out orphans and poor children has no jurisdiction to remove from his apprenticeship, an apprentice bound out by his father, and not by the court. *Spradling v. Gilmore* (1850) 11 B. Mon. 116.

In Pennsylvania the sessions, or mayor's court, have no power to decide on the validity of an indenture. *Com. v. St. German* (1806) 1 Browne (Pa.) 24; *Ex parte Hester* (1811) 1 Browne (Pa.) 369.

In *Pidgeon's Case* (1811) 1 Browne (Pa.) 374, note, it was held that the mayor's court might legally inquire into, and decide upon a question respecting the age of an apprentice, where it arose as an incidental question, or by way of answer to the master's complaint for desertion from service, or on any other ground which might give the court original cognizance; but that they had no power to discharge an apprentice on the single allegation that he was at the time of his application, of full age.

In *Cannon v. Davis* (1807) 1 Cranch, C. C. 457, Fed. Cas. No. 2,385, it was held that the Federal circuit court sitting in the district of Virginia had jurisdiction to discharge an apprentice under Va. Acts 1792, chap. 95, § 15.

Under the Maryland act of 1842, chap. 25 (Pub. Gen. Laws 1904, art 6, § 1), suggestion being made by counsel in writing, the orphans' court may take proof, and set aside an apprentice's indentures, although he was not made a formal party. *Lammott v. Maulsby* (1855) 8 Md. 5.

⁵ On the ground that the power of the sessions to discharge apprentices could be exercised only in respect of the trades specified in Stat. 5 Eliz. chap. 4, it was held in *Rex v. Gateley* (1696) Carth. 366, Comb. 353, 2 Salk. 471 (a later hearing of the case of the same name mentioned in note 4, *supra*), that they had no power to discharge a surgeon's apprentice. (As a fact which throws a curious sidelight upon the change which the lapse of two centuries has made in the social position of surgeons, it may be mentioned that the breach of duty alleged in this case was that the master,

being a mountebank, had kept his apprentice as a tumbler on the stage.)

The discharge of an apprentice to a tallow chandler was quashed on the same ground in *Punting's Case* (1698) 3 Salk. 41.

In *Rex v. Taylor* (1826) 7 Dowl. & R. 622, it was held that a conviction, under 4 Geo. IV. chap. 34, of an apprentice for misbehavior could not be supported, unless it showed on its face that the defendant was an apprentice within 4 Geo. IV. chap. 29, which extended the previous acts to apprentices upon whose binding out no larger sum than £25 had been paid.

In a Scotch case a workman, known by the usage of his trade as an "apprentice," and receiving less wages than ordinary workmen, but without any indenture, was held liable to be proceeded against summarily, as an ordinary workman, if he left without the customary notice. *Hamilton v. Outram* (1855) 17 Sc. Sess. Cas. 2d series, 798.

In *Ex parte Paynter* (1862) 2 New South Wales, S. C. R. 189, it was held that §§ 4 & 5 of the apprentices act, 8 Vict. No. 2, were applicable to all apprentices, whether created in pursuance of the act, or in the exercise of common-law rights.

In *Reg. v. Proud* (1867) L. R. 1 C. C. 71, 10 Cox, C. C. 455, 36 L. J. Mag. Cas. N. S. 62, 16 L. T. N. S. 364, 15 Week. Rep. 796, where the prisoner was indicted for perjury committed before a police magistrate, upon a summons taken out by him as an apprentice against his master, under 4 Geo. IV. chap. 34, § 2, for nonpayment of wages, it was held, that the magistrate had jurisdiction to adjudicate upon the complaint, although the summons was not taken out until the relation of master and servant had ceased; and that, at any rate, he had jurisdiction to inquire into the existence of such relation. See also § 2197, *post*.

⁶ In *Finley v. Jowle* (1810) 12 East, 248, it was held that the requirement of 4 Geo. IV. chap. 34, § 1, that the complaint against an apprentice should be made "upon oath," was satisfied if the complaint was verified by a person other than the master.

the proceedings were instituted by a proper party plaintiff;⁷ whether the defendant was duly brought into court;⁸ and whether the requirements of the given statute in respect to the form of the discharge were complied with.⁹

2196. Review of proceedings by higher tribunals.—The general rule of procedure, that an appeal from the decision of an inferior or special tribunal does not lie unless it has been explicitly granted by the legislature, is illustrated in several cases within the scope of this subtitle.¹ This rule manifestly does not preclude the removal of a case into a higher court for the purpose of determining the competency of the inferior tribunal to assume jurisdiction of the proceedings in question.²

⁷ If the statute expressly provides that the application for relief shall be made by the apprentice, it is clear that the proceedings must be instituted either by him, or by some other person in his name. *McDaniel v. McGowen* (1825) 3 T. B. Mon. 9.

A similar rule prevails where it is enacted that the proceedings shall be "upon the complaint" of the apprentice. *Ackerman v. Taylor* (1827) 9 N. J. L. 65.

⁸ That an order for discharge must show either that the master appeared, or was summoned, was laid down in *Rex v. Gill* (1719) 1 Strange, 143; *Reg. v. Rutter* (1712) 1 Bott, Poor Law, 571; *Rex v. Heaseman* (1735) Annelley's Rep. 101, 1 Bott, Poor Law, 575; *Broadwell v. Everett* (1831) 6 J. J. Marsh. 603.

In *Ditton's Case* (1701) 2 Salk. 490, it was held that the justices might discharge the apprentice of a master who, after being bound over to appear, had not done so.

⁹ In *Punting's Case* (1698) 3 Salk. 41, one of the grounds assigned for quashing the order was that it was under the hands and seals of three justices only, instead of four.

¹ *Smith v. Hubbard* (1814) 11 Mass. 24; *Lammott v. Maulsby* (1855) 8 Md. 5; *Killoran v. Barton* (1882) 26 Hun. 648 (decision in question was that of a magistrate upon a complaint made against a master, under Code Crim. Proc. §§ 931, 932, accusing the master of cruelty).

In *Carmand v. Wall* (1829) 1 Bail. L. 209, it was held that no appeal lay from an order made by a judge in cham-

bers for the discharge of an apprentice, in pursuance of the authority specially delegated by the South Carolina act of 1740 (P. L. 177). But now, by Rev. Stat. 1894, § 2214, it is provided that either the master or the apprentice may appeal against an order made by the justices upon the hearing of a complaint by one or other of the parties. (Gen. Stat. 1882, § 2079.)

In *Cox v. Jones* (1866) 40 Ala. 297, it was held that an appeal does not lie from an order of a probate court refusing an application for the revocation of indentures granted by itself under Ala. Code 1852, § 1215, relating to poor apprentices. The decision proceeded not only on the general ground that no right of appeal was given in the case of such apprentices, but also on the ground that another method of revision was expressly provided.

In *McKimmey v. McKimmey* (1875) 52 Ala. 102, it was held that an appeal does not lie from the order of a probate judge revoking and annulling letters of apprenticeship, the *ratio decidendi* being that such an act did not constitute an exercise of judicial power. But in *Shows v. Pendry* (1890) 93 Ala. 248, 9 So. 462, it was held (overruling *Mattheus v. Hobbs* [1874] 51 Ala. 210) that, under Ala. Code, 3640, an appeal to the supreme court lies from an order made on habeas corpus by a probate judge, discharging a minor apprentice from the custody of his master. *Cox v. Jones*, *supra*, was not referred to.

² *Vunck v. Whorl* (1807) 2 N. J. L. 336; *Ackerman v. Taylor* (1826) 8 N. J. L. 268. In the latter case a certiorari was allowed (without prejudice to the

2197. Applicability of statutes to adult apprentices.—In Pennsylvania it has been held that a person of full age, who binds himself apprentice to learn a trade, is not subject to the provisions of the act of Sept. 29, 1770, by which a summary jurisdiction in disputes between masters and apprentices is vested in the court of quarter sessions.¹

O. TERMINATION OF THE CONTRACT BY OR ON ACCOUNT OF THE ACTS OF THE PARTIES.

2198. Rule where no definite term is specified.—Where the indenture does not contain any stipulation for a definite period of service, the contract may be rescinded by either party at pleasure.¹

2199. Termination by consent of the parties to the indenture.—*a. Generally.*—There is authority for these propositions:—(1) that a discharge of an indenture may be effected by canceling it with the consent of all the parties by whom it was executed;¹ (2) that, even though the indentures have not been formally canceled, a dissolution

question of jurisdiction), to remove an order of the sessions, notwithstanding the general language of § 10 of the apprentices act (Rev. Laws, p. 368) to the effect that no certiorari should be granted. This prohibition was deemed to be applicable to cases in which the proceedings in the sessions were not irregular.

¹ *Com. v. Sturgeon* (1810) 2 Browne (Pa.) 205. The court said: "When it is considered that the term apprentice signifies a learner, and impliedly therefore looks to youth and a minority, and that all the provisions in the different statutes in England and here bear constantly on a state of minority, it would seem to follow that the penal part of our act of assembly before mentioned, and the provisions therein given, are necessarily limited and restrained to persons within age. In contracts between persons of full age, a master and a person willing to be instructed in the character of apprentice, the agreement is to be carried into effect as all other contracts, according to the stipulation of the parties. It is not to be inferred that in such case, from the term 'apprentice' being used, imprisonment at hard labor (the punishment of felons) may follow the breach of the covenants." This reasoning seems to be satisfactory, and to justify the court in disapproving

of the earlier decision in *Com. v. St. German* (1807) 1 Browne (Pa.) 24, where the statute was held to be applicable to adults.

With reference to the clause in the above-mentioned act which provides that, when an apprentice comes to the age of twenty-one, his term shall expire as fully, to all intents and purposes, as if the same apprentice were at full age at the time of making the said indenture, it has been held by the court of common pleas that an apprentice is not free when he arrives at the age of twenty-one, but is relieved from the summary proceedings provided by that act for difficulties between master and apprentice. *Flaccus v. Smith* (1899) 30 Pittsb. L. J. N. S. 129.

¹ *Wright v. Delano* (1882) 62 N. H. 252.

¹ *Rex v. Ecclesal Bierlow* (1766) Burr. Sett. Cas. 562, 1 W. Bl. 592; *Rex v. Weddington* (1774) Burr. Sett. Cas. 766 (indenture destroyed); *Rex v. Spawnton* (1775) Burr. Sett. Cas. 801 (seals and names of parties torn off); *Powers v. Ware* (1824) 2 Pick. 451 (indenture of poor apprentice not discharged, where master cut out his name with the consent of one of the selectmen).

of the contract results, where they have been surrendered,² or a binding and enforceable agreement has been made for their surrender;³ and (3) that, if a master licenses an apprentice to leave him, he cannot, by recalling the license, revive the obligations of the indenture.⁴

As the use of a seal was not an element involved in any of the transactions to which the cases which illustrate the second and third of these propositions had reference, those cases would seem to be, upon the facts, essentially inconsistent with some others in which the rights and liabilities of the parties have been determined by an application of the technical doctrine that a contract under seal cannot be varied or discharged by a contract not under seal.⁵ But that doc-

² *Rea v. St. Mary Kalendar* (1748) Burr. Sett. Cas. 274. 1 Bott. Poor Law, 531 (exchange of indentures between master and father of apprentice, with the consent of the apprentice,—held to amount to a cancellation both in law and equity); *Rea v. Titchfield* (1763) Burr. Sett. Cas. 511.

³ In *Rea v. Harburton* (1786) 1 T. R. 139, 1 Bott. Poor Law, 615, a valid cancellation was inferred on the ground that the agreement which a poor apprentice had, after reaching his majority (see next subsec.), entered into with regard to the surrender of the instrument, was such as would operate as a bar to an action of covenant.

In *Rea v. Justices of Devonshire* (1777) Cald. 32, 1 Bott. Poor Law, 534, where a master had received money from an apprentice of full age to vacate his indenture, and had given a written discharge, it was held that, though the indentures remained uncanceled, the relation was dissolved so as to enable the apprentice to gain a settlement by service under another master.

In *Rea v. Gwinear* (1834) 3 Nev. & M. 297, 1 Ad. & El. 152, 3 L. J. Mag. Cas. N. S. 81, it was held that no dissolution had resulted where the agreement merely bound the master to give up the indenture at a subsequent date, upon the payment of a sum of money, and was therefore merely prospective and executory until the consideration was paid. The conclusion arrived at was that a residence of forty days between the making of the agreement and the payment of the money was a residence under the apprenticeship, and conferred a settlement. It is worth remarking that Parke, J., expressed a doubt as to whether the consent of the

father would be sufficient to make the dissolution complete. Its sufficiency, however, was assumed for the purposes of the decision.

In *Rea v. Skeffington* (1820) 3 Barn. & Ald. 382, there was held to have been no dissolution of the contract, where the indenture was in the hands of a third person when the parties agreed that it should be surrendered, but it had never been applied for nor surrendered. The fact that the master said he would have given up the indenture if he had had it in his possession was held to be immaterial.

⁴ *Anonymous* (1704) 6 Mod. 69. 1 Salk. 68; *Lewis v. Wildman* (1803) 1 Day, 153 (action against guardian, not maintainable).

⁵ *Reg. v. Daniel* (1705) 6 Mod. 182; *Buckington v. Shepton Bechanp* (1737) 8 Mod. 236; *Rea v. Bow* (1816) 4 Maule & S. 383.

In *Reg. v. Thursley* (1705) 6 Mod. 190, it was laid down that an indenture which remains uncanceled continues in force, although it is given up.

In *Rea v. Warden* (1828) 2 Mann. & R. 24, it was held that the parties were not discharged by a parol agreement to give up the indentures.

For cases not relating to apprentices, in which the general rule was affirmed, see *Rogers v. Payne* (1768) 2 Wils. 276, Selwyn, N. P. "Covenant" 6th ed. 524; *Kaye v. Waghorn* (1809) 1 Taunt. 428; *Nash v. Armstrong* (1861) 10 C. B. N. S. 259, 30 L. J. C. P. N. S. 286, 7 Jur. N. S. 1060, 9 Week. Rep. 782.

An apprenticeship *de facto*, under which services are rendered without the execution of any indenture, may of course be terminated by any description of agreement. *Nickerson v. Easton*

trine has never been accepted by courts of equity.⁶ So far as England is concerned, therefore, it has been rendered obsolete by the operation of the general provision in the judicature act which subordinates legal to equitable rules in cases where they conflict. In the United States it has been rejected, independently of statute, in most, if not all, jurisdictions.⁷

Under the Scotch law the contract may be brought to a close by the consent of parties, either expressed or implied from the mode in which they conduct themselves towards each other.⁸

b. Rule applicable in the case of poor apprentices.—The English doctrine applied in settlement cases is that an indenture of a pauper child bound out by parish officers cannot be dissolved during his

(1831) 12 Pick. 110, where it was stipulated that the plaintiff should go on a voyage, and that at the end of it the relation of apprenticeship *de facto* should cease, whether he were twenty-one or not.

⁶ *Webb v. Hewitt* (1857) 3 Kay & J. 438; *Steeds v. Steeds* (1889) L. R. 22 Q. B. Div. 537, 53 L. J. Q. B. N. S. 302, 60 L. T. N. S. 318, 37 Week. Rep. 378.

⁷ "Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement." *Chesapeake & O. Canal Co. v. Ray* (1879) 101 U. S. 522, 25 L. ed. 792. See also the other cases cited in Wade's Edition of Pollock on Contracts, *457, note (9). It may be remarked in passing that the allusion in the passage above quoted to the old cases as the only authorities for the doctrine betokens an imperfect acquaintance with these English decisions. An examination of the language used in *Steeds v. Steeds*, note 6, *supra*, will show that it was applied up to the time when the judicature act abolished it.

In *Graham v. Graham* (1815) 1 Serg. & R. 330, where the only point actually discussed was whether an indenture may be annulled by consent, a discharge of the contract seems to have been inferred on the ground of words and acts only.

⁸ So stated in Fraser on Master and Servant, p. 315. One of the authorities cited is *Ferguson v. McKenzie* (1815) Hume's Dec. 21. There an apprentice, after having deserted, and been compelled to return, was impressed as a

seaman, and continued in the navy for sixteen years, during which time no claim was made by the master for breach of indenture. After the apprentice returned home, the master claimed payment for certain articles furnished to him when an apprentice, but nothing else. Thereafter he made a claim for damages for breach of contract, which the court in these circumstances refused. It was admitted that obligations under written contracts subsist for forty years; but the reporter, Baron Hume, answers the plea founded upon this, as follows: "In the case of these contracts, which, like an indenture, are by their very nature destined for early and immediate execution, and are quite inapplicable to the age and other circumstances of parties at a distance of time, the right must be subject to relinquishment by deliberate course of conduct on the master's part continued for a length of time. If the master, having it in his power, make no attempt for a series of years to recover his apprentice, or enforce a claim of damages, this cannot reasonably be construed any otherwise than as a tacit permission to the young man to consider himself as released from his engagement."

In the other case referred to, *Robertson v. Smith* (1800) Hume, 20, an apprentice deserted a second time after having been compelled to return to service, and had for four years thereafter engaged, with the master's knowledge, in another kind of work. Held, that the master had thereby discharged the indenture, so as to be barred from insisting for the penalty against the ap-

minority without their consent,⁹ but that the dissolution may be effected by an agreement between the master and himself after he has reached full age.¹⁰

The general principle embodied in two American cases seems to be that the apprenticeship of a child bound by a public official can be discharged only by judicial proceedings taken in accordance with the statute.¹¹

c. Conditional cancelation by the master.—Where an agreement by the master to cancel the indenture is, by its express terms, subject to a condition subsequent in his favor, he is entitled to recall the apprentice to his service if the condition is broken.¹²

2200. Termination by apprentice on the ground of his minority.—

In England where an infant is bound by a beneficial contract of apprenticeship made by himself, he is not entitled to renounce the contract, unless, by reason of circumstances supervening while it is in course of performance, its renunciation will be for his advantage.¹

prentice, his cautioner, and an officer with whom he had enlisted.

⁹ *Rex v. Austrey* (1758) Burr. Sett. Cas. 441, Bott, Poor Law, 607; *Rex v. Weddington* (1774) Burr. Sett. Cas. 766; *Rex v. Langham* (1782) Cald. 126, 1 Bott, Poor Law, 612.

¹⁰ *Rex v. Ecclesal Bierlow* (1766) Burr. Sett. Cas. 562; *Rex v. Harburton* (1786) 1 T. R. 139, 1 Bott, Poor Law, 615.

¹¹ In *Glidden v. Unity* (1855) 30 N. H. 104, the court thus discussed the contention of counsel that the indentures of a poor apprentice were no longer in force because they had been waived by the overseers of the poor: "The overseers, in making such indentures, act as public officers, in the discharge of a public duty, and not chiefly, if at all, as agents of the town. Their duty, under the statute, is discharged when the indentures are made, and they have no further duty and no further power than to see that the contract is executed in good faith towards the boy. They have themselves no interest, and can release none. The town is not a party, and neither they nor their agents can affect the validity of the agreement by any release they can make. . . . It being, then, clear that neither the town nor the overseers have any power to release or discharge the master from any of the obligations of his contract,

their waiver, either express or implied, can have no greater effect."

A free infant of color, rightfully bound as an apprentice, remains subject to the jurisdiction of the county court wherein he was bound, until discharged in the mode provided. Rev. Code, chap. 5, § 5; *Prue v. Hight* (1858) 51 N. C. (6 Jones, L.) 265.

¹² *Gray v. Cookson* (1812) 16 East, 13, where it was held that the apprentice had, by setting up a trade for himself in a certain town, broken a condition embodied in a clause of the indenture, "provided he made no engagement or entered into any person's service" in that town.

¹ In *Rex v. Mt. Sorrell* (1815) 3 Maule & S. 497, where the indenture was made by the infant himself, his master ran away, whereupon the infant procured it to be given up with the master's consent. Held, competent for the parties so to discharge themselves, as it was for the infant's benefit to put an end to the contract when the master could no longer teach him.

That case was distinguished in *Rex v. Great Wigston* (1824) 3 Barn. & C. 484, where it was held that as no facts were stated whence the court could infer that it was for the infant's benefit to put an end to the apprenticeship, the case fell within the general rule; the consequence being that, as the first binding was not dissolved, the second

That doctrine has also been recognized in North Carolina.² But as the apprenticing of minors is in this state entirely regulated by express enactments, it would seem that the obligatory quality of an indenture must in every instance depend simply upon whether it was executed in the manner prescribed by the legislature, and that for this reason no occasion for the application of the English rule can properly arise. In those American states in which the power of the father and the other persons specified to bind minors is absolute as regards those under fourteen years of age, but cannot be exercised without the consent of those above that age, a minor who is bound without his consent before he reaches the age of fourteen years is entitled to avoid the indenture after he has reached it.³

2201. Termination by apprentice upon reaching his majority.—

Under the express terms of most of the statutes, minors can be bound as apprentices only until a specified age, which is usually specified as twenty-one years in the case of males, and eighteen years in the case of females. See § 2115, *ante*. The effect of such enactments obviously is that a minor bound for a term of years which will expire at a date subsequent to that on which the statutory age will be attained is entitled to avoid the contract when he attains that age.¹

was necessarily invalid, and the service under it could not confer a settlement. Abbott, Ch. J., said: "If, then, it is for the benefit of the infant to bind himself an apprentice, it is impossible to say, generally, that it is for his benefit to dissolve such a connection; such a position involves a contradiction. That being the general rule, we must inquire whether in the particular instance it is for the advantage of the infant to dissolve his apprenticeship."

² In *Musgrove v. Kornegay* (1859) 52 N. C. (7 Jones, L.) 71, the court remarked, *arguendo*: "There are two acts which an infant cannot avoid: Marriage, because of the nature of the subject, and a deed of apprenticeship, if he be over the age of twelve years; because the power to execute the deed is necessary to provide the means of support, and it is presumed to be for the benefit of the infant, and it concerns the commonwealth that infants should be kept employed so as to acquire habits of industry, and become skilful in arts and trades. McPherson, Infants, 41 Law Lib. 479. 'The act of binding himself apprentice, being an act manifestly for the benefit of an infant, is one which

he is competent to perform.' For this, is cited Burns's Justice, art. *Apprentice*. If the father of an infant be dead, he may, at the age of twelve years, at common law, execute the deed alone."

³ *Hudson v. Worden* (1867) 39 Vt. 382.

¹ *Coghlan v. Callaghan* (1857) 7 Ir. C. L. Rep. 291; *Drew v. Peckwell* (1852) 1 E. D. Smith, 408; *Reg. v. Templeton* (1872) 3 Australian Jur. R. (Victoria) 106.

That an apprentice seventeen years of age and upwards bound by indenture, which stated her to be fourteen, for seven years, was entitled to be discharged at twenty-one, although it was declared by §§ 42, 45, of 5 Eliz. chap. 4, that minors bound under that act were as fully bound as if adults, was held in *Ex parte Davis* (1794) 5 T. R. 715. Lord Kenyon said: "Every indenture of an infant is voidable at his election: and in such cases the master must trust to the covenant of those who engage for the infant. But where the binding is under the authority of an act of Parliament, that takes away the power of electing to vacate the indentures. But I know of no act which prohibits the

2202. What constitutes a legal avoidance of the contract by the apprentice.—*a. In cases where no public official was a party to the binding.*—In several of the cases in which the binding was not effected by or with the assent of a judge or other public official, the position has been taken that an apprentice cannot terminate a voidable contract except by making a formal declaration of his intention to abandon the service, and that his departure will not of itself operate so as to release him from his obligations.¹ But some courts have refused to adopt this doctrine.² The theory that a master possesses rights in respect of the services of an apprentice who, *ex hypothesi*,

party in a case like the present to make such election upon her coming of age. According to the argument of the counsel against the rule, an infant who imprecipitously bound himself till the age of fifty or upwards would be bound to serve till that time; but it is impossible to support such a proposition. This apprentice ought not to have been bound longer than till she was twenty-one; and we ought now to discharge her."

In *Dent v. Cock* (1880) 65 Ga. 400, on the ground that in Georgia the age of majority for general purposes is twenty-one years in the case of females, it was unsuccessfully contended that indentures binding a female "during minority," being in restraint of her right to contract a marriage at the age of eighteen years, became void when she attained that age.

¹ In *Rex v. Evered* (1777) Cald. 26, 1 Bott, Poor Law, 534, where the apprentice was convicted for running away, Aston, J., observed: "Supposing the indentures voidable, I cannot conceive that the apprentice's running away can avoid them. Had he served regularly, and during such service declared his intention to depart, it might have been different. Here he would make use of his offense in order to avoid the punishment that attends it: but it is too late to do it before a justice when charged with a crime."

See also *Rea v. Hindrigham* (1796) 6 T. R. 557 (settlement case in which it was held that the act of the apprentice in leaving the master's service and enlisting in the army with the master's approbation did not constitute an avoidance); *Ashcroft v. Bertles* (1796) 6 T. R. 652 (action for enticing in which the contract was held to be still subsisting); *Gray v. Cookson* (1812) 16 East,

13 (absconding apprentice cannot escape penal consequences of his default by repudiating the contract when he is on his trial before a magistrate); *Coghlan v. Callaghan* (1857) 7 Ir. C. L. Rep. 291 (action complaining of apprentice's having absented himself:—held, that the apprentice must give reasonable notice of his intention to exercise his right to avoid the contract upon reaching his majority).

In *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61, an action for harboring the apprentice, the court said: "It is, we think, fully settled, and wisely settled, that where an apprentice can himself avoid a voidable indenture he must do so by some formal and authentic notice of his intention to dissolve the contract, and that it will not do, when he is called on to answer for misconduct, such as quitting his master's employment, to allege his very offense as an apology, on the ground that it was done with intent thereby to avoid the indenture: nor can the third person who has harbored or maintained him set up the misconduct of the apprentice as a justification for his invasion of the rights of the master *de facto*."

² In *Hudson v. Worden* (1867) 39 Vt. 382, an action for money earned by the apprentice, the court thus stated its views: "No formal act or express declaration was necessary on the part of the apprentice to avoid the indenture. We think the leaving of the plaintiff, enlisting into the Army of the government as a soldier, and going into the military service, was an abandonment of the indenture, and in law a revocation of it. The new duties which he thereby assumed, the service which he undertook, and the obligations which he contracted, were not only entirely foreign

is entitled to abandon the contract at any moment, seems to be somewhat anomalous. But, even assuming that such rights may be predicable, it is difficult to understand why the departure of an apprentice should not be deemed sufficient, as an act *in pais*, to constitute a legal avoidance of the indenture.

b. In cases where a public official joined in the indenture.—A contract made in pursuance of a statute which provides for the binding of minors by or with the assent of a judge or other public official cannot be avoided by the apprentice himself during his minority.³

to the purposes and objects of the indenture, but entirely inconsistent with it. He formed new relations and put himself under new masters, thereby relieving the defendant from the obligation of that support, instruction, education, and other duties imposed on the defendant by the indenture, and at the time placed himself beyond the reach of its benefits. This was a sufficient revocation. This new service can in no sense be considered a service under the indenture. Even the assent of the minor to treat it as a service under the indenture would not bind him; such contract would be revocable by him through his guardian, the same as ordinary contracts of infants, and attended with the same legal results. It would be a new contract, and not a continuation of the old one. It will be noticed that in *Phelps v. Culver* (1834) 6 Vt. 430, cited in argument, the services for which the plaintiff sought to recover were of the same character contemplated in the indenture, while at the same time the plaintiff enjoyed all its provisions for her benefit. Not so in this case, but the very reverse. In this case the plaintiff under his enlistment neither did nor could perform the duties or enjoy the benefits of the indenture. The plaintiff therefore is liable for the money in question." The court did not refer to any of the cases cited in the preceding note.

The same doctrine was adopted in *Drew v. Peckwell* (1852) 1 E. D. Smith, 408 (action against second master for value of apprentice's services); *Campbell v. Cooper* (1856) 34 N. H. 49 (action for enticement of apprentice); *Brown v. Whittemore* (1862) 44 N. H. 369 (similar facts).

In *Dillingham v. Wilson* (1840) 6 U. C. Q. B. O. S. 85, it was held that, as

the evidence showed that the apprentice had left the service with the intention of never returning to it, the only remedy available to the master was an action against the apprentice's father for procuring this abandonment of the service. The English cases *contra* (see note 1, *supra*) were not referred to by the court.

³ In *Dowd v. Davis* (1833) 15 N. C. (4 Dev. L.) 61 (action for harboring), the court argued thus: "It is to be remarked that Lydia Burnett was not a party to this indenture. There is an important difference between the parties to an indenture under the statute of 5th Elizabeth, and the parties to an indenture of apprenticeship under our act of 1762. To an indenture under that statute the infant and the master are the parties; but to an indenture with us, the chairman of the court and the master are the parties. In this respect our indentures much more nearly resemble those which are taken in England on the binding of parish apprentices by church wardens, under Stat. 43 Eliz. chap. 2, and subsequent statutes, than those we have been considering. If the indenture in question be voidable at the election of the parties thereto, or of that party who can object to it as defective or irregular, it seems to us that the act of avoiding must be done not by the apprentice, but by the county court or its chairman. Nor is this to be regarded as a technical distinction. In its principle and its consequences it seems necessary for following out the scheme of the legislature, and for taking proper care of the interests of the apprentice. Were the power of vacating the indentures to rest with him during his minority, he might be seduced into an unfit service, and lured away to vice and idleness and ruin."

2203. Dismissal by the master.—*a. Generally.*—The common-law doctrine is that “discharge of an apprentice by parol is not good; for he cannot be an apprentice but by writing, and therefore the discharge ought to be by writing.”¹

b. What constitutes a dismissal.—The rights of the parties sometimes turn upon the question of fact whether in the given instance the apprentice had been dismissed or had abandoned the service.² The cases cited under § 203, *ante*, should be compared in this connection.

2204. Dissolution of employing partnership.—Except in so far as the obligations of the parties may be controlled by an explicit agreement,¹

¹ Viner's Abridgment, Vol. XV., *Master and Servant*, p. 319, citing Br. Laborers, p. 30, and 21 Hen. VI., 33.

² In *Bradley v. Perkins* (1904) 138 Mich. 356, 101 N. W. 583, where the contract authorized the employer, in case of a breach thereof, merely to discharge the apprentice, and not to impose a penalty, it was held the statement of the employer to him that he could leave, or continue to work under an agreement to remain thirty days above the time provided in the contract, amounted to a constructive discharge, as it required him to make a new contract which he was under no obligation to accept. He was therefore justified in leaving, and suing for what would become due to him under the contract.

In *Freit v. Belmont* (1909) 132 App. Div. 723, 117 N. Y. Supp. 656, plaintiff, with his mother's written consent, agreed to work in defendant's racing stables for five years for certain compensation, defendant having the option to discharge plaintiff and cancel the agreement any time. Before the end of the stipulated period, defendant wrote to plaintiff's mother, stating that he was giving up his stable and would not have any further need of plaintiff's services, but would endeavor to get him a good position elsewhere, if his mother consented. Held, that the letter authorized plaintiff to consider relations between himself and defendant as having been terminated, and that his leaving was not an abandonment of the employment.

In *Stirling v. Calderhead* (1832) 11 Sc. Sess. Cas. 1st series, 180, the captain of a ship had used angry words to an apprentice, but they were not intended as a dismissal, and were not understood in that sense by the appren-

tice. Subsequently he took away his clothes, without making any explanation. Held, that an abandonment, not dismissal, should be inferred, and consequently that no wages were recoverable.

¹ In *Young v. Brown* (1785) 3 Pat. Sc. App. Cas. (H. L.) 42, it was held that an apprentice who had agreed to serve a specified company, and the subsisting members thereof carrying on the business, was bound by the terms of his contract to serve a new company with a different name, formed by some of the members of the original company, after its dissolution.

In *Com. ex rel. Fisher v. Leeds* (1829) 1 Ashm. (Pa.) 405, where an apprentice was bound to two copartners, or the survivor of them, it was provided by the indenture, that, in case of a dissolution, he was to have the right to elect or choose which of the said copartners he would serve. Afterwards the partnership was dissolved, and one of the partners assigned to the other all his right, title, and interest in the said indenture. The court stated its conclusions as follows: “No arrangement or contract between the master and his apprentice, altering the persons to whom an apprentice is bound, can be valid, unless ratified by the consent of the parents, or other person standing *in loco parentis*, in writing. A parent might place confidence in one member of a firm, and doubt the capacity of the other, or he might rely upon the mutual ability of both; it is therefore expedient and necessary that any vital alteration of the parties should be sanctioned by the parent or guardian, and not alone by the boy, whose infancy incapacitates him. If this were not the case, a parent might see his child transferred, on the

a dissolution of an employing partnership operates so as to discharge an indenture absolutely. In this point of view it is clear that, after the dissolution has taken effect, an action for damages may be maintained against the members of the firm on the ground of their having so acted as to incapacitate themselves from fulfilling the contract in the manner contemplated; ² that the apprentice ceases to be amenable to the summary remedies provided by statute for the enforcement of his obligations; ³ and that a person who has executed the indenture

dissolution of a firm, to a man of questionable or depraved morals, without having the ability to avert the evil. The dissolution of the partnership therefore abrogated the indenture, the parent not consenting to the election."

² In *Eaton v. Western* (1882) L. R. 9 Q. B. Div. (C. A.) 636, the covenant in the indentures was that the apprentice should serve "the firm," which was defined to be the defendants and the successor or successors of them, and such other person as might from time to time carry on the business "now carried on by them," either in copartnership with or in succession to them or any of them. The firm was dissolved and split into two firms, one carrying on business in London and the other at Derby. The Derby firm carried on the manufacturing part of the business, and the London firm the repairing and agency part of the business. Held, that the words "now carried on by them" could not be regarded as applicable to the business carried on by either of the new firms. Sir James Hannen said: "I also agree with the master of the rolls that the business of the firm who gave him the order was not the same business as that to which he was apprenticed. It has been split into two parts, neither of which is the same business as the original one. The apprentice looked to the advantage of being educated in a firm carrying on the business in its entirety, and he is entitled to see the business of buying and selling as well as the mere manufacturing. But now that the business has been split into two, it appears to me that neither of the firms represent the original firm, and is entitled to command the services of the apprentice."

In *Couchman v. Sillar* (1870) 18 Week. Rep. 757, 22 L. T. N. S. 480, it was held that a stipulation by two part-

ners to teach a trade is broken if one of them retires from the business. Bovill, Ch. J., observed that, "by every principle of law, nonperformance of a contract cannot be excused by a fault of the person whose duty it is to perform it."

³ In *Brook v. Dawson* (1869) 20 L. T. N. S. 611, the respondent and his partner, to whom the appellant had been bound, dissolved partnership, the respondent continuing to carry on the business. At the time of the dissolution the appellant was told that he would have to serve out his apprenticeship with the respondent. This he agreed to do, and he continued to serve as such apprentice for about two years, when he absented himself. Held, that an information for misconduct would not lie under the statute relating to apprentices. During the argument of counsel the following remarks were interjected by the judges named: Mellor, J., "The difficulty is in seeing to which party he is now bound." Lush, J., "Which is his master? Suppose both should claim him." Cockburn, Ch. J., "The covenant by the partners is joint, and his covenant with them is with them jointly. When there is a dissolution, how can the covenants be performed?" The argument based upon the appellant's having elected to remain was disposed of by the Chief Justice with the remark: "That does not make a fresh indenture." He summed up the situation as follows: "The information is founded upon this indenture, which is entered into by the appellant with two partners, and it is sought to be enforced by one of them, the other having retired from the partnership; and the appellant says, 'I am not bound to you alone; I am bound to two, and no such contract now exists as that which forms the subject of your information.'"

as a joint covenantor in behalf of the apprentice is discharged from his liability.⁴

The cases reviewed in this section should be compared with those cited in § 263, *ante*.

2205. Termination for cause by a court or public officer.—a. On the ground of the invalidity of the contract.—The release of an apprentice from an invalid indenture may be obtained by bringing a suit for its cancelation. But a writ of habeas corpus is the procedure most commonly resorted to for this purpose.¹ On the other hand, this form of relief is inappropriate for procuring the release of an apprentice who has been wrongfully committed to prison by a tribunal of summary jurisdiction.²

A final order on habeas corpus directing the party by whom the apprentice was bound to restore him to the petitioner cannot be prop-

⁴In *Lloyd v. Blackburn* (1842) 11 L. J. Exch. N. S. 210, 9 Mees. & W. 363, 1 Dowl. N. S. 647, the defendant in an action on an indenture by which his son had been apprenticed to a firm of engineers which had been dissolved after the commencement of the term pleaded that, when the indenture was entered into, the plaintiffs were partners, and that, before any breach of duty by the apprentice, the partnership was dissolved. Held, that the plea was issuable as raising a fair point for discussion, and should not have been set aside.

In *Modeland v. Maguire* (1862) 12 U. C. C. P. 407, where the plea of the apprentice's father, in answer to an action for damages caused by the absence of the apprentice, was that the plaintiffs had dissolved partnership before the alleged breach of covenant, it was held that, in order to make this plea an answer to the declaration, it should appear that the covenant was so framed that if the plaintiffs were partners the dissolution of the copartnership would, by rendering the service impossible, cancel the obligation to serve.

¹The following are some of the very numerous cases in which this rule has been affirmed or taken for granted: *Cannon v. Stuart* (1866) 3 Houst. (Del.) 223; *Comas v. Reddish* (1866) 35 Ga. 236; *Demar v. Simonson* (1835) 4 Blackf. 132; *Ackley v. Tinker* (1881) 26 Kan. 485; *State v. Barrett* (1863) 45 N. H. 15; *State ex rel. Mayne v. Baldwin* (1846) 5 N. J. Eq. 454, 45 Am. Dec. 399; *People ex rel. Barbour*

v. Gates (1870) 43 N. Y. 40; *Com. v. Atkinson* (1871) 8 Phila. 375; *Brewer v. Harris* (1848) 5 Gratt. 285; *Re Goodenough* (1865) 19 Wis. 275.

In a jurisdiction where it is held that a father is not entitled at common law to bind out his minor child, it has been held that, where a child over twelve years of age has been illegally detained as an apprentice under a deed made by the father alone, the proper order upon a habeas corpus is that the infant be discharged to go where he pleases, but that, where the infant is under the age of twelve, the proper order is that he be restored to his father. *Musgrove v. Kornegay* (1859) 52 N. C. (7 Jones, L.) 71.

A return to a habeas corpus for the discharge of an apprentice above twenty-one, stating the custom of London that every citizen and freeman of the city may take as an apprentice any person above fourteen and under twenty-one, to serve for seven years and more, must show that the apprentice was within those ages when he bound himself; for the court will not intend that from matter *dehors* the return. *Eden's Case* (1813) 2 Maule & S. 226.

²In *Ex parte Gill* (1806) 7 East, 376, 3 Smith, 369, an apprentice had bound himself when an infant to serve till twenty-five, and when he came of age had elected to avoid the indentures, after which he had been committed to the house of correction for a misdemeanor in absenting himself from his master's service. Held, that the court of King's

erly made in a case where compliance with the order is impossible by reason of the fact that the master is residing in another jurisdiction.³

b. On the ground of some specific cause supervening during the term.—As is shown in § 2193, *ante*, one of the forms of relief provided by the enactments which relate to the special remedies of the parties to a contract of apprenticeship is an annulment of their obligations. Presumably such annulment may also be decreed in a proper case by any court of general jurisdiction acting in the exercise of its ordinary powers.⁴

c. Authority of officers by whom poor apprentices are bound out.—Power is conferred upon the board of commissioners of public charities of New York city, or any single commissioner, to cancel the indentures of children bound out by them. (Laws 1860, chap. 510, § 18.)

2206. Liabilities of apprentice where the contract is terminated before the end of the stipulated period.—*a. In respect of compensation for teaching, etc.*—Where an apprentice renounces a contract which is invalid under the statute of frauds, his master may maintain against him an action of assumpsit for a reasonable compensation in respect of instruction given and advances made previous to the renunciation.¹

b. In respect of satisfaction for lost time.—In a Scotch case, where an apprentice who had stipulated that for every day on which he should be absent he would, at the master's option, either pay a certain sum of money, or serve for two days, had been dismissed for a

bench had no power to discharge him on habeas corpus from his indentures, as the return to the writ showed that he had been committed on a regular conviction by two magistrates. The *ratio decidendi* was that, if the defense (election to avoid) had been properly made before the magistrates, and they had disregarded it, the apprentice had a remedy against them; but that the court had no authority to grant the relief asked. It was observed that there was a mistake in that respect in the report of *Ex parte Davis* (1794) 5 T. R. 715, 2 Revised Rep. 690; the judgment of the court there being that the apprentice should be discharged out of the custody of her master.

³ *People ex rel. Billotti v. New York Juvenile Asylum* (1901) 57 App. Div.

383, 68 N. Y. Supp. 279, where it appeared from the return made to the writ that the defendant had bound the children in question out to persons in Illinois, over whom the orphan asylum had no power; that said persons refused to produce the children or to send them into the state of New York; and that the children were unwilling to return. (Two judges dissented).

⁴ In two English cases a rule nisi was granted by the court of King's bench to discharge an articulated clerk of an attorney who had become bankrupt and absconded. *Anonymous* (1815) 1 Chitty, 558 note; *Anonymous* (1817) 2 Chitty, 62.

¹ *Hambell v. Hamilton* (1835) 3 Dana, 501.

good cause, it was held that for every day of absence up to the expiration of his term he might be required to pay the stipulated amount, without any deduction in respect of his board.² But it does not seem probable that a decision which can be supported only upon the assumption that a master may relieve himself of the burdens of the contract, and at the same time retain its benefits, would be followed in any common-law jurisdiction. In this point of view, the conclusion arrived at was essentially antagonistic to what seems to be the accepted principle in respect of the situation which arises when one party desires to be discharged from the contract on account of the other party's breach of duty, *viz.*, that the court to whom application for relief is made should cancel the indenture upon such terms and conditions as may be fair and equitable to both parties. This criticism is independent of the more particular objection that, according to the preponderance of common-law authority, the effect of the doctrine regarding the independence of the covenants of the indenture is to preclude the master from terminating the contract by his own act. See § 2146, *ante*.

c. In respect of money paid for his benefit by his guardian.—An action cannot be maintained against an apprentice, by his guardian, for money paid to the master for the apprentice's support, etc., while in his service, where the apprentice has unjustifiably left that service, and has another guardian. The claim should be adjusted in the probate court, on settlement of a guardianship account.³

2207. Liabilities arising out of the termination of the relationship between a master and an apprentice who is not formally bound.—

a. Liability of father for value of instruction given to his child.—Where a father agrees to bind his son by indenture, and the son thereupon enters upon the service, and, after having received some instruction and having been furnished with certain necessities, abandons the master, the father is bound to pay the value of the instruction and necessities, if it appears that he had refused to comply with the master's request to execute the indenture, and was the only party in fault.¹

b. Liability of father for board of child.—Where a minor is taken on trial for a certain period, with a view to being bound as apprentice, and the indenture is never executed, the master cannot, in the

² *Maxwell v. Buchanan* (1770) Morr. Dec. (Sc.) p. 593.

¹ *Squires v. Whipple* (1829) 2 Vt. 111.

³ *Hagood v. Wesson* (1828) 7 Pick 47.

absence of a specific agreement, recover compensation for his board and lodging, either in respect of the period of trial originally arranged, or in respect of any further period that he may serve upon a similar footing.² A similar doctrine has been affirmed in respect

²In *Harrison v. James* (1862) 7 Hurlst. & N. 804, it was verbally agreed between the plaintiffs and the defendant, that the son should go on trial for a month, and if the parties were satisfied he should be bound apprentice for four years, the defendant to pay a premium of £100 by instalments. The son was removed by the defendant after having remained about sixteen months. No deed of apprenticeship was executed. nor any part of the premium paid; nor was any new arrangement made. Held, that the plaintiffs could not recover for the son's board and lodging during any part of the time he remained with them. On behalf of the plaintiffs it was urged that the case was controlled by the doctrine thus stated in *Smith's Lead. Cas.* vol. 2, p. 17, 5th ed.: "It is an invariably true proposition, that whenever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may on doing so immediately sue on a *quantum meruit* for anything which he had done under it previously to the rescission." This contention did not prevail. Pollock, C. B., said: "I am of opinion that the rule must be discharged,—not because I differ from what is laid down in the authority cited from *Smith's Leading Cases*, for I do not wish to be understood as throwing the slightest doubt upon what is there stated to be law. My judgment is founded upon what I conceive was the intention and understanding of the parties at the time they made the contract. A month was allowed for trial, during which time it is admitted that the defendant was to pay nothing. That month gradually extended to two, three, and four months, until at length the time amounted to more than sixteen months. If the plaintiffs had wished to insist upon payment, they might, at any time after the first month, have said to the defendant, 'Pay the £40 or take your son away;' for no new contract was entered into. They

did not, however, take the course, but went on upon the same footing. Probably the lad turned out so useful that it was a benefit to the plaintiffs to allow him to remain, since he received no wages and was not provided with clothes, but only got his board and lodging. The agreement between the parties was never altered; and the plaintiffs never contemplated charging the defendant until after he had taken his son away. To apply to such a case the principle of the authorities cited would be most unreasonable. In my judgment the parties meant nothing more than the extension of the month's trial; and if the plaintiffs could not charge for the month (and it is admitted they could not), they cannot charge for a day over it." Some remarks of a similar tenor were made by Wilde, B.

In the earlier *nisi prius* case of *Wilkins v. Wells* (1825) 2 Car. & P. 231, which involved similar facts, it was ruled that the master could not, in an action for money lent by the minor's father, set off the value of the minor's board and lodging.

In *Attwaters v. Courtney* (1841) Car. & M. 51, A. placed his son with B., chemist and druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health. It was intended that A.'s son should be apprenticed to B.; but he stayed for five years with B., having his board and lodging, and being taught the business of a chemist and druggist, and he then left B., and was never apprenticed to him. Gurney, B., directed the jury that, to entitle B. to recover for the board, lodging, and teaching of A.'s son, they must be satisfied that A.'s son was placed with B., upon an agreement or understanding that B. was to be paid for his board and lodging and for teaching him; but that if they were not so satisfied, or if they thought that A.'s son was to be paid for till B. had passed his examination at Apothecaries' Hall, and that A.'s son was then to be apprenticed to B. as an apothecary, then B. would not be entitled to recover anything for the board and lodging and

of cases in which a minor, without being formally bound, and without any understanding as to a preliminary period of trial, is received into his master's service on the footing of an apprentice.³

c. Liability of master for services rendered during period of trial.—A minor who is taken on trial for an indefinite period, and dismissed, without any valid reason, while the conditional arrangement is still subsisting, is prima facie entitled to recover remuneration in respect of the services rendered by him.⁴

2208. Obligations of an apprentice not to compete with his master after the expiration of his term.—As a minor apprentice cannot be

teaching during the five years. The jury found for the defendant.

In *Earratt v. Burghart* (1828) 3 Car. & P. 381, Tenterden, Ch. J., directed the jury as follows: "If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill after complaints to his father of his misconduct, it will be for the jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging." But having regard to the generality of the language used in *Harrison v. James*, *supra*, it seems doubtful whether the qualification embodied in the second sentence can be considered as good law. The two cases were distinguished by Wilde, B., upon the ground that in *Earratt v. Burghart* the case had been left to the jury, while in *Harrison v. James* the plaintiff was asking to have a nonsuit set aside.

In *Keene v. Parsons* (1819) 2 Starkie, 506, it was ruled at nisi prius that a master whose refusal to perform his statutory obligation to pay the stamp duty on the indenture (see § 2095, *ante*) had led to the abandonment of the contract by the defendant and his son could not recover for the board and lodging of the latter.

³ *Taylor v. Hutchinson* (1812) 3 N. J. L. 952 (apprentice served for several years).

⁴ In *Phillips v. Jones* (1834) 1 Ad. & El. 333, defendant agreed with plaintiff's father to receive plaintiff (who was a minor) into his service on trial, and to take him as apprentice if approved of. Plaintiff went into the serv-

ice, and worked for defendant nearly two years. After several applications made during that time by the father, defendant told the father that plaintiff should serve out the two years, and then be bound, the father paying defendant £10. This was agreed to, but defendant shortly after quarreled with plaintiff, and told him to go home about his business. Plaintiff went home, and on the father applying to defendant for an explanation, the latter told him to go and do his worst. The father then caused a letter to be written to defendant by his attorney, requiring him either to take plaintiff as his apprentice, or recompense him for his work; but no satisfactory answer was given, and plaintiff, by his next friend, brought an action to recover compensation for his service. The judge put it to the jury on these facts, whether or not the defendant's conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded; and he further stated that if they thought it was, they were to give plaintiff such compensation for his work as they thought proper. The jury found a verdict for the plaintiff, with damages by way of compensation for his services. Held, that the direction was right, and the verdict not to be disturbed. Williams, J., said: "The expressions of the master and the other facts in the case lead to the conclusion that he was evading the performance of his agreement. If he had not actually determined the contract, he had put off the fulfilment of it unreasonably and unjustly. The Lord Chief Justice therefore left the case properly to the jury, and they were at liberty to find an implied agreement that the plaintiff should have something for his services."

sued on the covenants of his indenture, a stipulation binding him not to compete in business with his master after the expiration of his term cannot be enforced against him.¹ By some of the American statutes the insertion of a stipulation of this character in the indenture is prohibited.²

P. TERMINATION BY OR ON ACCOUNT OF CIRCUMSTANCES BEYOND THE CONTROL OF THE PARTIES.

2209. Death of father of minor apprentice.—A contract of apprenticeship entered into by the father of a minor remains in force after the father's death, if it was made in the manner prescribed by statute, but not otherwise.¹

2210. Death of individual master.—*a. Generally.*—It has always been regarded as settled law that, unless the indenture provides otherwise,¹ or the incidents of the contract are modified by the operation

¹In *Capes v. Hutton* (1826) 2 Russ. Ch. 357, the articles under which A served his clerkship to an attorney contained a proviso that A should not practise within a certain distance; and also a covenant, on the part of his father, that A should, within a month after he came of age, execute a bond, in a specified penalty, to insure his fulfilment of the proviso. A, who was an infant at the time of the execution of the articles, served under them for three years after he attained full age, but was never called on to execute any bond, and, with a knowledge of the purport of the articles, completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within that district was refused with costs. No observations by the court are reported, but the rationale of the decision is indicated by the argument of defendant's counsel to the effect that an infant's covenant, even in a contract of apprenticeship, is not binding on him, and that the covenant of his father cannot be more effectual against him after he becomes an adult than his own covenant would have been.

²*New York.*—Domestic relations law, § 127.

South Dakota.—Code 1908, § 178.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2390.

¹*Campbell v. Cooper* (1856) 34 N. H. 49 (contract void as not being by indenture in two parts); *State ex rel. Neider v. Reuff* (1887) 29 W. Va. 751, 755, 6 Am. St. Rep. 676, 2 S. E. 801 (parol gift of child's services, held to be ineffectual after father's death).

¹In *Cooper v. Simmons* (1862) 7 Hurlst. & N. 707, 31 L. J. Mag. Cas. N. S. 138, 8 Jur. N. S. 81, 5 L. T. N. S. 712, 10 Week. Rep. 270, an infant, with the consent of his father, bound himself apprentice to a tradesman, "his executors and administrators, such executors or administrators carrying on the same trade or business and in the town of W.," and with him and them to serve for the term of seven years. And the master, in consideration of the service of the apprentice, covenanted to teach and instruct him, or cause him to be taught and instructed, during the term. Held, (1) that upon the death of the master the apprentice was bound to serve his widow, who was his executrix, whilst she carried on the same business in the town of W.; and that she was bound to teach the apprentice; (2) that it was no answer to an information against the apprentice for absenting himself from the service of the executrix, that he had consulted an attorney, who advised him that the apprenticeship was determined by the death of the

of a special custom,² the death of the master discharges the covenant on his part to teach,³ and the covenant on the part of the apprentice to serve.⁴ But with regard to the latter covenant it should be observed that there is some authority for the view that the master's death merely renders it voidable at the option of the apprentice.⁵ In

master, and that he had acted on the bona fide belief that the advice was correct.

In one case it was held that a covenant in an indenture of general apprenticeship, whereby the master bound himself and his administrators to provide meat and drink for the apprentice, extended to the administrators. *Eastman v. Chapman* (1802) 1 Day, 30. No opinion is reported, and it is not apparent whether the court intended to rely upon the specific terms of the indenture, or upon the distinction taken in *Wadsworth v. Guy*, note 3, *infra*.

In *Frazer v. Wright* (1858) 16 U. C. Q. B. 514, where the master had covenanted that, in the event of death, his heirs, executors, and administrators should be bound to instruct the apprentice, it was held that the heir was not liable for the performance of the covenant. The court (without citing any cases) laid down the general rule that a master cannot impose upon anyone the duty of teaching. This statement was undoubtedly correct, so far as an heir is concerned. But the authorities show clearly that this duty may be imposed upon executors.

² By the custom of London the executors of a deceased master are required to put out his apprentice to another master in the same trade. *Holt, Ch. J., in Peck's Case* (1699) 3 Salk. 41.

³ In *Wadsworth v. Guy* (1665) 1 Keble, 820, 1 Sid. 216, 1 Bott, Poor Law, 578, it was held that an apprenticeship entered into solely for the purpose of instruction is discharged by the death of the master; otherwise where it is complex, that is, where the master undertakes both to instruct and find him meat, drink, and lodging.

That the covenant as to instruction is discharged was also laid down in a case reported under different dates and various names as *Pett v. Wingfeild* (1693) Carth. 231; *Rea v. Pett* (1693) 1 Shower, K. B. 405; *Rea v. Prat* (1693) 12 Mod. 27; *Rea v. Peck* (1699) 1 Salk. 65, (1698) 3 Salk. 41.

The doctrine of the above cases was also affirmed in *Cochran v. Davis* (1824) 5 Litt. (Ky.) 118; *Phelps v. Culver* (1834) 6 Vt. 430 (*arguendo*).

⁴ *Rea v. Channel* (1676) 3 Keble, 519; *Rea v. Peck* (1693) 1 Salk. 66 (1698) 3 Salk. 41 (s. c. *sub. nom. Rea v. Pett* (1693) 1 Shower, K. B. 407; s. c. *sub. nom. Rea v. Prat* (1693) 12 Mod. 27); *Rea v. Chaplin* (1696) Comb. 224, 1 Bott, Poor Law, 579 (order of justices directing an apprentice to serve the husband of the widow of his deceased master was held bad); *Rea v. Eakring* (1753) Burr. Sett. Cas. 320, 1 Bott, Poor Law, 583 (apprentice held to be at liberty after his master's death to hire himself to another person); *Petrie v. Voorhees* (1867) 18 N. J. Eq. 285.

In *Baxter v. Burfield* (1747) 1 Bott, Poor Law, 581, 2 Strange, 1266, an action of debt upon a bond for the performance of indentures of apprenticeship was brought by the master's executrix. The breach assigned was that the defendant, having been put apprentice to the plaintiff's deceased husband, he refused to serve her. In the judgment delivered for the court, Lee, Ch. J., remarked: "It appears by words of the covenant that it was only to serve with the master, and there is no mention of 'executors or administrators.' . . . Covenant between master and apprentice implies that he shall only serve the master, for he is the only person he is bound to. . . . A master has an interest in his apprentice, yet it is not such a one as a person has in lands or chattels, which is transferable, but is an interest coupled with a personal trust annexed to the person of the master, which cannot be assigned, and is gone by his death. Another reason why the apprentice is not bound to serve the executor is because the covenant to instruct is personal, and dies with the master, and cannot extend to the executors, who may not be capable of instructing."

⁵ The theory reflected in *Rea v. Stockland* (1779) 1 Dougl. K. B. 70, Cald.

this point of view it has been held that, if an apprentice continues to work for his master's administrator, he acquires the rights and incurs the obligations of an apprentice, and consequently cannot, after renouncing the relationship, sue on a *quantum meruit* for the value of his services.⁶

The doctrine clearly sustained by the decisions as they stand is that a covenant for the maintenance of the apprentice survives against the executors or administrators of the master.⁷ But this view

60, 2 Bott, Poor Law, 416, seems to be that, if the apprentice elects to treat the contract as still subsisting after his master's death, third persons are not entitled to take the position that it has been dissolved.

⁶ *Phelps v. Culver* (1834) 6 Vt. 430. The court said: "The distinction between an instrument which is void and one which is voidable merely is well understood; the former being a nullity to every purpose, and the latter being valid and effectual until some act of avoidance is done by the party entitled to avoid it. And even then it may be effectual to many purposes; for even the right of avoiding a contract must be, to some extent, controlled by established rules of law and considerations of natural and acknowledged equity between the parties. The reason given why an apprentice is not assignable, and why the contract does not survive to the executor, is that the contract is in its nature fiduciary, implying a personal trust and confidence. To a certain extent it is so. So far as instruction and education are concerned, there is a personal confidence; and an executor or assignee may not, in this particular, be equally qualified or entitled to the same confidence as the original master; but as to the duty of maintenance, it requires only pecuniary ability, and may be discharged by one person as well as another. An executor or assignee may also possess equal or superior qualifications, in all respects, to the master. It would seem, therefore, that every consideration growing out of the fiduciary character of the contract is satisfied by treating it as voidable. It is for the benefit of the apprentice that the contract is relaxed, and it may be for his interest that the contract continue. It is therefore a very proper case for the exercise of a right of election. If he

elect to serve either an assignee or an executor, and all parties consent, no good reason can be given why the law should interpose, and determine the contract against the will of the parties. . . . It is therefore a case where, if she elect to continue the apprenticeship, it is continued in its original terms. There is no reason why she should discard these,—they were settled in the outset, not by an infant, but by persons fully competent to contract. Indeed, with respect to them she has no privilege to exercise. The fallacy in the plaintiff's argument consists in confounding the principles applicable to this case with those which govern the contracts of an infant. The cases are wholly dissimilar. In one case the contract is originally voidable for want of a legal competency in the party to make it; in the other an election is given to determine the subsisting relation between the parties, in consequence of reasons arising *ex post facto*. The privilege of an infant apprentice, arising upon the decease of the master or an assignment by him, is totally different, and rests upon different principles from his ordinary privilege in respect to his contracts."

⁷ It was so laid down in *Wadsworth v. Guy* (1665) 1 Sid. 216, 1 Kebble, 820, 1 Bott, Poor Law, 578. See note 3, *supra*.

In *Rex v. Prat* (1693) 12 Mod. 27, where an order of the sessions directing the executors of a deceased master to keep an impotent and crippled apprentice was quashed, Eyre, Ch. J., is reputed to have observed: "An apprenticeship is a personal trust between master and servant, and is determined by the death of either, because the end and design of it cannot be obtained; for the executor may not understand the trade in which he is to be instructed. Perhaps an action of covenant may lie

has been adversely criticised by a distinguished judge.^{7a} It would certainly seem to be at least arguable that, if the covenants as to teaching and service are to be treated as being discharged by the master's death, there is no satisfactory ground upon which it can be maintained that any of the other covenants survive. The position may well be taken that the extinction of the principal obligations

against the executor upon the contract of the testator; but there he may make his defense by pleading 'no assets,' and therefore this case differs from *Wadsworth v. Gye* (1665) 1 Sid. 216." The broad language used in the former of these sentences might seem to indicate that the learned judge regarded the contract as being dissolved *in toto*. But from the reports of the case in 1 Shower, K. B. 405 (*sub nom. Rex v. Pett*), and *Pett v. Wingfeild* (1693) Carth. 231, it appears that the actual ground upon which the order under review was quashed was that the justices had no jurisdiction to make it, and that the court distinctly affirmed the doctrine that the covenant for maintenance survives. That this was the actual position taken is also shown by the terms of the report of the case in 1 Salk. 65, and 3 Salk. 41 (*sub. nom. Rex v. Peck*, and dated 1699).

In *Petrie v. Voorhees* (1867) 18 N. J. Eq. 285, an equity judge accepted the general doctrine as to the survival of the obligation to support the apprentice, but expressed the opinion that it is operative only in respect of the period during which the apprentice actually continues to perform services. It was observed: "This is the view taken by Judge Reeve in his treatise on Domestic Relations, p. 345. It seems to me that a correct application of the usual rules of construction to such contracts should limit the contract to support in this way. Else the injustice and absurdity would follow, that upon the death of his master an apprentice having years to serve could call upon his master's executor for board, clothing, and pocket money, as covenanted, and spend his time in idleness, or in other service; and the estate of an honest mechanic who left half a dozen apprentices with five years to serve would be eaten up in their gratuitous support, and his wife and children left penniless; and this, too, when he had maintained them during

the first unremunerative years of their service. The case in Salkeld, which is the only one produced on this point, does not adjudge the point. The court was not called upon to consider it, and is not of sufficient authority for me to consider the law so settled, against what I conceive to be the correct principles of construction. The principle must be settled at law, and unless the right is so settled, the aid of this court cannot be extended to prevent distribution to protect a doubtful claim."

The doctrine of the above cases was also approved by the court, *arguendo*, in *Phelps v. Culver* (1834) 6 Vt. 430.

According to one case, the death of the master does not discharge any of the covenants except that concerning instruction. *Cochran v. Davis* (1824) 5 Litt. (Ky.) 118. It was held that the covenants as to general education and payment of freedom dues survived, and must be performed so far as assets extend. The court relied upon Jacob's Law Dict. title *Apprentices*, where no judicial authority is cited. Nor has the writer been able to find any such authority for the broad doctrine propounded.

^{7a} In *Com. v. King* (1818) 4 Serg. & R. 109, Gibson, J., made the following remarks, *arguendo*: "It seems to be held, however, that the executor remains liable as to covenants to provide meat, drink, clothing, etc., although not liable on the covenant to instruct. This appears to be an absurdity, and if the point should arise again, it would, I apprehend, receive a different decision. The contract to provide for the apprentice is grounded on the civil relation that exists between him and the master, and when that relation ceases so should all its incidents. The covenant to maintain is grounded on the covenant to serve, and a want of mutuality in this respect should release both parties."

which constitute the essence and the real inducement of the contract should be regarded as involving the extinction of the subsidiary obligations also.

In one jurisdiction a distinction which seems rather arbitrary has been drawn, *viz.*, that, while all the obligations of the master in respect of teaching, supplying food, etc., which he is required by statute to enter into are discharged by his death, his executors are bound to perform any collateral covenant which he may have made.⁸

b. Rule in the case of poor apprentice.—In Vermont it is considered that there are specially strong reasons for applying, in the case of poor apprentices, the doctrine adopted in that state (see subsec. *a, supra*), *viz.*, that the master's death merely operates so as to render the indenture voidable.⁹

⁸ *Goodbread v. Wells* (1837) 19 N. C. (2 Dev. & B. L.) 476. There the court observed with reference to a stipulation by which the decedent had promised to give his apprentice "one horse worth \$50 over and above what the law allows:" "The administrators of the master cannot plead the act of Providence, the death of the covenantor, as a discharge of this undertaking, as he well might, in not himself complying with those stipulations which the act of assembly had actually required the master to covenant for, and the master himself to do and perform, or have performed, during the time the relationship of master and apprentice continued. That relationship was dissolved by the death of the master. This isolated covenant to furnish the horse worth \$50 rests on the footing of any other undertaking by deed that a man will do a particular thing, lawful in itself, at a future day. If the man who thus covenants dies before the day of performance, the obligation to do the thing or have it done devolves upon his personal representative; and if he fail, the law will give the covenantee his action to recover damages." The same doctrine was again applied in *Austin v. McCluney* (1850) 5 Strobb. L. 104.

⁹ In *Phelps v. Culver* (1834) 6 Vt. 430, the court, after making the general remarks quoted in note 6, *supra*, proceeded thus: "We have, thus far, discussed this case upon common principles applicable generally to the relation of master and apprentice. But it is worthy of consideration, whether the case here presented does not stand upon

a peculiar footing. It is certainly true that a binding out by overseers of the poor depends upon different principles, in many respects, from other cases of apprenticeship. In the first place, it is done by an authority derived from statute, and does not depend upon the relation of parent and child, or guardian and ward. In the second place, the consent of the apprentice cannot be necessary; and, in the third place, the object may be maintenance alone. These peculiarities have certainly an important bearing upon the rules which are to govern the subject. If instruction in any particular trade is not an object of the contract, it loses much of its fiduciary character; and if maintenance is the main object, we have seen already that the obligation may well be transferred. If the overseers have authority to bind out without the assent of the apprentice (and if they have not, the statute is nugatory), they doubtless have the power to bind anew, upon the decease of the master, without such consent. It follows that they have also the right to assent to a transfer of the apprentice. If, then, there be a transfer or assignment with the assent of the overseers, it is made with the assent of all parties whose assent is necessary to its validity." It was further remarked that, in a case like the one under review, if the apprentice was a poor child bound out by an official, the element of his consent to the continuation of the service was not material, and that if he was an ordinary apprentice, "his reluctance could not vary the effect of his actual service."

c. Rule in Scotland.—In a standard treatise it is stated that, according to the law of Scotland, the contract is dissolved by the master's death, unless the contrary has been stipulated.¹⁰

d. Effect of statutory provisions.—From the subjoined note it is apparent that the enactments regarding the effect of the master's death vary considerably in their terms.¹¹ Some of them evidently import an intention on the part of the lawmakers that that event should operate so as to render the contract either void or voidable, in respect of the master as well as of the apprentice. Others provide specifically that the indenture shall cease to be binding upon the apprentice. But with regard to the enactments which belong to the second of these categories, it may be a question whether his discharge should not be regarded as involving, *ex necessitate rei*, the discharge

¹⁰ Fraser, Mast. & S. p. 326, citing *Neil v. —* (1760) 5 Sup. 877.

¹¹ *England.*—32 Geo. III. chap. 57, § 1. It was declared that the indenture of a poor apprentice should continue in force only for three months after the master's death, unless continued in the manner specified in §§ 2, 3, 4 of the act (see § 2143, *ante*).

California.—Civil Code 1909, § 266. No indenture binds a minor apprentice after the death of the master.

Colorado.—Rev. Laws 1908, § 144. Indenture not binding upon the minor after the master's death.

Georgia.—Code 1895, § 2607, (1882). On the death of the master of an apprentice bound by a court, the judge or ordinary may either dissolve the contract or substitute in the place of the deceased his legal representative or a member of his family.

Indiana.—Burns's Anno. Stat. 1908, § 8393 (7311). Death of master discharges apprentice.

Iowa.—Code 1897, § 3245. The death of the master, or removal from the state, works a dissolution of the indentures, unless it is otherwise provided therein, or unless the apprentice elects to continue in the service. (Code 1873, § 2300; Rev. Code 1860, § 2593.)

Kentucky.—Stat. 1903, § 2606. Servitude ceases with death of master.

Louisiana.—Civ. Code, art. 172 (166). The death of the master of the apprentice dissolves the engagement of the latter, in the condition in which it is, and there can be no claim for remuneration on either side.

Massachusetts.—Rev. Laws 1902, chap. 155, § 18. No indenture of apprenticeship or service shall bind the minor after the death of his master, but the apprenticeship or service shall be thereby discharged, and the minor may be bound out anew. (Act of 1794, chap. 64, § 5; Rev. Stat. 1836, chap. 80, § 24; Gen. Stat. 1860, chap. 111, § 21.)

Michigan.—Comp. Laws 1897, chap. 235, § 8771, How. Anno. Stat. 1882, chap. 241, § 6374. Minor apprentice not bound after death of master.

Missouri.—Rev. Stat. 1899, § 4805 (379). Indenture void on death of master.

New Hampshire.—Pub. Stat. 1901, chap. 180, § 6. Indenture not binding upon the minor or his parent or guardian after death of master.

Oregon.—Hill's Anno. Laws 1892, 2934. No indenture binds a minor apprentice after the death of the master.

Rhode Island.—Gen. Laws 1896, chap. 198, § 20; Gen. Laws 1909, chap. 169, § 20. Apprenticeship is discharged by master's death, although the binding is to executors, administrators, and assigns.

Utah.—Comp. Laws 1907, § 80. The master's death dissolves the contract.

Vermont.—Pub. Stat. 1906, § 3261. Death of master discharges apprentice.

Wisconsin.—Sanborn & B. Anno. Stat. 1898, § 2392. No indenture binds a minor apprentice after the master's death.

New Brunswick.—Consol. Stat. 1903, chap. 83, § 4. Indenture not binding upon the minor after death of master.

of the master also. It would seem to be reasonably certain, at all events, that this question must be answered in the affirmative, if they are construed as dissolving absolutely the obligations of the apprenticeship, and not merely as entitling the apprentice to avoid the contract if he so desires.

2211. Death of one of an employing partnership.—The effect of three of the decisions under this head is that an apprentice bound to two or more partners is, for the purpose of determining his settlement under the poor laws, to be regarded as being the apprentice of the surviving partner or partners;¹ that the surviving partner remains liable for the performance of the covenants as to instruction and payment of wages, so long as the apprentice is willing to serve him;² and that an apprentice who binds himself to a firm must fulfil his indenture with any of the partners who survive.³ But if we advert to the English doctrine that a contract of service is dissolved by the death of a member of an employing partnership (see § 217, *ante*) the inference seems unavoidable that these decisions would not now be approved in any part of the United Kingdom.⁴ Having regard to the characteristic incidents of relationship between a master and an apprentice, it is clear that the reasons for predicating a dissolution of the contract are stronger in the case of an apprentice than in the case of a servant. That the contract is determined by the death of a partner has been explicitly laid down by an Australian court, the position taken being that a personal trust reposed in two persons cannot be performed by one of them.⁵

¹ *Rex v. St. Martin's Exeter* (1835) 1 H. & W. 69, 4 Nev. & M. 388, 2 Ad. & El. 655, 4 L. J. Mag. Cas. 54. Counsel cited Gambier's Treatise on Settlements, p. 123, for the doctrine that the master's death is a dissolution of the apprenticeship only if the apprentice wishes to take advantage of it as such, and to serve no longer under the indentures.

² *Connell v. Owen* (1854) 4 U. C. C. P. 113 (different point was discussed on previous appeal [1853] 3 U. C. C. P. 249). The court expressed the opinion that its conclusion was not inconsistent with the cases which proceed on the ground that the contract is discharged by the dissolution of an employing partnership. See § 2204, *ante*. Some reliance was placed upon the analogy of the cases in which executors have been

held liable on the covenants to provide board and lodging for the apprentice. See § 2210, note 7, *ante*.

³ *Ragans v. —*, (1839) 10 Sc. Jur. 90.

In *Connell v. Owen* (preceding note) the court was "not satisfied" that the apprentice was not bound to serve the survivor, but the point was not decided.

⁴ It will be observed that the English and Canadian cases cited in notes, 1, 2, *supra*, were both decided before *Tasker v. Shepherd* (1861) 6 Hurlst. & N. 575, 30 L. J. Exch. N. S. 207, 4 L. T. N. S. 19, 9 Week. Rep. 476, (§ 217, *ante*.)

⁵ *Beaver v. Fox* (1876) 2 Vict. L. R. (L.) 4. The court declined to defer to the authority of the *dicta* of Littledale, J., to a contrary effect, in *Rex v. St. Martin's Exeter*, note 1, *supra*.

In a few jurisdictions the matter is regulated by a statutory provision.⁶

2212. Death of apprentice.—Apparently the only judicial authority upon this subject is a remark made *arguendo* by Eyre, J., to the effect that the contract is dissolved by the death of the apprentice.¹ The doctrine thus stated has never been questioned.

2213. Physical incapacity of the apprentice.—Unless it is expressly stipulated that the master's obligations are to cease if the apprentice becomes physically incapable of performing his duties efficiently,¹ the contract cannot be terminated on account of the sickness or disease of the apprentice, even though it may be incurable. In one of the cases in which this doctrine was affirmed, the decision was put upon the broad ground that a master takes an apprentice for better or worse.² In the other the court proceeded upon the ground that the covenants on both sides are independent.³

⁶ *New Jersey*.—Gen. Stat. 1895, *Apprentices*, §§ 11, 14. After death of a partner, covenants of indenture shall accrue to and be performed by the survivors.

Illinois.—Starr & C. Anno. Stat. 1885, chap. 9, ¶ 18. Where an apprentice is bound to two or more persons, and one or more of them die before the end of the term, the indenture shall survive to and against the survivors; in case of the death of all the masters, the apprentice shall be discharged.

¹ *Rex v. Prat* (1693) 12 Mod. 27. For a list of the various names under which this case is reported, see § 2210, note 3, *ante*.

¹ In *Glidden v. Unity* (1855) 30 N. H. 104, the master of a poor apprentice covenanted, among other things, that he would provide board, clothing, nursing, attendance, and other necessities for the comfortable support of the minor in sickness and health; would give him an education sufficient for him to transact any business as a farmer or mechanic (providing he has capacity); pay said minor at the age of twenty-one years \$100, and give him two suits of clothes throughout, "providing said minor should continue to be a healthy boy, and to be a faithful servant during his minority." As the result of an accident, the minor became permanently disabled for any bodily labor. Held, that the condition relative to the minor's continuing to be a healthy boy

should be construed as referring to a permanent loss of health; that it was not to be limited to the stipulation for the payment of the \$100 and the suits of clothes, but extended to all the stipulations of the master; and that the indenture after the injury was void at his election.

² *Rex v. de Hales Owen* (1718) 1 Strange, 99.

³ *Powers v. Ware* (1824) 2 Pick. 451. The court said: "By the indentures under consideration some of the covenants were to be performed by the master presently, and some at a remote period. And so on the part of the apprentice; his duty was to be a continued service until the end of his apprenticeship. We are of opinion that these covenants are independent. If it were otherwise, and the master should not supply a sufficient quantity of food for a single day, or the apprentice should disobey a single command, the contract would be dissolved, and the apprentice would lose the benefit of the instruction which the legislature intended should be given to him. *Winstone v. Linn*, in (1823) 1 Barn. & C. 460, 2 Dowl. & R. 465, 1 L. J. K. B. 126, 25 Revised Rep. 455, 17 Eng. Rul. Cas. 186, is a case much to this point. . . . It has, however, been contended for the defendant, that the overseers were not personally liable, and that the engagement of the infant was the only consideration for the covenants on the part of the defendant, and

2214. Bankruptcy or insolvency of master.—*a. Effect as regards the obligations of the apprentice.*—The common-law doctrine is that the master's failure in business does not operate so as to discharge the apprentice from his indentures.¹ Nor, speaking generally, is such a failure regarded as a sufficient reason for the immediate annulment of the indenture by judicial action.²

In England and in some of the British colonies the matter has been regulated by various statutory provisions.

By 6 Geo. IV. chap. 16, § 49 (now repealed), it was provided the issuing of the commission should "be and enure as a complete discharge of the indenture or indentures" whereby an apprentice was bound to the bankrupt. To the same effect was § 170 of the repealed act of 1849.

In one case it was held with reference to this provision that an indenture was discharged, although the bankruptcy had been subsequently annulled by a composition between the bankrupt and his creditors.³

By the bankruptcy acts of 1869, § 33, and of 1883, § 41, it is provided thus: When at the time of the presentation of the bankruptcy petition any person is apprenticed or is an artied clerk to the bankrupt, the adjudication of bankruptcy shall, if either the bankrupt or apprentice or clerk gives notice in writing to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement. Where it appears expedient to a trustee, he may, on the application of any apprentice or artied clerk to the bankrupt, or any

not sufficient to support them. But by force of the indentures and of the statutes of the commonwealth, the infant did become the servant of the defendant. The defendant became entitled to the services of his apprentice, and had by law a right to inflict proper correction for his offenses. He might cause him to be committed to the house of correction in certain cases, and in case of gross misbehavior the court of common pleas is authorized to discharge the indenture."

¹ *Buckington v. St. Michael Sebington* (1724) 1 Ld. Raym. 1355, Strange, 582, 1 Sess. Cas. 278, 8 Mod. 235, Fort. 321, Foley, 229, 2 Bott, Poor Law, 395 (holding that the apprenticeship was continued for the purpose of gaining a settlement, although the bankrupt master had absconded, and afterwards delivered the indentures to a second master).

In two cases it has been held that service by an artied law clerk under the person to whom his articles have

been assigned with the assent of his bankrupt employer is sufficient to give him the necessary qualifications to be admitted to practise as an attorney. *Ex parte Rowle* (1820) 2 Chitty, 61; *Ex parte Stokes* (1819) 1 Chitty, 536.

² In *Davis's Case* (1832) 1 Harr. (Del.) 17, the court observed that if the master did not continue his business on such a footing as to enable the petitioner to obtain a competent knowledge of his trade, he might afterwards apply for relief. The fact of the master's insolvency did not conclusively show that he might not yet perform his covenant to teach the petitioner, or cause him to be taught the trade in question.

³ *Allen v. Coster* (1838) 1 Beav. 274. The *ratio decidendi* was that, having regard to the positive language of the statute, such an agreement could not affect the rights of persons who were not parties to the arrangement.

person acting on behalf of such apprentice or articted clerk, transfer the indenture or articles to some other person.

The provisions in the New South Wales bankruptcy act 1887, § 49 (1), and in the Victoria insolvency and bankruptcy act, 1890, § 116, are of the same tenor.

b. Effect as regards the obligations of the master.—On the ground that a master's duties to his apprentice are for the most part purely personal in their nature, it has been held that his liability for their performance is not released by a discharge in bankruptcy.⁴

Q. PREMIUM OR APPRENTICE FEE.

2215. Payment, generally.—The payment of the premiums, so far as it is a matter connected with the requirements of the stamp acts, is discussed in § 2095, *ante*. With regard to the subject in other points of view the books contain very little information. The only cases which have been found by the author relate to the circumstances under which the payment of a premium out of the property of a ward of court may properly be directed,¹ and under which a trustee is entitled to recoupment in respect of money voluntarily advanced by him for the payment of a premium for the benefit of his *cestui que trust*.²

By the New Zealand shops and offices act 1904, § 7, (f), it is provided that no premium in respect to the employment of any "shop

⁴ *Strader v. Mardis* (1883) 4 Ky. L. Rep. 995.

¹ In *DaCosta v. DePaz* (1752) 1 Dick. 168, an order was made for apprenticing an infant to a particular person named, and paying the premium, *without a reference*, the counsel for the father having alleged that he thought it proper.

In *Harrison v. Goodall* (1854) Kay, 310, it is mentioned that the court of chancery had approved of the infant ward in question being apprenticed, and had directed that a sum of money should be raised out of a trust fund for the payment of the premium.

In *Livesley v. Livesley* (1886) 12 Vict. L. R. 221, the court granted leave to an infant ward of court to become an apprentice, though none of his money was wanted for the purpose of the apprenticeship.

² In *Franklin v. Green* (1690) 2 Vern. 137, a will provided that £100 should be paid to an infant named, when he reached the age of twenty-one

years, and, if he died before that time, to another person, and also that the interest of the money bequeathed should be applied to the infant's maintenance. A sum of £20 which the trustee appointed to receive the profits of the estate had expended for the apprentice's fee of the infant was allowed upon his account, although the infant had died before reaching his majority.

In *Worthington v. M'Craer* (1856) 23 Beav. 81, 26 L. J. Ch. N. S. 286, 5 Week. Rep. 124, a trustee bona fide advanced a sum to apprentice an infant during the lifetime of his father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation. Held, that in taking the accounts, as against the trustee, after the infant's interest in the fund had become vested and absolute, the amount ought to be allowed him.

assistant" shall be paid to or received by the "occupier" of one of the establishments covered by the act. The term "shop assistant" includes apprentices (§ 2).

2216. Repayment of part of premiums in cases where the contract is not completely performed. Rule apart from statute.—*a. Cancellation of indenture with the consent of the parties.*—In a case where the indentures had, with the consent of all the parties, been canceled by an official authorized to do this, but nothing had been said about the return of any part of the premium, a court of equity refused to order the repayment of the money. The decision was put upon the ground that, under such circumstances, there is not an accident in such a sense as to bring the case within the jurisdiction of such a court.¹

b. Judicial annulment of indenture on account of master's breach of duty.—It has been laid down that a court of equity "has no jurisdiction to order the cancellation of articles of apprenticeship and the return of a portion of the premium, on the ground of the wrongful refusal of the master to continue to instruct his apprentice in his trade, according to his agreement." The rationale of this decision was that for such a breach of contract an adequate remedy is afforded by an action at law, in which the premium and damages may be recovered.² A different rule is applicable, where a court of equity is dealing with an indenture made, with its sanction, by one of its

¹ *Hale v. Webb* (1786) 2 Bro. Ch. 78.

² *Webb v. England* (1860) 29 Beav. 44. The master of the rolls said that, except in the case of bankrupts and of the administration of assets, he had found but one instance in which the court had interfered between master and apprentice, viz., *Therman v. Abell* (1688) 2 Vern. 64. From an examination of the registrar's book, he had ascertained that it fully bore out the plaintiff's contention; for it showed that the court actually exercised jurisdiction between master and servant, the decree being to the effect that £30 odd of the premium of an apprentice who had been turned away for negligence and other misconduct was to be repaid, and that, if the defendant did not do it, he was to pay the costs of the suit. The learned judge also referred to *Richards v. Whitney*, cited in Spence's *Equitable Jurisdiction* (vol. 1, p. 698). In that case, decided about the middle of the sixteenth century, the chancellor restrained a person from harboring a runaway apprentice. This case was de-

clared to be manifestly not good law. On the other hand the case of *Argles v. Heaseman* (1739) 1 Atk. 518, was a direct authority against the interference of a court of equity. In that case the actual situation was that the parties had agreed upon an order, but Lord Hardwicke expressly stated that the court had no jurisdiction. This decision had been adopted and acquiesced in, and there had been no instances in which a court of equity had interfered in cases of master and apprentice, except where from accident the contract had been imperfectly performed, and where circumstances made it equitable that the party who was unable to perform his contract, as his estate, should make good to the other person what he lost by the accident. [The cases thus referred to are *Hale v. Webb* (1786) 2 Bro. Ch. 78 (see note 1, *supra*); *Ex parte Sandby* (1745) 1 Atk. 149 (see § 2217, note 4, *post*); *Soam v. Bowden* (1678) Finch, 396, 1 Bott, Poor Law, 562 (see note 7, *infra*); *Hirst v. Tolson* (1849) 16 Sim. 620, 18 L. J. Ch.

wards. If such an indenture is canceled by it, a return of a portion of the premium may be decreed if the master has been guilty of some misconduct, and not otherwise.^{2a}

c. Dismissal of apprentice by master for a valid reason.—In one case the court rejected the contention that the defendant, who had dismissed an apprentice on the ground of his habitual dishonesty, was bound to return so much of the premium as was not exhausted by keeping, teaching, and maintaining him. The *ratio decidendi* was that there had been no total failure of consideration and that no action for damages was maintainable.³

d. Withdrawal of apprentice from the service for a valid reason.—The general rule undoubtedly is, that an apprentice who abandons his contract voluntarily, and without a sufficient excuse arising out of the master's conduct, is not entitled to a return of any portion of the premium.⁴ But a court may, in the exercise of its summary jurisdiction over attorneys and articulated clerks, disregard this rule, if under the circumstances it seems proper to do so.⁵

e. Death of individual master.—A clause providing for the return of a portion of the premium in the event of the master's death is frequently inserted in contracts of apprenticeship.⁶ The rule to be applied where no such stipulation has been made would seem to be still a matter of considerable uncertainty.

N. S. 308, affirmed (1850) 2 Macn. & G. 134, 2 Hall & T. 359, 19 L. J. Ch. N. S. 441 (see note 7, *infra*).] The relief asked for was therefore denied. The attention of the learned judge was apparently not directed to another early case where the master, having been found guilty by the lord mayor's court of ill using his apprentice, had refused to obey the order of that court to provide a new master. The court of chancery decreed that he should deliver up the indenture and a bond for the honesty of the apprentice, and also repay part of the premiums. *Lockley v. Eldridge* (1674) Finch, 124. This case, however, like the others noticed by the master of the rolls, must be regarded as having been overruled by the statement of Lord Hardwicke upon which he relied.

^{2a} *Craven v. Stubbins* (1865) 34 L. J. Ch. N. S. 126, 10 Jur. N. S. 1189, 11 L. T. N. S. 402, 13 Week. Rep. 208.

³ *Learoyd v. Brook* [1891] 1 Q. B. 431, 60 L. J. Q. B. N. S. 373, 64 L. T. N. S. 458, 39 Week. Rep. 480, 55 J. P. 265. This decision is essentially inconsistent

with that rendered in *Therman v. Abell* (1688) 2 Vern. 64. But that case is no longer good law. See note 2, *supra*.

⁴ *Cuff v. Brown* (1816) 5 Price, 297, 19 Revised Rep. 621, where the apprentice had run away and enlisted, and the master had refused to receive him again when he had offered to return.

The question whether a proportionate part of the apprentice fee of a doctor should be returned when the apprentice left him was raised, but not definitely settled as a matter of law, in *Hart v. Hosack* (1803) 1 Caines, 25.

⁵ In *Ex parte Pranker* (1819) 3 Barn. & Ald. 257, an attorney who had refused to take back a clerk who had run away from service was ordered to return a reasonable part of the premium.

⁶ In *Newton v. Rowse* (1687) 1 Vern. 40, A., an attorney, had taken B. as his clerk, and received £120 as a premium, with a proviso that, if he died within a year, £60 was to be returned to B's father. A. having died within three weeks, it was decreed that his executor should pay back £100.

In two cases where the estate of a deceased master was in course of administration by the court of chancery, the restitution of a proportionate part of the premium was decreed.⁷ In the more recent of these cases the court proceeded upon the theory that the duty of

⁷ In *Soam v. Bowden* (1678) Finch, 396, 1 Bott, Poor Law, 562, the executors were directed to repay the amount of the premium as a debt due on simple contract, deducting a certain sum in respect of the maintenance of the apprentice during the master's lifetime. In *Whincup v. Hughes*, note 8, *infra*, this decision was explained upon a footing which was deemed to deprive it of its significance as an authority for a general rule.

In *Huist v. Tolson* (1850) 2 Macn. & G. 134, affirming (1849) 16 Sim. 620, Lord Cottenham directed the master in chancery to inquire what sum ought to be returned by the executors of a solicitor who had died two years after his clerk had been articulated, and while there were still three years of the contract to run. The grounds of this decision were thus explained: "There are two modes in which this case may be viewed. If the question arose upon a covenant, this court would have no original jurisdiction, and the only claim would be the damages which a jury might assess upon a breach of that covenant; but if, independently of the right under the covenant, there is a right arising from the transaction itself, and which would have existed if there had been no covenant, namely, to a return of a portion of the money paid, upon the ground that the consideration for which it was paid failed, then that would certainly be a ground of equitable interference which this court would regard in administering the estate of an intestate. The transaction itself, independently of the covenant, would give to the party whose money was so advanced a right to recover it back; and, without referring to the older authorities, we find Lord Kenyon and Lord Chief Justice Gibbs thus dealing with the question. In the case before Chief Justice Gibbs (*Stokes v. Twitichen* [1818] 8 Taunt. 492), the claim was made against a party not dead, but where the consideration had failed, upon the ground that the money had been advanced for a benefit which had not been realized in consequence of a legal defect

in the articles. The facts were that a premium had been paid to an attorney for taking an articulated clerk; but the articles did not contain a statement of the premium: this, it was held, made them void within the act of Parliament; and the only question discussed was whether the omission was an error, or was a fraud upon the revenue, intended by and brought home to both parties. Chief Justice Gibbs, in giving the judgment of the whole court, was of opinion that the plaintiff, the mother of the young man, was as much to blame as the defendant, and therefore she could not be at liberty to recover, because the claim was founded upon an attempt to defraud the revenue, and was a violation of an act of Parliament, which act of Parliament in that case made the articles void, and therefore it was that the court refused the relief prayed. But Chief Justice Gibbs says, 'Supposing the plaintiff to be an innocent party, she who is the mother of the apprentice would be entitled to recover the money so paid as being paid without consideration.' Thus we have it expressed in terms that if the plaintiff had been an innocent party, if there had not been a violation of the act, then she would have been entitled to recover the money back. Now, that goes the whole length of the plaintiff's proposition in the present case; for whether the consideration fails by a defect in the articles which makes them not of a binding character, or whether it fails by the death of the party before the time for which the contract was made expires, is quite immaterial. There is a premium paid for a risk not run, and money given in anticipation of a future benefit which is not enjoyed. In either case, the consideration failing, the money must be paid back again. Thus it is with an annuity which becomes void by a legal defect. All these are instances of a payment made by anticipation for something hereafter to be enjoyed; and if circumstances arise so that that future enjoyment is denied, the party paying is not to lose his money. In the present case, therefore, the party paying for future

restitution was enforceable upon legal as well as upon equitable principles. Subsequently, however, the exchequer chamber held that no part of the premium can be recovered in an action at law from the personal representatives of a deceased master.⁸ The case was regard-

instruction which he cannot receive is entitled to recover back his money. The authorities established beyond all question that there is in a transaction of this sort an equity arising, totally independent and unconnected with the covenant; and if that be so, are the parties precluded from coming against intestates' or testators' estates for the recovery of a demand so constituted? It is not like a case where the right depends upon what a jury may assess, although it is in the character of a demand arising upon ascertaining an amount of unliquidated damages. . . . There can, therefore, be no possible reason for saying that this court has not jurisdiction in favor of claims of this sort. The only thing that I have to consider is whether the claim is one which can be at once safely adjudicated upon, or whether I am bound to send the party to law to establish his title first, and then to come here against the estate. Acting upon the ordinary rules affecting the administration of the estates of deceased debtors, I am of opinion that at all events it is a debt; that certainly it is a debt at law, and I think also a debt in equity; and that it is a case in which the party proving such a debt is entitled to the decree he asks for, namely, the administration of the estate."

⁸ *Whincup v. Hughes* (1871) 24 L. T. N. S. (Exch. Ch.) 74 (master died within a year from the commencement of the service which was to have been for six years). Bovill, C. J., said (p. 78): "There is no instance that I am aware of in which an action has been brought successfully upon an ordinary apprenticeship under circumstances like the present." He referred to *Re Thompson* (1848) 1 Exch. 864, where the court declined to order the repayment of any portion of a premium by an attorney whose article clerk died within a month after he was article for five years. It was there admitted that no action would lie, and Pollock, C. B., stated that the application was one which was made to the equitable jurisdiction of the court. This decision, it was observed by Bo-

vill, Ch. J., was a very strong precedent against the contention that the premium should be returned; since the court, notwithstanding its general jurisdiction over its officers, refused to exercise that jurisdiction in opposition to what was assumed to be the general rule of law. He conceded that at least one application in a similar case had been successful. *Ex parte Bayley* (1829) 9 Barn. & C. 691, 4 Mann. & R. 603, where a clerk had been article to one of two partners, and the application was made for a return by the surviving partner of part of the premium paid to the deceased. But he pointed out that Lord Tenterden, in ordering the return of the premium, expressed the opinion that the case was not to be decided by any strict rule of law, and that the court arrived at its conclusion with reference to their special jurisdiction over attorneys, and to the act of Parliament which prohibited attorneys from having more than a certain number of clerks. Criticizing the position taken by Lord Cottenham, he remarked that the decree in *Hirst v. Tolson* (note 7, supra) was based upon "the notion that there existed a debt at law due to the clerk upon the partial failure of the consideration for the premium;" but that the case relied upon in support of this theory, *Stokes v. Twitchen* (1818) 8 Taunt. 492, was not really in point, as "the plaintiff there sought to recover the whole premium on the grounds of the indenture being void, and the failure of the whole consideration. The plaintiff was nonsuited, because she did not come into court with clean hands, and there is no allusion in the judgment of Gibbs, Ch. J., to the plaintiff's right to recover part of the premium if the consideration should partially fail." He then proceeded to discuss the effect of two other cases referred to by Lord Cottenham: "I find no reference to the first of these cases, *Soam v. Bowden* (1679) Finch, 396, 1 Bott, Poor Law 562, that the executors there expressed a willingness to pay back part of the premium after the satisfaction of the specialty debts, or to carry out their

ed as being within the scope of the general rule that, "where a contract has been in part performed, no part of the money paid under such contract can be recovered back." It was conceded that this rule was subject to an exception in cases where the consideration was apportionable; but the court was of opinion that there was no principle on which such an apportionment could, under the given circumstances, be made.⁹

As the exchequer chamber was a court of error, the decision thus rendered must be deemed to have destroyed the authority of the earlier cases, in so far as they rested upon the notion of a legal duty. But as it was rendered before the fusion of law and equity by the judicature act, the necessary inference seems to be that it could not affect those cases in so far as they were based upon equitable principles. The rules of law and equity being, in this point of view, conflicting at the time when that act came into force, the situation would seem to be one which comes with the purview of its general provision to the effect that whenever there is such a conflict the rules of equity shall prevail. This aspect of the matter, however, seems to have been either overlooked or disregarded in a recent case in which a judge of the chancery division preferred to follow the decision of the exchequer chamber.¹⁰ The true doctrine applicable to cases of this kind can now

testator's covenant, as the court should direct. And in the other case, *Newton v. Rowse* (1687) 1 Vern. 460, the grounds of apportionment, which Lord Cottenham thought were difficult to discover, are probably explained in the note to Raithby's 3d ed. of Vernon, as mentioned in 1 Story's Equity Jurisprudence, § 472. According to the pleadings, the case seemed to have been decided on the ground of mutual mistake or misrepresentation. It seems, therefore, that the cases on which the Lord Chancellor relied in *Hirst v. Tolson* failed to support the proposition which he laid down. That decision is therefore very unsatisfactory, and the case in the exchequer is an authority directly the other way."

⁹ With reference to this aspect of the case, Bovill, C. J., said (p. 81): "It [the apportionment] could not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early part of the term the teaching would be most onerous, and the services of the apprentice of little value; as time went on his

services would probably be worth more, and he would require less teaching." Montague Smith, J., also laid stress upon the point, that, "in order to arrive at an equitable return of the proportion of the premium lost by the apprentice, it would be necessary to consider the comparative usefulness of the apprentice to the master at the various periods of the service, the degree of improvement acquired by the apprentice at the master's death, and various other circumstances. The measure of injury incurred cannot be obtained merely from the proportion of time."

In Scotland a similar doctrine has been applied. *Outler v. Littleton* (1711) Morr. Dec. p. 583. In that case, where the master had died after two years out of a term of four years had expired, the division of the fee *pro rata temporis* was deemed to be improper, as the master had received but little benefit from the apprentice's services during the two years. Only one third of the fee, therefore, was awarded.

¹⁰ *Ferns v. Carr* (1885) L. R. 28 Ch. Div. 409, holding that where a solicitor who had received a premium on taking

be settled only by the existing court of appeal, which may possibly prefer to adopt the view that the premium is apportionable. Having regard to the fact that the rule which permits an apportionment of the premium in bankruptcy proceedings was originally adopted in the exercise of the general jurisdiction of the court of chancery (see § 2217, *c, post*), analogy seems to favor the conclusion that a similar rule should be followed when the full performance of the master's obligations is rendered impossible by his death. There is, it is submitted, no satisfactory ground upon which a distinction can be taken in this connection between the consequences of an act of God and an act of the law. The fundamental consideration that the retention of money which has not been earned is unconscientious, and therefore inequitable, would seem to be no less decisive in the one case than in the other. In both instances the practical difficulty of obtaining a suitable basis of apportionment—an element upon which the exchequer chamber laid much stress—is involved precisely to the same extent. Finally, it may perhaps be doubted whether, having regard merely to legal principles, the doctrine applied by that court is not open to criticism on the ground of its being inconsistent with what may reasonably be presumed to be the understanding of the parties to every contract of employment, *viz.*, that if its performance be interrupted by causes beyond the control of one of them, the other shall not suffer any prejudice except that which is unavoidable under the circumstances.

f. Death of member of employing partnership.—The writer has not found any case which involved the general question whether an apprentice in the employ of a partnership is entitled to a return of a

an articulated clerk died during the term of the articles, his estate was not liable for the return of any part of the premium. The position taken by Pearson, J., was that, if there was no debt at law,—which he must take to be the fact on the authority of *Whincup v. Hughes*, it was exceedingly difficult to say there was any debt in equity. If there was no debt in equity he was thrown back on that which was said to be “the paternal and masterful jurisdiction over attorneys.” The learned judge then proceeded thus: “I must say I do not understand what that is. I quite understand it put in another form, that everyone who is a solicitor is an officer of the court, and in respect of his conduct as such the court has a summary jurisdiction which it exercises in a manner

beneficial both to solicitors and others. But I cannot understand how there can be a paternal and masterful jurisdiction which can enable the court to say that a contract between a solicitor and a third person is to be construed in another way than a like contract between other persons, and that, notwithstanding the contract means one thing, the solicitor is to do another because the court thinks it more honorable. I think if I were so to hold I should be assuming a jurisdiction to enforce a code of morals not written and not to be found definitely stated by any authority, and should be making the rule of the court to vary, as Lord Selden (*Selden, Table Talk, title Equity*) once said it did vary, according to the length of the foot of each chancellor.”

part of the premium when he elects to avoid the contract on account of the death of one of the partners. So far as appears, that question would be determined on the same footing as that discussed in the preceding section. But there is specific authority for the doctrine that, if the result of the death of a member of a legal firm is to render it impossible for the survivor to retain an articulated clerk without violating a statute which forbids the employment of more than a certain number of such clerks by each attorney, a court may, in the exercise of its jurisdiction over its officers, order the repayment of a part of the premium of the clerk whose dismissal has thus become necessary.¹¹

g. Death of apprentice.—In one case a proportionate part of the premium of an apprentice who had died during the term of service was held to be recoverable, on the ground that the circumstances were such as to bring the case within the scope of a specific stipulation relating to that contingency.¹² The general question of the right of recovery, independently of such a stipulation, does not seem to have been noticed in any English or American case. If it arose, it would presumably be determined with reference to considerations similar to those discussed in subsec. *e*, *ante*. In Scotland it has been held that the whole apprentice fee is payable where the apprentice dies before the expiration of the term.¹³

2217. Same subject considered with reference to statutory provisions.—*a. English apprentice acts.*—The older English cases dis-

¹¹ See *Ex parte Bayley* (1829) 9 Barn. & C. 691, 4 Mann. & R. 603, the effect of which is stated in note 8, *supra*.

In *Stewart v. Davis* (1847) 11 I. R. L. Rep. 34, where a youth had been articulated to an attorney individually, to serve him and his partner, and his master died during the period covered by the articles, the court held that, as the partner was shown by the evidence to have adopted the contract, he must take the benefit *cum onere*, and, as he already had the full legal number of articulated clerks, and refused to consent to the assignment of the indentures except to a person named by himself, he was ordered to return a proportionate part of the premium.

¹² In *Derby v. Humber* (1867) L. R. 2 C. P. 247, 15 L. T. N. S. 538, the deed of apprenticeship contained a provision that, in the event of the failure of the health of the apprentice, so as to inca-

pacitate him from following the profession of a civil engineer, before the first of April, 1866, the master should refund to the father £50 of the premium; it being agreed that the production at any time before that day of a certificate signed by two duly qualified medical men, testifying as to the fact, should be conclusive evidence that the health of the apprentice had failed, so as to incapacitate him from following his profession. The health of the apprentice failed, and he died on the 4th of August, 1865. On the 28th of March, 1866, the defendant (the master) was served with a certificate in the terms of the condition, dated the 24th of March, but referring to the state of health of the apprentice in June, 1865. Held, that the certificate was a sufficient compliance with the condition to entitle the father to recover the £50.

¹³ *Mowat v. Innes* (1760) Morr. Dec. p. 589.

close a conflict of opinion with regard to the question whether the power conferred upon the justices by Stat. 5 Eliz., chap. 4, § 35, to discharge an apprentice from his indenture on the ground of the master's breach of duty carried with it as an incident the power to direct the return of a part of the premium.¹ The latest decision rendered upon the subject before the alteration in the law referred to in the next paragraph was to the effect that the magistrates had no jurisdiction to order either that money already paid should be repaid, or that no further payments should be made.²

The matter is now regulated by the express provisions of the employers and workmen act 1875, § 6, subs. 2, which provides that if a court which is exercising summary jurisdiction with respect to a dispute between an apprentice and his master, "rescinds the instrument of apprenticeship it may, if it thinks it is just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid."

b. American apprentice acts.—The provisions which some of these acts contain with regard to the disposition of money or property paid or contracted to be given in relation to the apprenticeship vary considerably in their tenor. Some of them, it will be observed, are sufficiently general in their terms to cover money or property paid or contracted to be paid by the master, as well as the fee which is the consideration of his instruction.³

¹ The existence of the consequential power was denied in *Rex v. Vandeleer* (1718) 1 Strange, 69, but affirmed in *Hawkesworth and Hillary's Case* (1670) 1 Wms' Saund. 315, 1 Mod. 2 (restitution ordered in a case where an apprentice had been guilty of a breach of duty); *Du Hamel's Case* (1684) Skinner, 108, 1 Bott, Poor Law, 570 (apprentice discharged by court for default on part of master); *Rex v. Cherry* (1694) Comb. 203 (general affirmation of rule); *Dillan's Case* (1700) 1 Salk. 67 (general affirmation of rule); *Rex v. Johnson* (1702) 1 Salk. 65 (general affirmation of rule); *Rex v. Anies* (1733) 2 Barnard, K. B. 244, 1 Bott, Poor Law, 574 (per Probyn, J., *obiter*). See also *IV. Bacon's Abr. Master & Servant*, p. 346, (c) (a), where it is stated to have been the established practice to apportion the premium.

² *East v. Pell* (1839) 4 Mees. & W. 665. Parke, B., observed: "I think, therefore, that there is not any such uniform course of decisions as to be

binding upon us, but that we may exercise our own judgment in the matter. If, then, we may construe this as a modern statute, it appears to me that no power is given beyond that of discharging the apprentice."

³ *California*.—Civ. Code 1909, § 274. When the indenture is annulled on the ground of the apprentice's misconduct, and money or other thing has been paid or contracted to be paid by either party, the court must make such order concerning the same as may seem just and proper.

Colorado.—Rev. Laws 1908, § 148, court, when discharging an apprentice, shall make such order as seems just and reasonable regarding money or anything contracted to be paid by the master in relation to the apprenticeship.

Illinois.—Starr & C. Anno. Stat. 1885, chap. 9, ¶ 15. In cases where the contract is dissolved upon a complaint laid against the master, if any money or other thing shall have been paid, given, or agreed for by either party in

c. English bankruptcy acts.—The earliest of the English bankruptcy acts contained no express provision with regard to the return of a portion of the premium of an apprentice whose master should become bankrupt during the period covered by the contract. But under such circumstances, apprentices were allowed to come in as ordinary creditors in respect of such a sum as might be deemed reasonable with relation to the unexpired residue of the term.⁴ In the more recent acts, clauses were inserted, dealing specifically with the subject.⁵ The footing upon which the apportionment is to be made in a

relation to the apprenticeship, the court shall make such order concerning the same as shall seem just and reasonable.

Indiana.—Burns's Anno. Stat. 1908, § 8391 (7309). Court, when annulling an indenture on the ground of the master's misconduct may award the apprentice such sum of money as may seem fit.

Louisiana.—Civ. Code, art. 170 (164). Where a contract is rescinded for good cause at the suit of either of the parties, "the judge shall direct a restitution of such part of the money received on account of such engagement, in proportion to the time not yet elapsed of that which has been fixed by the indenture, unless such rescission is occasioned by the fault of him who paid the money, in which case no restitution shall be made."

Missouri.—Rev. Stat. 1909, § 1701 (4816) (391). When a court discharges either of the parties from the indenture, it may order the refunding of the whole or any part of money that has been paid, or agreed for, on the execution of the indenture. A similar provision is contained in § 1694 (4809), which relates specially to the discharge of the apprentice.

New Jersey.—Gen. Stat. 1895, *Apprentices*, § 5. Justices, when ordering the discharge of an apprentice, may direct part of money paid to the master to be refunded.

Vermont.—Pub. Stat. 1906, § 3258. Court, when discharging an apprentice, may order the refunding of the whole or a part of the money paid, as agreed for, by either party, on the execution of the indentures.

⁴ See *Ex parte Sandby* (1745) 1 Atk. 149, where this course was adopted by Lord Hardwicke, who relied upon some earlier precedents.

The Commissioner usually recommended the creditors to allow a gross sum to put the apprentice out to another master. *Barwell v. Ward* (1744) 1 Atk. 259.

⁵ The act of 6 Geo. IV., chap. 16, § 49, provided that the bankruptcy of the master should operate as a discharge of the apprentice, and that, if an apprentice fee had been paid, it should be lawful for the commissioners "to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the Commission."

In *Ex parte Haynes* (1826) 2 Glyn & J. 122, the duty of restitution under this provision was asserted with reference to a case in which the actual execution of the indenture had not taken place, owing to mere inattention on the part of the apprentice's father.

In *Ex parte Soames* (1833) 3 Deacon & C. 320, J. had apprenticed his son to B. two years before the bankruptcy of the latter. J. was in partnership with T., and the bankrupt owed the firm a joint debt exceeding the amount of the apprentice fee due from J. Held, that J. could not set off the apprentice fee against the joint debt unless he could show some express agreement between himself and partner and the bankrupt.

This provision was in one case held not to apply to articulated law clerks. *Ex parte Prideaux* (1837) 3 Myl. & C. 327; but in *Ex parte Fussell* (1837) 3 Mont. & A. 67, the opposite doctrine was adopted. The point is covered by the

given case will depend upon circumstances. The most material element to be considered is obviously the length of the period during which the apprentice has received the benefit of the master's instructions.⁶

express terms of the later statutes. See *infra*.

For the provisions of a similar tenor in later statutes, see 12 & 13 Vict. chap. 106, § 170; 32 & 33 Vict. chap. 71, § 33.

The provision in the existing act of 1883, § 41, is as follows: If any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the official assignee or trustee may, on the application of the apprentice or clerk or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the judge, thinks reasonable, out of the bankrupt's prop-

erty, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture of articles before the commencement of the bankruptcy, and to the other circumstances of the case.

Provisions of a similar tenor are contained in the New South Wales bankruptcy act, 1887, § 49 (2), and in the Victoria insolvency and bankruptcy act 1890, § 116.

⁶ *Ex parte Gould* (1887) 35 Week. Rep. 381.

CHAPTER XCI.

LIABILITY OF A MASTER FOR THE TORTS OF A SERVANT. WHEN THE MASTER IS CHARGEABLE AS A PRINCIPAL TORT-FEASOR.

2218. Introductory statement.

2219. Imputation of liability to the master on the ground of his personal fault. Generally.

2220. Liability of master for acts done in pursuance of his orders.

2221. Liability imputed to the master on the ground of ratification.

2222. Liability of master predicated on the ground of negligence in regard to the employment of the servant.

a. Generally.

b. Liability as affected by character of work.

c. General rule not applicable where servant is the husband of the defendant.

d. Averments under which evidence of incompetency is admissible.

e. Liability considered with relation to the principle, *Respondeat superior*.

2223. Liability of master predicated on the ground of negligence in regard to other matters.

2218. Introductory statement.—In this and the succeeding chapters it is proposed to discuss the circumstances under which a master is deemed to be responsible for the torts of his servant. Such responsibility may be on one or other of three grounds:

(1) That the master authorized the servant to do the particular act which caused the injury complained of, or ratified it after it had been done. The circumstances under which an action is maintainable against the master upon this ground are discussed in the following sections of this chapter.

(2) That the particular act complained of, although it was not directly authorized or ratified by the master, was incidental to the class of acts which the tort-feasor was hired to perform. This is the situation exemplified in most of the cases reviewed in chapter xcii., *et seq.*

(3) That the master was subject to an absolute duty to protect the aggrieved party against such an act as the one which caused the injury. This phase of the master's liability is discussed in §§ 2406 to 2461. See also chapter CVII., *post*.

2219. Imputation of liability to the master on the ground of his personal fault. Generally.—In a case where the primary and direct cause of an injury was the wrongful act of a person occupying the position of a servant, it is clear that, irrespective of whether the circumstances were or were not such as to render the master liable under the principle, *respondeat superior* (see following chapters), he will be answerable as a principal tort-feasor, if it appears that his own fault was a concurrent cause of the injury. The cases which present such a situation in its simplest form are those in which the master is a joint perpetrator of the wrongful act itself.¹ Other classes of cases are discussed in the following sections.

By referring to §§ 2233 *et seq.*, *post*, the reader will see that, until the doctrine of vicarious liability was introduced into the common law at the close of the seventeenth century, personal fault was the only ground upon which, as a general rule, an action could be maintained against a master in respect of the torts of his servant.

The circumstances under which a parent is liable as a principal tort-feasor for the acts of his minor child are discussed in § 2270, *post*.

2220. Liability of master for acts done in pursuance of his orders.—One of the classes of cases in which an action lies against the master upon the ground adverted to in the preceding section consists of those which apply or recognize the rule that a master is liable for an injury which results from an act done by his servant in pursuance of his direction or that of his agent.¹ So far as the law of master

¹ It is scarcely necessary to cite authorities in support of the obvious proposition that the master is liable under these circumstances. See, however, *Penas v. Chicago, M. & St. P. R. Co.* (1910) 112 Minn. 203, 30 L.R.A. (N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926, p. 929, where "personal commission" is referred to as one of the grounds upon which a master may be held liable.

¹ "The law of England is that if a man command another to do a trespass, and he doth it, the commander is a trespasser." Docter and Student, I. c. 9 (Muchall's ed. p. 32).

"Where the trespass complained of is the direct and necessary consequence of an order given for its committal, the person who gives the order is clearly liable for the consequences, as much as if the trespass were done by his own hand." Pollock, C. B., in *Lucas v. Mason* (1875) L. R. 10 Exch. 251.

"It is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it." Jessel, M. R., in *Smith v. Keal* (1882) L. R. 9 Q. B. Div. 340.

"When a servant causes an injury to a third person, the master is liable for it if he directed the injury to be done."

and servant is concerned, it is only under the circumstances thus predicated that the maxim, *Qui facit per alium facit per se*, can,

This principle extends to all cases where wrongs are committed by the express orders of others, whether the particular relation of master and servant exists between them, or not." *Wilson v. Peverly* (1823) 2 N. H. 548 (jury found that no direct order had been given to kindle a fire in a field).

When a servant by the command of his master does an apparent wrong, both the master and the servant are liable. Bull. N. P. 47.

A master is liable for injuries which are "the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders." Pollock, Torts, Wade's Am. ed. p. 97, quoted in *Ploff v. Putnam* (1909) 83 Vt. 252, 26 L.R.A. (N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277.

That evidence of the acts of an agent in perpetrating a fraud under instructions from his principal was admissible against the principal was held in *Lunday v. Thomas* (1858) 26 Ga. 537.

In *Rich v. Jakway* (1854) 18 Barb. 357, where the action was brought to recover for damages done to plaintiff's ventilator by a shot alleged to have been fired at it by B. at A.'s request, it was not disputed that A. would be liable if such a request had been established by competent evidence. But the verdict for the plaintiff was set aside on the ground that the trial judge had improperly allowed B. to be asked whether he would have done the injury, had he not understood from A. that he would pay the damage, and whether he did the act with the understanding from A. that he would pay the damage. The court said that the understanding of B. as to what A. would do in regard to the wrongful act could be learned only from the transaction itself, including what was said between A. and B. in relation to it, and all the accompanying circumstances.

One who writes a libel, and employs another to translate it into the language in which it is published, is liable for the act of the employee. *Wilson v. Noonan* (1871) 27 Wis. 598.

For other authorities which sustain the statement in the text see *Stone v. Hills* (1877) 45 Conn. 47, 29 Am. Rep.

635 (rule recognized); *Douglass v. Stephens* (1853) 18 Mo. 362 (rule recognized); *Grattan v. Suedmeyer* (1910) 144 Mo. App. 719, 129 S. W. 1038, 1040 (evidence held to be inconsistent with inference that assault on plaintiff was committed in pursuance of the master's command); *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418, 8 Am. Neg. Cas. 524 (master liable for acts "committed by his express authority"); *McClung v. Dearborne* (1890) 134 Pa. 396, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698 (rule recognized); *Byram v. McGuire* (1859) 3 Head, 530 (instruction embodying the rule held correct); *Eligh v. Winters* (1856) 5 U. C. C. P. 491 (nonsuit improperly granted in action of trespass, where the evidence warranted the inference that the trespasser's servant, whose act was the immediate cause of the particular injury complained of, did that act by the orders of the trespasser); and the cases cited in the following notes.

In *Rabassa v. Orleans Nav. Co.* 5 La. 461, 25 Am. Dec. 200, it was held that a corporation is civilly responsible, under the Louisiana Code, for damages occasioned by an act done at its command by its agent, in relation to a matter within the scope of the objects for which it was incorporated. See §§ 428, 429, 432, 433, Louisiana Code.

With regard to the historical aspects of the rule under discussion, the following passage may be quoted from Pollock & M. History of English Law, vol. 2, bk. 11, chap. 8, § 3, p. 526: "In the dominance over our growing law of torts exercised by an action which came of a penal stock we may find an explanation of a debated episode of legal history, namely, the genesis of 'employer's liability.' In order to clear the field, we may take for granted that the man who commands a trespass, which is committed in obedience to his command, is himself a trespasser. About this our law of the thirteenth century and of much earlier times had no doubt whatever. From of old the 'rede-bane' had been guilty as the 'deed-bane.' What is done by man's command may be imputed to him as though it were his own act. From the grave crimes we may argue *a fortiori*

properly speaking, be regarded as applicable,² unless the purely fictitious notion of an implied command is invoked for the purpose of bringing within its scope all acts done by a servant in the course of his duties. See § 2245, *post*. The liability predicated in this point of view extends to all the necessary or natural consequences of what the servant was ordered to do.³

to the minor offenses, though the law in all cases observed that strict rule of logic which required that a principal should be convicted or outlawed before any accessory was put on his trial."

² "A party may be responsible *civilter*, by reason of his participation in the act occasioning the injury, either by direct personal interference, or by giving directions, or commands, or permission, which will make the act, though done by others, his own, in conformity with the maxim, *Ille qui facit per alium, facit per se*." *Brown v. Lent* (1848) 20 Vt. 529.

"Upon the ground of personal fault, if a master authorize his servant to do an unlawful act, *e. g.*, to steal, or to commit an assault, or to drive with dangerous rapidity in a public place, the master is answerable for the wrong of which he is really the author. *Qui facit per alium facit per se*." *Fraser, Mast. & S. p. 261*.

³ In *Gregory v. Piper* (1829) 9 Barn. & C. 591, 4 Mann. & R. 500, a master ordered his servant to lay down a quantity of rubbish, a loose sort which would be apt to shingle down, near his neighbor's wall, but so that it might not touch the same. The servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall. Held, that the master was liable in trespass. The only point really disputed in this case was the proper form of action.

In *Emmons v. Quade* (1903) 176 Mo. 22, 75 S. W. 103, the defendant was held liable for injuries sustained by a trespassing minor who fell from a car in attempting to escape from an employee who had been ordered to imprison him in the car, with a view to giving him into the custody of an officer.

In *Fraser v. Freeman* (1871) 43 N. Y. 566, 3 Am. Rep. 740, reversing (1870) 56 Barb. 234, the plaintiff's intestate was shot and killed by M., while in the employment of the defendant, and while the defendant, together with M. and an-

other servant, were endeavoring, under claim of right, to enter upon the premises of the intestate. The testimony showed that the defendant had been advised that the intestate disputed the right of entry, and would resist; that the defendant had asked one of the servants to go in with him and "fight it out," and that he and they were armed, one with a crowbar, another with a hammer, and a third with a pistol. But in the view of the court of appeals there was no sufficient evidence that the fatal shot was fired by the express direction of the defendant, or with the assent of the defendant. Held (three judges dissenting), that in a civil action brought by the plaintiff under the damage act, it was erroneous for the court to refuse to charge the jury that if they believed that M. fired the shot with the premeditated design to effect death, the defendant was not liable for the act. In the opinion delivered for the majority of the court, Allen, J., said: "It will be assumed, for the purposes of this appeal, that the defendant was a trespasser seeking by force to enter upon the premises in dispute, and that Mul-lady and the other persons aiding him were employed with a design to overcome all opposition, and to use such force as should be necessary to accomplish the purpose, and that this was illegal, and constituted the defendant, and those present and assisting him, trespassers as against Fraser the deceased. . . . Under such circumstances the defendant, the principal, putting the others in motion, is answerable for all the necessary or legal and natural consequences that ensue, such as might in the ordinary and natural course of events follow. To this extent he must be regarded as intending all the consequences of the proceedings instituted and carried on by him. The acts of the agent are his acts. The law holds that he ought to have foreseen whatever results naturally or necessarily flow from his unlawful act, and he will be

The doctrine relied upon in one case was that "a person who has ordered a certain thing to be done, the doing of which imposes upon him the duty of seeing that something further be done, can escape responsibility for the non-performance of that duty by showing that

held liable for all that is done by his agents in furtherance of the general design, for acts within the general scope of the design, or which legitimately and naturally result from the purpose." After pointing out that this criterion of responsibility as applied in certain earlier cases rendered a master free from liability in respect of the wilful acts of his servants, the learned judge proceeded thus: "By the refusal to charge as requested, the judge held the defendant liable for the wilful and malicious as well as criminal act of Mullady. There was no qualification or limitation of the responsibility of the defendant for the acts of his agents; but he was declared chargeable for everything that was done by them, whether in the course of the employment, and at the instigation of the defendant, or of their own volition, to effect their own purposes, or to gratify their own malice. . . . Wilful murder was certainly a remote and scarcely possible result of the action of the defendant, and could not have been within his intent, so that it could be said that he performed the act by the hands of his servant, which is the foundation of the ordinary liability of masters for the acts of their servants. The request excluded the idea that the homicide was authorized by the defendant, or committed in the furtherance of his plans and purposes, or that it was within the range of possibilities contemplated, or which could have been foreseen by him. The cause was submitted to the jury upon the theory that the defendant was responsible for all the acts of his servants, whether committed in furtherance of his plans and purposes, and in pursuance of his orders, or of another's, and for purposes of their own. This was in violation of the principles regulating the liability of a master for the acts of his servant. Bacon, *Abr. Master & Servant*, K. As joint tort-feasor, the individuals concerned were only liable for the acts of each other, committed in furtherance of the common design, or which they instigated, or in which they took part as aiders and abettors." It is

perhaps allowable to feel some doubt regarding the correctness of a decision which seems to involve an acceptance of the theory that if A invites B to assist him in carrying out a project by forcible means, and to that end furnishes B with weapons, a jury is not warranted in inferring that A contemplated the use of these weapons in a manner which might be hurtful or even fatal to the person who was to be overcome by B's assistance. In some jurisdictions the reversed judgment of the supreme court may possibly be thought to embody the sounder views. An extract from its opinion is therefore inserted: "The theory of the defense, in reference to the killing of the deceased, seems to have been that the defendant, although he put Mullady in a position where he might use violence on his behalf, and where he was invited to employ it, is nevertheless not responsible if Mullady did any wilful act by which the life of the deceased was taken; and we are asked to entertain propositions in reference to the act of Mullady in shooting the deceased, which are of the criminal law, and properly applicable to trials for murder or manslaughter. The plaintiff's right to recover does not rest on such distinctions. The defendant and his servant were tort-feasors. They unitedly engaged, and engaged deliberately, in a determination to obtain by force what should have been accomplished through the tribunals of the state. . . . Accepting the statement of Mullady, one of the results of the defendant's violence was an impression in his mind, arising from the conduct of the deceased after he was assailed by the defendant, that he was in danger of bodily harm, and if such was the fact, his act in firing upon the deceased was, even if wilful, but one of the consequences of the enterprise in which he had engaged at the solicitation of the defendant. He went on to fight it out. He went on with a pistol which the defendant knew he had, and violence by him, either by the use of the pistol or any other weapon, in the *mêlée* which the defendant created, was, in my judgment,

he ordered his servant to perform it, and that his servant neglected to do so." ⁴

In most of the cases in which the claims have been based upon the theory that the tortious acts complained of were done by the master's order, he was in point of fact present when the injury in question was inflicted.⁵ But such presence is manifestly not an essen-

so far as the defendant's liability in this action is concerned, fully within the employment of Mullady when used against the deceased, whose vanquishment was the object of the defendant. We cannot limit the responsibility of the master under circumstances such as are disclosed by the evidence herein, to any more precise extent than will be defined by declaring that if the act complained of was the possible result of the employment, he must answer for the act done. (*Althorf v. Wolf* [1859] 2 Hilt. 344, and cases cited. s. c. [1860] 22 N. Y. 355.) If a person, therefore, asks another, already in his service, to assist him, and to do it by fighting an adversary named or known, in order to accomplish some purpose, though lawful in itself and connected with the service, as in this case, he must respond for the act of the servant, because he has enlisted him to commit acts which otherwise might be held to be wilful and without the line of duty or the service for which he was employed. . . . In all the views thus taken of this action, it seems to be clear that the defendant was properly charged with the consequences of Mullady's act, as a result of the improper proceeding which he set on foot, and in which he asked Mullady to assist."

⁴ *Driscoll v. Carlin* (1887) 50 N. J. L. 28, 11 Atl. 482. There an action was held to be maintainable by a person who was injured through falling over some timber which the defendant's servants had, contrary to his orders, left on a sidewalk for several days after it had been unloaded. The court said: "It is plain that when the defendant's workmen unloaded his wagon in front of his yard, they were obeying his directions, and the depositing of the timbers upon the edge of the sidewalk, as a step in their transfer from the wagon to the yard, was neither a tortious nor a careless act, and was in reasonable pursuance of the defendant's orders. When, however, that was done, it was incumbent on the defendant to see that the

timbers were not left for an unreasonable length of time upon the public highway; and it was this duty resting upon the defendant personally, which was never performed, and through the non-performance of which the plaintiff sustained her injury. . . . The case comes within the familiar rule that if one does or authorizes the doing of an act which creates a public nuisance by unlawfully obstructing or interfering with the free use of a highway, or otherwise, he becomes answerable in damages to those who suffer special injury thereby."

⁵ In debt upon bond against executors, conditioned for quiet enjoyment of lands sold by the testator to the plaintiff, the breach assigned was that the testator had entered and cut down five trees, upon which they were at issue, and the jury found that the testator's servant by his command entered and cut, etc., in his said master's presence. The court held that the condition was broken, and that the master was the principal trespasser. *Seaman and Browning's Case* (1589) Leon. pt. 1, p. 157.

For injuries sustained by a mare of plaintiff's, which was found astray on the defendant's land, and which a servant of the defendant, by his express directions, rode excessively, and then turned loose, the defendant was held liable in *Knott v. Digges* (1823) 6 Harr. & J. 230.

In *Grossbart v. Samuel* (1900) 65 N. J. L. 543, 47 Atl. 501, in an action against a partnership for an assault, the refusal of a nonsuit was held to be proper, because there was evidence which would warrant the conclusion that the party guilty of the assault was not only employed by the firm, but was engaged in its business at the time the assault was committed, and that one of the defendants was actually present and urged him on, saying, "Give him, give him, so he will keep his mouth shut."

For other cases in which the presence of the master was one of the elements

tial prerequisite to the maintenance of an action.⁶ Nor is it material, whether the servant acted innocently or maliciously in executing the order.⁷ Nor can the master shield himself from responsibility by showing that his instructions were not strictly followed by his servant.⁸

2221. Liability imputed to the master on the ground of ratification.—

The cases under this head are divisible into two classes:

(1) Cases in which it is sought to hold the defendant liable for an act done by another person who was performing services on his behalf, but without any previous agreement respecting the performance. Where it appears that the services in question were performed under circumstances which, if there had been an antecedent contract between the party who rendered them and the party for whose benefit they were rendered, would have warranted the inference that the parties stood towards one another in the relation of master and servant, the acceptance of the work as completed operates so as to affect the latter party with responsibility for any tortious acts

involved, see *Korah v. Ottawa* (1863) 32 Ill. 121, 83 Am. Dec. 255 (injury to bridge caused by a canal boat which the defendant was commanding in person); *Goodwin v. Greenwood* (1906) 16 Okla. 489, 85 Pac. 1115 (restaurant keeper failed to exercise any authority to prevent an assault which he knew that his servant was about to commit upon a customer).

See also *Chandler v. Broughton* (1832) 1 Crompt. & M. 29, 3 Tyrw. 220, 2 L. J. Exch. N. S. 25; *M'Laughlin v. Pryor* (1842) 4 Mann. & G. 48, 4 Scott, N. R. 655, Car. & M. 354, 11 L. J. C. P. N. S. 169; *Strohl v. Levan* (1861) 39 Pa. 177; *Wilkins v. Gilmore* (1840) 2 Humph. 140. The actual point determined in all these cases was that, under the given circumstances, the appropriate form of action against the master was trespass. See chapter CIX., *post*.

⁶ In *Michael v. Alestree* (1677) 2 Lev. 172, an action on the case in which the plaintiff alleged that "the defendants, in Lincoln's Inn Fields, a place where people are always going to and fro about their business, brought a coach, with two ungovernable horses, and then, improvidently, incautiously, and without due consideration of the unfitness of the place, there drove them to make them tractable, and fit them for a coach; and the horses, because of their

ferocity, being not to be managed, ran upon the plaintiff, and hurt and grievously wounded him." The report states that "the master was absent, yet the action was brought against him, as well as his servant, and both found guilty." A motion was made in arrest of judgment for several causes. But judgment was given for the plaintiff; and the court said, among other things: "It shall be intended the master sent the servant to train the horses there." In Keble's report of the same case (3 Keble, 650) no part of the declaration is set forth; but it is stated that the court said, on a motion in arrest: "It's at the peril of the owner to take strength enough to order them" (the horses), "and the master is as liable as the servant, if he gave him order for it; and the action is generally for bringing them thither." The principle of the decision, therefore, was that the master, though absent, had ordered his servant to train intractable horses in a place constantly thronged with passengers, and was therefore, in legal intentment, guilty of the act of training them there, jointly with his servant."

⁷ *Hynes v. Jungren* (1871) 8 Kan. 391 (illegal arrest).

⁸ *Armstrong v. Cooley* (1849) 10 Ill. 509 (fire set out on a prairie in contravention of a statute).

which may have been committed by the former within the scope of his constructive employment.¹

¹In *Dempsey v. Chambers* (1891) 154 Mass. 330, 13 L.R.A. 219, 26 Am. St. Rep. 249, 28 N. E. 279, it was held that a coal-dealer who had presented a bill and demanded payment for coal ordered from him, but delivered by a third person without authority, had so ratified the act of the latter as to make him his servant, and had thus made himself become liable for the value of a plateglass window broken by him in delivering the coal. In delivering the opinion of the court, Holmes, J., made the following remarks: "If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society. It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are 'fained to be all one person' by a fiction which is an echo of the *patria potestas* and of the English frankpledge. *Byington v. Simpson* (1883) 134 Mass. 169, 170, 45 Am. Rep. 314; Fitzh. Abr. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way." After a general review of the older and more recent authorities regarding the ratification of unlawful acts, the learned judge proceeded thus: "The question remains whether the ratification is established. As we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCulloch's employment that

the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See *Coomes v. Houghton* (1869) 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In *Gibson's Case* (1657) Lane, 90, it was agreed that if strangers as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so. And this proposition is stated as law in Comyns's Dig. Trespass, C. 1. *Elder v. Bemis* (1841) 2 Met. 599, 605. In *Coomes v. Houghton* (1869) 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one."

In *Coomes v. Houghton*, cited by Holmes, J., *supra*, a mechanic, without having received any prior order or direction from the defendant, did some work in relation to a job which the defendant had undertaken. While engaged in the work, the mechanic carelessly let a brick fall on the plaintiff. Held, that the defendant was not liable for the injury thus inflicted, because "availing himself of the work done, and paying and receiving payment therefor, in the manner and under the circumstances stated, would not be an adoption by the defendant of anything which was not a part of or result from the work thus accepted. It would not, of itself, establish the relation of master

(2) Cases in which it is sought to hold the defendant liable for an act done by a servant outside the scope of his employment. The general rules which control the right of recovery under this head are that there "can be no ratification, unless the original act was in some sense done on behalf and for the benefit" of the employer,² and that, "in order that there may be a valid ratification, there must be both a knowledge of the fact to be ratified and an intention to ratify it."³ The decisions collected in the note below illustrate the circumstances under which the right of recovery has been affirmed or denied with reference to these elements.⁴

and servant, with all of its incidental consequence, as existing, at the time of the accident, between the defendant and Teneefe." It was conceded that "for an injury resulting directly from the performance of work thus done for the benefit of the defendant and accepted by him, he would unquestionably be responsible."

² *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297 (giving into custody a passenger for a breach of a by-law in not having paid his fare,—said to be an act which manifestly might have been for the benefit of the company); *Walker v. South Eastern R. Co.* (1870) L. R. 5 C. P. 640, 39 L. J. C. P. N. S. 346, 23 L. T. N. S. 14, 18 Week. Rep. 1032 (similar point).

In *Tolchester Beach Improv. Co. v. Steinmeier* (1890) 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188, where the superintendent of a public resort directed a special policeman to arrest the plaintiff on a charge of assaulting him, one of the grounds on which the right of recovery, in so far as it depended on an alleged ratification by the owners of the resort, was denied, was that the arrest "in no way enured to the benefit" of such owner, since it was the act of a state officer, in the exercise of his common-law powers, and not in the execution of the orders of the owners.

In *Kinsella v. Hamilton* (1890) Ir. L. R. 26 C. L. 671, the contention that the defendant had, by taking and selling the cattle which were being distrained when the plaintiff's decedent was killed, adopted and ratified the killing, was thus disposed of: "There are two answers to this: First, that the act of causing the death was collateral to, and not part of, the seizure which

was adopted, and therefore insisting upon the latter act could not amount to an adoption of the former; secondly, the seizure was for, and in the name of, Brooke, the principal, not of Hamilton, the agent; and was therefore an act not capable of being adopted by Hamilton."

³ Keating, J., in *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 448. The authority cited was *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297 (see last note).

A qualification of the general rule applied in the above cases is indicated by a decision to the effect that a principal who had ratified the purchase by his agent of a chattel which the vendor had no right to sell was guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful. *Hilbery v. Hatton* (1864) 2 Hurlst. & C. 822, 33 L. J. Exch. N. S. 190, 10 L. T. N. S. 39. The rationale of this case is, according to Mr. Evans (Agency, *75), that the ratification was effected with the intent to take all liability, whatever the facts might actually be.

⁴ (a) *Ratification inferable*.—In *Bishop v. Montague* (1600) Cro. Eliz. pt. 2, p. 824, the defendant's bailiff took five oxen as for heriots due to the defendant when there was not any due, without any command from the defendant; but she agreed thereto and converted the oxen to her own use. Two of the judges held that she was liable in trespass, but not in trover; the other two held that she was liable in trespass or trover.

In *Padget v. Priest* (1787) 2 T. R. 97, B's servant A, acting under the orders given by C before he died intestate, sold the goods of C, as well after his

death as before, and paid the money arising from the sale into B's hands. Held, that B might be sued as an executor *de son tort*.

In *Ewbank v. Nutting* (1849) 7 C. B. 797, a ratification of the act of the master of a ship in selling the cargo of a leaky ship at a foreign port was inferred from the fact that the ship-owner had received the proceeds of the sale.

In *Dunn v. Hartford & W. H. R. Co.* (1876) 43 Conn. 434, C., an employee of a corporation, who had been sent with an officer to find property of one M. to attach upon a note which the corporation held against him, settled the claim with M. by taking a horse at an agreed price and a bill of sale to himself of a wagon, the understanding being that he was to sell, retain \$50 of the proceeds for the defendants, and return the balance to M. C. took the wagon into his possession, delivered the horse to the defendants, and paid them the \$50 which he was to get from the sale of the wagon; at the same time informing the president of the company of the particulars of the arrangement. The president expressed no disapproval, but withdrew the suit that had been instituted, and delivered the note of M. to C. C. acted in the whole matter for the benefit of the defendants. The wagon proved to be the property of D., who demanded it of the defendants; they replied that they knew nothing of it, and he sued them in trover. The action was held to be maintainable on the ground that the acts of C. had been ratified by the defendants.

In *Byne v. Hatcher* (1885) 75 Ga. 289, Code, § 2203, it was held that the jury were justified in finding that the defendant had ratified the conversion of a bale of cotton by his clerk, the evidence being that he had received most of the proceeds of the cotton, and paid the cost of proceedings for the foreclosure of a chattel mortgage thereon.

In *Fogg v. Boston & L. R. Corp.* (1889) 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109, it was admitted that a libelous extract from a newspaper was kept posted forty days in a conspicuous place in the defendant's office in Boston, which was arranged especially for the sale and advertising of railroad tickets, and was in the immediate charge of one of the defendant employees. The plaintiff was a

railroad ticket broker doing business on the same street. The statements in the libel indicated that he was not a safe and reliable person from whom to buy tickets. From the evidence in the case the jury might have inferred that the defendant's office was used not merely for advertising tickets, but for advertising and publishing any other information of interest to persons about to purchase tickets, which would be likely to induce them to buy at the defendant's office, rather than elsewhere. Commenting upon this state of facts, the court said: "One who maintains a place of business may be presumed to have general knowledge of what is done there. The jury might properly have found that the defendant, having its principal terminus and the offices of its principal managing agents in Boston, had knowledge from time to time of what kinds of advertisements and notices were posted in its ticket office there, and that the libel would not have remained so long in that conspicuous place if the corporation had not originally authorized, or afterwards ratified, the act of posting it." It was held that a ratification of the libel might properly be inferred from the fact that the responsible officer of the company, being thus affected with knowledge of the posting of the notice, had not interfered with it.

In *White v. Apsley Rubber Co.* (1907) 194 Mass. 97, 8 L.R.A. (N.S.) 484, 80 N. E. 500, where the defendant's book-keeper, who had general supervision of the renting of houses owned by it, used criminal process to compel a tenant to surrender a house, a ratification of his act was held to be inferable on the ground that the defendant's president and general manager had knowledge of the measures taken, and either assented or declined to interfere.

In *Exum v. Brister* (1858) 35 Miss. 391, the defendant was held liable on the ground that he had, with knowledge of the facts sanctioned and appropriated the proceeds of timber wrongfully cut by his servant on the plaintiff's land.

In *Elder v. Bemis* (1841) 2 Met. 599, a surveyor of highways who had ordered his servant to fell trees that were within the limits of the road, and to place them elsewhere than on the land of the adjoining owner, but was in view of such land when they were felled and placed thereon by the servant, and

knew that they were so placed, and assented thereto, and gave no direction to have them removed, was held to be liable to the owner of the land in an action of trespass. The court said: "Another exception to the charge of the presiding judge is that the defendant's assent to the trespass does not make him liable, as the same was not committed for his benefit. In support of this objection the defendant's counsel relies on the doctrine as laid down in *Bacon, Abr. Trespass, G. 1*, where it is said that 'if J. S. agree to a trespass which has been committed by J. N. for his benefit, this action lies against J. S., although it was not done in obedience to his command, or at his request.' So in *Comyns's Dig. Trespass, C. 1*, it is said that 'trespass lies against him who afterwards assents to a trespass done for his use or benefit, though not privy at the time of doing it.' But 'if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing of the goods, in seizure, though not privy to the misusage.' And so it was ruled in *Gibson's Case* (1657) *Lane, 90*. In that case it appeared that two or three strangers, affirming themselves to be servants of Gibson, seized the plaintiff's goods; and it was decided, 'if they, as servants to Gibson, without his precedent appointment, did seize the plaintiff's goods, and the said Gibson approved them to be seized, although his servants, without his consent, abuse the goods, yet Gibson shall be trespasser *ab initio*.' We find nothing in the instructions to the jury inconsistent with these principles; on the contrary, they are, we think, fully supported by *Gibson's Case*. There is a distinction between the assent of a master to a trespass committed by his servant, and to that committed by a stranger. And there is also a distinction between the case of a party who is present, assenting to a trespass while another is committing it, and the case where the assent is given subsequently. Keeping these distinctions in view, we are of opinion that the charge to the jury was perfectly correct. The trespass complained of was a continuing trespass until the trees were removed. And it was the duty of the defendant to cause them to be removed immediately. As he neglected to do this, he must be considered as authorizing the continuance of the trees on the plaintiff's land, and so was a trespasser

ab initio. We are of opinion, therefore, that the defendant is clearly liable in this action."

In *Green v. Southern Exp. Co.* (1871) 41 Ga. 515, one of the grounds on which the liability of the defendant company for the wrongful arrest of the plaintiff was affirmed was that, after his discharge, it had recognized the authority of its agent to make the arrest, by endeavoring to procure a release from the plaintiff for the damages sustained by him in consequence of the arrest.

In *Caldwell v. Sacra* (1811) *Litt. Sel. Cas. (Ky.) 118*, 12 Am. Dec. 285, the death of the plaintiff's horse had been caused by sticks tied to his tail by a slave of the defendant, into whose field the horse had frequently broken. Upon being informed by a witness that he had understood the horse had died from the abuse occasioned by the sticks which had been tied to his tail, the defendant replied that he was glad of it. A verdict rendered for the plaintiff in an action of trespass was sustained. See, however, the remarks of *Erle, Ch. J.*, in *Moon v. Towers*, *infra*, with regard to the effect of a similar statement by the defendant.

In *McKay v. Botsford* (1862) 10 N. B. 550, where the servant of the committee of provincial board of agriculture illegally sold certain timber belonging to a contractor, it was held that ratification might properly be inferred from evidence which showed that before the removal of the timber by the purchaser the chairman of the committee, when he was informed that it had been sold, had said that this was the best thing that could be done, and that the proceeds had been received by the committee.

In *Vroom v. Litt* (1911; *Sup. Ct. Trial Term*) 70 Misc. 375, 128 N. Y. Supp. 758, it was held that a principal who receives money obtained by his agent through duress is bound to return it.

In *Pennsylvania Iron Works Co. v. Vogt Mach. Co.* (1906) 139 Ky. 497, 8 L.R.A. (N.S.) 1023, 96 S. W. 551, the defendant's ratification of a libel written by its agent was held to be inferable from the fact that the defendant had failed to repudiate it. A different view as to the consequences of mere inaction was taken in *Kane v. Boston Mut. L. Ins. Co.* subd. (b) *infra*.

An instruction that, if the master ratified or adopted the wrongful acts

of his servants when he came to a full knowledge of them, he thereby made them his own, though they might not originally have been so, and though he might not have ordered or commanded them to be done, was upheld in *Byram v. McGuire* (1859) 3 Head, 530.

(b) *Ratification not inferable.*—In *Freeman v. Rosher* (1849) 18 L. J. Q. B. N. S. 340, 13 Q. B. 780, 13 Jur. 881, it was held that a ratification of an illegal distress could not be inferred from the defendant's receipt of the proceeds of the sale, because he had no knowledge that a trespass had been committed, and received the money in the belief that his warrant had been lawfully executed.

In *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297 (railway passenger given into custody for a breach of a by-law). Patteson, J., after pointing out that the only evidence offered with regard to ratification was that the attorney of the company had attended before the magistrate in support of the criminal charge upon which the plaintiff had been arrested, observed: "It must be remembered that this was a charge against the plaintiff, not by the plaintiff against the company; and that the charge was for having refused to produce his ticket or pay his fare, and for having assaulted Richardson. Not a word is said to show that the fact that Richardson had apprehended the plaintiff, and that the plaintiff had been taken into custody on these charges, was known either to the company or to their attorney." It was accordingly held that ratification could not be inferred. This decision was followed in *Walker v. South Eastern R. Co.* (1870) L. R. 5 C. P. 640 39 L. J. C. P. N. S. 346, 23 L. T. N. S. 14, 18 Week. Rep. 1032, where similar facts were involved.

In *Moon v. Towers* (1860) 8 C. B. N. S. 611, the defendant's son, a youth about seventeen or eighteen, in his employ, caused a servant whom he suspected of obtaining money from him by false pretenses, to be apprehended and taken before a magistrate, who remanded him, but ultimately discharged him. After the remand, the son told his father what he had done; the latter did not prohibit his son from proceeding in the matter, but said that, as he (the son) had begun it, he would not interfere. Held (*dubitante* Williams, J.), that

there was no evidence for a jury, of either previous authority or subsequent ratification by the father. Erle, Ch. J., thus commented on the evidence: "Suppose the son had knocked the plaintiff down, and the father had said, 'I think it served him right;' would that be such a ratification of the son's act as to make the father a trespasser? Notwithstanding the son's youth, and the fact of his being in some degree under the father's control, and that the son was acting in his father's business, I think there was no evidence to go to the jury of an adoption of the trespass by the father, so as to make it his act." Williams, J., thus explained the reasons for his reluctance to adopt the views of the other judges: "I incline to think that where an act is done by an agent in the course of his employment for a principal, the agent, as in this case, being an unemancipated member of the family of the principal, and the latter allows his agent to go on with it and to take steps which could only be taken at the expense of the principal, the jury may fairly take these matters into their consideration as some evidence of ratification. However, the doubt I entertain is not so strong as to induce me to dissent from the rule being made absolute to enter a nonsuit."

In *Rowe v. London Pianoforte Co.* (1876) 34 L. T. N. S. (Div. Ct.) 450, 13 Cox, C. C. 211, the plaintiff, a workman employed in the defendants' factory, was discharged with others in consequence of slackness of work. He carried away, with his own tools, one belonging to the defendants, which, when he found inquiry was made for it, he returned to the foreman of the factory. When he afterwards called about it at the factory, a detective was present, who asked the foreman if he gave the plaintiff in charge for stealing the tool, to which the foreman replied he must see the defendants' managing director first. The plaintiff and the detective went together to the police station, and the foreman afterwards appeared, charged the plaintiff, and signed the charge sheet. The next morning, the plaintiff having been locked up all night, the defendants' managing director gave evidence against the plaintiff, but the charge was dismissed. Upon that, the managing director made a remark impugning the magistrate's decision, for which he was called to order. The

Whether the circumstance that the defaulting servant was retained in the employment is sufficient of itself to warrant the inference of a

plaintiff brought an action in the county court for false imprisonment; at the end of the plaintiff's case the judge refused to nonsuit; and the jury found a verdict of £50 for the plaintiff. Held, that these facts afforded no evidence that the managing director ratified the foreman's action in the matter; and that a nonsuit must be entered.

In *Roe v. Birkenhead, L. & C. Junction R. Co.* (1851) 7 Exch. 36, 21 L. J. Exch. N. S. 9, 6 Eng. Ry. & C. Cas. 795, it was held that as certain letters which had passed between the secretary of the defendant and the plaintiff merely had reference to a compromise of the claim (for wrongful arrest), no ratification could be implied from the terms of the correspondence. See, however, *Green v. Southern Exp. Co.* (1871) 41 Ga. 515, cited in subd. (a) of this note.

In *Central R. Co. v. Brewer* (1894) 78 Md. 394, 27 L.R.A. 63, 28 Atl. 615, where the superintendent of a street railway had arrested a passenger for putting counterfeit coin in the box for his fare, the fact that the president, superintendent and driver testified before the commissioner was held to afford "no legally sufficient evidence of ratification or adoption; for if they were without authority in causing the arrest, the subsequent testimony given for the government by them, or the manner in which they demeaned themselves in delivering their testimony, in no way supports the theory of adoption or ratification." *Tolchester Beach Improv. Co. v. Steinmeier* (1890) 72 Md. 320, 8 L.R.A. 846, 20 Atl. 188, was cited.

That ratification of an assault was not proved by evidence which showed merely an unfriendly disposition towards plaintiff was held in *Arasmith v. Temple* (1882) 11 Ill. App. 39.

In *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1908) 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517, the grounds upon which the court denied that there was any adequate evidence of the defendant's ratification of an assault made by the driver of one of its wagons, upon a customer with whom he had had a dispute about the payment for the cleaning of certain blankets, were thus stated: "Ratification requires proof of full knowledge of all material

facts, and upon this point the record is absolutely silent. There is not a word to show that the defendant knew the blankets had ever been delivered to the plaintiff, or that any assault had been committed or even charged. The letter of Messrs. Yellott & Symington throws no light upon this question. It is simply a notice to call at the laundry, pay the charges, and take away the blankets, and it is nothing more. Such a notice is a natural and proper mode of calling attention to the debt, and getting rid of completed work. It would require a reckless stretch of imagination to deduce from such a notice knowledge by defendant of the alleged assault, with all its circumstances, and a purpose to approve and ratify it."

In *Kane v. Boston Mut. L. Ins. Co.* (1908) 200 Mass. 265, 86 N. E. 302, where the defendant's soliciting agents had slandered the plaintiff, the court thus laid down the law: "The mere inaction of the defendant, and Bradley's [superintendent of agencies] refusal to do anything for the plaintiff, cannot indicate a ratification of what did not appear to have been done in the name or behalf of the defendant, or with the help of its resources, or for its advantage. Nor is there any evidence that Bradley had authority to ratify these acts. The facts offered to be proved fall short of what appeared in *Fogg v. Boston & L. R. Corp.* (1889) 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109, and *White v. Apsley Rubber Co.* (1907) 194 Mass. 97, 8 L.R.A.(N.S.) 484, 80 N. E. 500. Nor would the facts that the plaintiff's business was diminished after the alleged slanders, and that a part of the business which he lost went to the defendant, be enough to show a ratification in the absence of evidence that the defendant knew these facts. The defendant did not knowingly receive the benefit of its agents' misconduct, and cannot be held on that ground to have ratified and adopted the misconduct."

In *Lindsey v. St. Louis, I. M. & S. R. Co.* (1910) 95 Ark. 534, 129 S. W. 807, an action for slander uttered by an agent of his employer, an employee alleged and proved that immediately after the slander he was discharged from his employment. The employer alleged that

ratification is a point with regard to which there is a difference of opinion.⁵ The particular matter under discussion in most of the

he was discharged solely because of insubordination to those in authority over him. Held, that the employer could prove the employee's incivility to show a cause for his discharge, and consequently had not ratified the slander.

In *Potulni v. Saunders* (1887) 37 Minn. 517, 35 N. W. 379, where the defendant, upon being informed that his servant had converted the plaintiff's property, promised to pay the damage if it was not too much, the court held that this did not warrant the inference of a ratification of the act, if it was unauthorized.

⁵ In *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, 8 Am. Neg. Cas. 302, the law is thus laid down in the syllabus composed by the court: "Ratification of an unauthorized and unlawful act can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving such intention. In this case, there being no witnesses, and plaintiff and the porter giving very different accounts of the affair, ratification of the misconduct imputed by plaintiff cannot be inferred from the retention of the porter, when the defendant so acted because it honestly believed the latter, and thought it just to main the *status quo* at least until judicial determination of the conflict."

The doctrine that the retention of a servant does not of itself constitute a ratification of his tortious act was also adopted in *Gulf, C. & S. F. R. Co. v. Kirkbride* (1891) 79 Tex. 457, 15 S. W. 495, 8 Am. Neg. Cas. 631. The court said: "We think it would be extending the doctrine of ratification too far to apply it to such a case as the one before us. Notwithstanding his one fault, the servant may be a useful and deserving one, and worthy of promotion and encouragement. We do not think it either just to the individual, necessary for the general good, or a wise public policy to so arbitrarily punish the master for lenity to a servant otherwise deserving and perhaps penitent."

For other cases in which the same doctrine was applied, see *Everingham v.*

Chicago, B. & Q. R. Co. (1910) 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912C, 848; *Kwiechen v. Holmes & H. Co.* (1908) 106 Minn. 148, 19 L.R.A. (N.S.) 255, 118 N. W. 668; *Grattan v. Suedmeyer* (1910) 144 Mo. App. 719, 129 S. W. 1038 (in this case the master also assisted in the defense of an action brought against the servant).

In *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216, an action for an assault on a railway passenger, the court is reported to have said: "If they discharge such servant, it would show disapproval of his conduct and may mitigate damages; if they retain or promote him, it may go to aggravate the wrong by ratifying the conduct of the wrongdoer." "Especially do we think that these principles should be applied when the conductors and baggage masters, so acting towards passengers, are retained by the managing agents of the company, and thereby their conduct ratified by implication by the higher officials."

In *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276, the court thus stated its position: "Retention of a servant in his employment after notice to the principal of a tort committed by the servant is evidence of ratification of the act by the principal. *Bass v. Chicago & N. W. R. Co.* (1877) 42 Wis. 654, 24 Am. Rep. 437; *Robinson v. Superior Rapid Transit R. Co.* (1896) 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 896, 68 N. W. 961. The information to the principal should be full and complete, in order to justify the conclusion of ratification on this ground. *Patry v. Chicago, St. P. M. & O. R. Co.* (1890) 77 Wis. 218, 46 N. W. 56. It is not essential that the information should come from the plaintiff, but however it comes it should be more than mere idle rumor, and should be so convincing and persuasive as to convince the mind of an ordinarily prudent employer that the facts exist which call for the servant's discharge. Any other rule would necessitate the discharge of faithful employees whenever their conduct is assailed by irresponsible, unfounded gossip, and such a rule would be plainly unjust both to employer and employee. The question is generally one

cases under this head was the right of the plaintiff to recover punitive damages. See chapter CIX., *post*.

A ratification effected by an employee is of course not binding upon his master, unless it was within the scope of his authority, express or implied.⁶

2222. Liability of master predicated on the ground of negligence in regard to the employment of the servant.—a. Generally.—Another of the situations in which a master is deemed to be liable on the ground

for the jury, in view of all the information which came to the employer, and was such in the present case, under proper instructions."

In *Pfister v. Milwaukee Free Press Co.* (1909) 139 Wis. 627, 121 N. W. 938, the court seems to have approved of the cases which treat the retention of the servant as being "in itself conclusive proof of ratification." The weight of authority is in favor of the view that this question should be answered in the negative.

⁶In *Knight v. North Metropolitan Tramways Co.* (1898) 78 L. T. N. S. 227, the question whether a ratification of the act of a conductor of a tram car could be inferred was thus dealt with: "There is evidence that the inspector of the defendant company, who was on the spot when the plaintiff was given into custody, ratified the act of the conductor. But there is no evidence that the inspector had any authority to act on behalf of the company in sanctioning the act of the conductor in giving the plaintiff into custody. There is no evidence of express authority, and the case as to his implied authority is not stronger than that as to the implied authority of the conductor; indeed, not so strong, for if any servant has a duty in safeguarding the money paid for the tickets it is the conductor, and not the inspector."

In *Lezinsky v. Metropolitan Street R. Co.* (1898) 31 C. C. A. 573, 59 U. S. App. 588, 88 Fed. 437, 4 Am. Neg. Rep. 595, one of the defendant's conductors had been himself arrested, while procuring the arrest of a passenger for non-payment of fare and disorderly conduct. Thereupon a clerk in the defendant's claim department, which had charge of the preparation of accident cases for trial, was sent by his superior officers to go to the police court "and see what the matter was." He went, and after

having ineffectually tried to induce the plaintiff to abandon his charge and have both cases dismissed, he endeavored to show the magistrate that the conductor was in the right. Held, that, in so doing he had departed from his employment without authority, and therefore that there would have been no propriety in submitting to the jury the question of ratification as based upon his act, or on the scope of his authority, or on the defendant's course of business.

"Circumstantial ratification, conduct by those intrusted with the whole power of the corporation, clearly indicating the approval of the wrongful act of the agent in performing his duties, is a sufficient ratification." *Topolewski v. Plankinton Packing Co.* (1910) 143 Wis. 52, 126 N. W. 554.

In *Houston & T. C. R. Co. v. Robertson* (1911) — Tex. Civ. App. —, 138 S. W. 822, an action for false imprisonment against a railroad company, its local commercial agent, and an officer employed by the company to ferret out offenders, one of the acts complained of was the incarceration of plaintiff by a deputy constable. An instruction that, if the defendant officer did not procure aid, or assist the deputy in arresting and imprisoning plaintiff, but ratified and consented to it, and in so ratifying the acts of the deputy constable he was the agent of either of the other defendants, with authority to ratify the acts, then the other two defendants would be liable for the act, was held to be erroneous, as against the other two defendants, for the reason that there was no contention that the deputy constable was acting independently for the company or the local commercial agent, nor any testimony that the defendant officer had any authority from either of the other defendants to ratify the act of the deputy constable.

of his personal fault is illustrated by the cases in which it has been held that an action lies against him for an injury resulting from a tortious act of an incompetent servant, if it appears that he had knowledge, actual or constructive, of such incompetency before the injury was inflicted.¹ The circumstances under which the master is deemed to be chargeable with notice of a servant's incompetency are indi-

¹In *Wanstall v. Pooley* (1841) the substance of which is stated in a note to 6 Clark & F. (Q. B.) 910, it was held that the employment of a tipsy man by the defendant's agent was an act of negligence rendering the defendant liable for injuries caused by the man's leaving a truck on the roadway.

In *McGahie v. McClennen* (1903) 86 App. Div. 263, 83 N. Y. Supp. 692, where the evidence justified the inferences that the driver of a team of horses negligently lost control of them, or that he was not competent to drive them, and that the owner was aware of that fact, a finding that the owner was negligent was held to be warrantable.

In *Dansey v. Richardson* (1854) 3 El. & Bl. 144, 167, it was not disputed that the plaintiff would have been entitled to recover, if carelessness had been established. The court was equally divided upon the question whether the claim could be enforced in the absence of proof that the defendant had been careless in regard to the hiring or retention of the servant. "The *scienter* as to the character and habits of the servants may become material where an attempt is made to throw upon him a liability for a loss by their felony or wilful trespass, to which *prima facie* he is not subject."

In *Ewing v. Callahan* (1907) 32 Ky. L. Rep. 537, 105 S. W. 978, evidence that the servant was about eighteen years of age, had been in defendant's employ but a few months, was without previous experience in street driving, and usually drove recklessly, was sufficient to warrant an instruction which predicated liability on the master's part if the servant was incompetent, and known by the master, either actually or constructively, to be so.

As a general rule, any mental disease or infirmity which would excuse an agent from criminal responsibility will also excuse his principal. But the insanity of such agent is not available as a defense, where the company em-

ployed him with knowledge of his insane condition, or of his being subject to sudden fits of insanity. *Christian v. Columbus & R. R. Co.* (1888) 79 Ga. 460, 7 S. E. 216.

In *Missouri, K. & T. R. Co. v. Freeman* (1903) — Tex. Civ. App. —, 73 S. W. 542, where a surgeon employed by a railroad company to care for a servant suffering from smallpox hired a nurse who was incompetent and had the reputation of being an habitual drunkard, and who went on to the public streets of the city without disinfecting himself, the railroad company was held to be liable for the death of a person to whom he communicated the disease. The court said: "When the defendant company took charge of Dickson for the purpose of isolating, nursing, and treating him for smallpox,—a dangerous and infectious disease,—it assumed and owed a duty to the public to employ competent and experienced persons and agents to perform that duty. It took the risk of all consequences of a wrongful execution of that duty, resulting from the incompetency of a nurse or guard so employed by it. It was the duty of the company's surgeon to employ a person as nurse or guard who had sufficient intelligence and discretion to remain isolated, and not leave the camp and go upon the public streets, where he would likely come in contact with persons who had not had the disease, without first disinfecting his person and changing his clothes. It was the negligence of the company surgeon in employing the incompetent guard, Ablo, that placed said Ablo in a position where he could, by reason of his negligence and incompetency, communicate the disease to others."

In *Long v. Chicago, K. & W. R. Co.* (1892) 48 Kan. 28, 15 L.R.A. 319, 30 Am. St. Rep. 271, 28 Pac. 977, the grounds upon which a railroad company was held not to be liable to a passenger who had caught a contagious disease from a ticket agent who happened to be

afflicted with it were thus stated: "The employment, knowingly, of an improper person to come in contact with the public as an agent, would be gross misconduct; but if the master or railroad company is faultless in regard to employing an agent and in continuing his employment, the master or railroad company ought to be excused civilly from the consequences of any secret disease or like infirmity of the agent, in the absence of all knowledge thereof. Even a dog which has manifested no vicious propensities may be kept by its owner without being tied or otherwise secured; but if the animal is vicious, and the owner has been notified of the fact, a duty is then imposed upon him to keep the animal secure, and he is responsible for any mischief if he fails to observe this duty. The *scienter* must be established. Chester D. Long was lawfully in the station at Anness, and was without fault, on his part, in purchasing his ticket of Clayton, the agent; and in selling his ticket Clayton was acting clearly within the scope of his employment; but his disease was not known to the railroad company, or any of its superior officers, and although it was contemporaneous with his employment, the railroad company cannot be charged with the consequences thereof."

In *Rahmel v. Lehnendorff* (1904) 142 Cal. 681, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 659, the court thus laid down the law: "An innkeeper is, no doubt, guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests; and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. And if, as in the Philadelphia case [*Rommel v. Schambacher* (1887) 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779] he stands by while a guest is exposed to the violence of a person who has been made dangerous by his fault, and sees an injury inflicted without any effort to prevent it, he may be regarded as *particeps criminis*. This case, however, presents no such features. There is neither allegation nor finding that the defendant was

negligent in employing or retaining the waiter who committed the assault." For the other point decided in this case, *viz.*, that an innkeeper is not an insurer of his guests against the torts of his servant, see § 2457, note 2, *post*.

In *McGuire v. Grant* (1897) Rap. Jud. Quebec, 2 C. S. 267, 16 L. N. 146, one of the grounds upon which a blacksmith was held liable for an injury sustained by a horse while it was on its way back to its owner was that he had sent it in the charge of a young boy and without any bridle.

In *Lyons v. Laskey* (1889) Montreal L. Rep. 5 Q. B. 5, it was held (affirming [1888] Montreal L. Rep. 4 S. C. 4) that a druggist who had left his shop in charge of an apprentice not qualified, under the Quebec pharmacy act (48 Vict. chap. 36), to mix prescriptions, was liable for an explosion of chemicals which occurred during his absence, as a result of an attempt of the apprentice to prepare a prescription. In the judgment of the majority of the court we find the following remarks: "Dechard was not a licentiate of pharmacy, nor a certified clerk, but only a certified apprentice, and had no authority to dispense prescriptions in the absence of a licentiate (which Lyons was) or of a certified clerk. He should not, therefore, have attempted to prepare the prescription, as he proceeded to do, in the absence of Lyons or other authorized licentiate or certified clerk. Lyons is responsible for the act of his subordinate. It is not sufficient excuse to say that it was Laskey's own request and by his particular direction that the preparation of the prescription was attempted. Laskey must have been, or is presumed to have been, totally ignorant of the science of pharmacy, and therefore ignorant of the danger of mixing the ingredients of the prescription he asked for. It was Lyon's business to have a suitable person present in his shop, with competent knowledge to prevent the danger and avoid the accident. It is not enough, to shift the responsibility, to show that Laskey's own solicitation and erroneous directions led to the disaster. The precautions which the statute interposes are enacted for the protection of the public. Ignorant persons should be protected even against their own rashness or imprudence. Dechard should have refused to act in the matter on Laskey's re-

cated by the decisions collected in the footnote.² In this connection it is important to observe that the fact of incompetency may be

quest, and Lyons must bear the consequences of his imprudence and failure of duty." Church, J., dissented on the ground that Dechard had been persuaded to mix a dangerous compound.

In *Grand Rapids & I. R. Co. v. Ellison* (1888) 117 Ind. 234, 20 N. E. 135, 11 Am. Neg. Cas. 445, an action by a passenger to recover for injuries received in an accident caused by the negligence of a watchman in the employ of the defendant, it was held to be no defense that the defendant had no knowledge of the watchman's incompetency until after the accident. (Rule laid down in discussing the answer of the jury to an interrogation.)

In *Savannah Electric Co. v. Wheeler* (1907) 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38, a demurrer to an allegation which stated that the defendant company knowingly placed a drunken conductor, armed with a pistol, and of bad habits, in charge of a passenger car traversing the streets of a city was overruled. The court also rejected the contention that the homicide was not the natural and probable result of such act on the part of the company.

For other cases in which the rule stated in the text was affirmed, see *De Haven v. Hennessey Bros. & E. Co.* (1905) 69 C. C. A. 620, 137 Fed. 472, 18 Am. Neg. Rep. 695; *Illinois C. R. Co. v. O'Neill* (1910) 100 C. C. A. 658, 177 Fed. 328; *Healey v. Patterson* (1904) 123 Iowa, 73, 98 N. W. 576; *Ewing v. Callahan* (1907) 32 Ky. L. Rep. 46, 105 S. W. 387, rehearing denied in (1907) 32 Ky. L. Rep. 537, 105 S. W. 978; *Warren v. Porter* (1906) 144 Mich. 699, 108 N. W. 435; *Willis v. Metropolitan Street R. Co.* (1902) 76 App. Div. 340, 78 N. Y. Supp. 478.

For cases in which the absence of any evidence of fault in respect of the employment of the wrongdoer was adverted to as a ground for denying the defendant's liability in so far as it depended upon that element, see *Raw v. Cutten* (1832) 9 Bing. 96; *Sanderson v. Collins* [1904] 1 K. B. 628, 632, 73 L. J. K. B. N. S. 358, 52 Week. Rep. 354, 90 L. T. N. S. 243, 20 Times L. R. 249; *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 92, 8 Am. St. Rep. 512, 3 So. 631, 8 Am. Neg. Cas.

302; *Smith v. First Nat. Bank* (1868) 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; *Haskell v. Boston Dist. Messenger Co.* (1906) 190 Mass. 189, 2 L.R.A.(N.S.) 1091, 112 Am. St. Rep. 324, 76 N. E. 215, 5 Ann. Cas. 796, 19 Am. Neg. Rep. 289; *Arzt v. Lit* (1901) 198 Pa. 519, 48 Atl. 297 (error to submit question of defendant's negligence in employing servant, there being no evidence tending to show such negligence).

In *Oakland City Agri. & Industrial Soc. v. Bingham* (1891) 4 Ind. App. 545, 31 N. E. 383, where it was held that a demurrer to a paragraph in the complaint which charged the defendant with negligence in regard to the employment of the servant in question should have been sustained, the court proceeded upon the broad ground that the rule under which a master who fails to exercise reasonable care in selecting a servant, is liable to any other servant who may be injured through the unfitness of the servant so selected has no application to cases in which the injured person is a third person. This decision was clearly erroneous, for the authorities cited in the present section show that the plaintiff was entitled to base his claim either upon the personal or the vicarious responsibility of the defendant.

²In *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881, where the reputation of the servant was that of a reckless and dangerous man, and was a matter of common knowledge in the neighborhood, the master was held to be chargeable with notice of it, after having had the servant nine years in his employ at the place where he had such ill repute.

In *Cox v. Central Vermont R. Co.* (1898) 170 Mass. 129, 49 N. E. 97, an action for the value of grain destroyed by a fire in an elevator, evidence that the watchman in the elevator had been habitually intemperate several years before the fire occurred was held to be admissible in connection with other evidence showing his habits from such period to the time of the fire.

In *Carson v. Canning* (1902) 180 Mass. 461, 62 N. E. 964, where the de-

proved by details of which the master had not and could not have had any knowledge, if his cause to know or suspect the general facts

fendant's servant had absconded and carried off certain chattels which the plaintiff had pledged with the defendant, the plaintiff was allowed by the trial court to recover on the ground that the absconding manager was an unfit man for his trust, and that the defendant could and would have found it out if he had used ordinary care. In order to prove these propositions the plaintiff put in evidence of specific cases of the servant's gambling and intoxication,—including one of his being drunk of a morning when opening the defendant's place of business,—and of other indications of a generally free and extravagant way of living; also evidence that the servant had a reputation corresponding to the alleged facts of his life, and, finally, evidence that the defendant was on terms of personal familiarity with him and to some extent joined him in convivial moments. All of this was excepted to, and afterwards the judge ruled out evidence bearing upon his drinking, except when the defendant was present, or when he went to the office drunk, and what may have been done in a public way at hotels. He also excluded evidence of private gambling. The exception of the defendant to the admission of the evidence received was overruled. One witness, who had testified that the manager had the reputation of living beyond his means and being a "sport" and a gambler, added that he had that reputation "around the building." It was held that the localization of the reputation by the witness, so far from being a ground for excluding the evidence, was a reason for admitting it, as tending to show a reputation or gossip peculiarly within the defendant's reach. The court remarked that, "if the defendant had been informed that in his building the manager was reputed to be a 'sport' and a gambler and living a great deal above his means, he would have neglected the information at his peril."

In *Etson v. Ft. Wayne & B. I. R. Co.* (1896) 110 Mich. 494, 68 N. W. 298, s. c. subsequent appeal (1897) 114 Mich. 605, 72 N. W. 598, a passenger on a street car was injured by a sudden jerk of the car, caused by the motor-

man's losing control of the brake. The motorman was inexperienced, having been intrusted with the operation of the car by the regular motorman. On the first appeal the case was determined against the plaintiff, on the ground that there was no evidence to show that the jerk of the car was not occasioned by some cause for which the defendant was not to blame. The declaration was then amended so as to charge negligence in employing a careless and incompetent motorman, who left his post of duty, and allowed an inexperienced and incompetent person to operate the motor. The evidence showed that the rules of the company forbade a motorman to intrust his car to another man not authorized by the superintendent to run it, and that the man in question had not been so authorized. A verdict for the plaintiff was sustained, the evidence being, in the opinion of the court, sufficient to prove that the jerk resulted from the incompetence of the substitute, and not from mere accident.

In *Culbertson v. Metropolitan Street R. Co.* (1897) 140 Mo. 35, 36 S. W. 834, the fact that the master knew that the servant was in the habit of taking an occasional drink did not charge him with notice of the servant's unfitness for his duties.

In *Fisher v. Waupaca Electric Light & R. Co.* (1910) 141 Wis. 515, 124 N. W. 1005, where the competency of a motorman was in issue, it was held that, in view of his limited experience before the accident in question, evidence of his competency when he first began work was admissible as bearing on his competency at the time when the accident occurred.

In *Vicksburg & J. R. Co. v. Patton* (1856) 31 Miss. 156, 66 Am. Dec. 552, where the plaintiff's horses were run over by a train, it was held that the character of the engineer, as a reckless and untrustworthy agent, might be shown by testimony to the effect that he was a man of dissipated habits, and had previously been in the habit of sounding the whistle unnecessarily, for the purpose of frightening animals and annoying persons residing near the line.

In *St. Louis, I. M. & S. R. Co. v. Stroud* (1899) 67 Ark. 112, 56 S. W.

can be shown by other evidence.³ The burden of proving negligence in respect of the employment or retention of the servant lies on the plaintiff.⁴

The general rule stated above is not applicable where the tortious act in question was done by means of or with relation to an instrumentality of the master which the servant was using for his own purposes at the time when the plaintiff was injured. Under such circumstances it cannot be said the continued employment of an unfit servant was the legal cause of the injury. The master's knowledge that the servant was habitually careless in the management of a given instrumentality has no tendency to prove that he ought to have anticipated that he would use it in contravention of the master's orders.⁵

For a discussion of the circumstances under which a servant who has been injured through the negligence of a fellow servant is entitled to recover on the ground of the unfitness of the fellow servant, see §§ 1083 to 1106, *ante*.

b. Liability as affected by character of work.—The duty of exercising care in employing servants, although it is peculiarly imperative, and has frequently been emphasized, in respect of occupations in which special skill and capacity are required for the proper performance of the functions intrusted to them,⁶ is manifestly

870, an action against a railroad company for damages suffered by the plaintiff in consequence of his expulsion by one of its servants from its station, it was held that an allegation as to the unfitness of the servant might be proved by evidence that he had a bad character as a violent and dangerous man, but that his character in this regard must be shown by evidence as to his general reputation, and not by adducing instances of his misconduct in the course of his employment. Compare also the cases cited in §§ 1096 to 1098, *ante*.

In *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306, it was laid down that the fact of a defaulting servant's incompetency cannot be established by proof of a single act of carelessness or recklessness, committed while the contract was in course of performance. But this statement possibly requires some qualification. For a discussion of the point with reference to actions brought by injured servants, see § 1091, *ante*.

³ *Carson v. Canning* (1902) 180 Mass. 461, 62 N. E. 964.

⁴ *Warren v. Porter* (1906) 144 Mich. 699, 108 N. W. 435 (team was frightened and ran away, owing, as was alleged, to its having been driven on the wrong side of a street car).

⁵ *Doran v. Thomsen* (1908) 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296.

⁶ It was with regard to this aspect of the duty that such observations as those quoted below have been made.

In *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602, where the plaintiff was injured while traveling upon a locomotive, the court remarked: "The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, the *causa causans* of the mischief."

In *Holladay v. Kennard* (1870) 12 Wall. 256, 20 L. ed. 390, involving the liability of a carrier for the loss of

predicable, whatever be the nature of the work for which a servant is engaged.⁷

c. General rule not applicable where servant is the husband of the defendant.—In a case where a guest at a hotel kept by a married woman was assaulted in the course of a personal altercation, by her husband, whom she employed as her servant in the conduct of the establishment, the contention that she might be held liable on the ground of having retained in her service a man whom she knew to be of a brutal and ferocious disposition was rejected. The *ratio decidendi* was that the right to recover against a master in respect of negligence of that description is based upon the theory that he is both entitled and bound to dismiss an unfit servant and compel him to leave the premises. As the hotel in question was the homestead of both spouses, the defendant was precluded from taking this course with regard to her husband.⁸

d. Averments under which evidence of incompetency is admissible.—In several cases the courts seem to have proceeded upon the doctrine that evidence going to show the servant's incompetency is admissible in support of a general averment as to the master's negligence.⁹ But the pleadings in these cases are not reported with sufficient fullness to

goods which he had undertaken to carry across the Western plains of the United States at a time when the Indians were still dangerous, the court approved of an instruction that it was the carrier's duty "to provide for the hazardous business a cool, self-possessed, prudent man, of good judgment and forethought."

In *Sloss-Sheffield Steel & I. Co. v. Bibb* (1910) 164 Ala. 62, 51 So. 345, it was held that an owner of a mine who retained control of the hoisting apparatus while the mine was being worked by an independent contractor owed to the plaintiff, a servant of that contractor, the duty of employing a reasonably qualified hoister to handle the apparatus. If at the time when the plaintiff began work the hoister was already in the service of the owner of the mine, it was his duty to discharge the hoister, if known, actually or constructively, to be incompetent, or, in the alternative, to see that the hoister did not commit any negligent act which might injure the plaintiff.

In *Stephens v. Chausse* (1885) 15 Can. S. C. 379, where the plaintiff had fallen down an elevator shaft, the door

of which had been negligently left open by the operator when he went to lunch, Strong, J., remarked: "It is the duty of the proprietors of elevators to see that they have in their employ careful and competent employees, and if they omit this duty, they are responsible to those who in lawfully using the elevators may suffer from their neglect."

⁷ In all the cases cited in the preceding note, the actual ground upon which the liability of the defendants was affirmed was that the defaulting servants were acting within the scope of their employment. The quoted remarks as to the duty of the defendants were merely made *arguendo*.

⁸ *Curtis v. Dinneen* (1886) 4 Dak. 245, 30 N. W. 148.

⁹ In *Lannen v. Albany Gaslight Co.* (1871) 44 N. Y. 459, the court, taking the position that a gas company which invites customers to give notice of the escape of gas, and keeps in its employ persons to examine and ascertain the location of leaks, is bound, upon receiving notice of a leak, to send a competent agent who knows how to conduct himself in the presence of gas, held that, as the defendant company had

warrant a commentator in citing them as clear authorities for such a doctrine. On the other hand, we find it distinctly laid down in other cases that evidence of the servant's incompetency cannot be introduced unless the complaint includes a specific allegation charging the master with negligence in hiring or retaining him.¹⁰ This seems to be the more reasonable rule of procedure. The specific ground upon which a

sent a person who had, by lighting a match in the cellar where the escape occurred, caused an explosion inflicting injury, it might be held liable, either upon the ground of its failure to select a proper and competent agent, or upon the ground of its responsibility for the carelessness of a competent agent. (So far as the report shows, the complaint did not allege the incompetency of the agent.)

In *Vicksburg & J. R. Co. v. Patton* (1856) 31 Miss. 159, 66 Am. Dec. 552, the opinion merely states that the action was brought to recover for injuries caused by the "negligence, mismanagement, and improper conduct of the company and its agents," and makes no reference to any allegation regarding the incompetency of the servant, a locomotive engineer, through whose negligence some horses were run over. It was held that the trial judge had properly admitted testimony showing that he was a man of dissipated habits and in other ways unfit for his position. The *ratio decidendi* was simply the existence of a duty on the defendant's part to hire competent agents, and the question whether the evidence objected to was admissible under the complaint as it was worded did not receive any adequate discussion.

In *Blumenthal v. Union Electric Co.* (1906) 129 Iowa, 322, 105 N. W. 588, 19 Am. Neg. Rep. 235, where the plaintiff, being frightened by electric flashes which appeared round the forward switch of a street car on which he was a passenger, jumped off and was injured, it was argued that the trial judge had improperly admitted evidence that the conductor had jumped off before the plaintiff, but the court said: "If an experienced and competent conductor would have understood the real condition when the fire appeared, and, exercising the care required by law, would have remained in the car, and, so far as possible, would have prevented the departure therefrom of the deceased, the

evidence complained of was competent on the question of the appellant's negligence in operating the car with that conductor in charge of it. Complaint is made because evidence was received tending to show the inexperience and incompetency of the conductor. What we have already said disposes of the material question involved, for the court instructed that such evidence would be immaterial, unless it was found that such incompetency caused or contributed to the injury."

For other cases in which evidence as to incompetency of the servant was apparently treated as being admissible under complaints which, so far as the reports indicate, contained no explicit allegation regarding the point, see *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881; *Cox v. Central Vermont R. Co.* (1898) 170 Mass. 129, 49 N. E. 97; *Culbertson v. Metropolitan Street R. Co.* (1897) 140 Mo. 35, 36 S. W. 834; *Fisher v. Waupaca Electric Light & R. Co.* (1910) 141 Wis. 515, 124 N. W. 1005 (action stated in opinion to have been brought in respect of "negligence in equipping and operating" a street railway).

¹⁰ In *Dinsmoor v. Wolber* (1899) 85 Ill. App. 152, such evidence was treated as being inadmissible on the ground that it was not responsive to any allegation in the complaint.

In *Fonda v. St. Paul City R. Co.* (1898) 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166, the inadmissibility was referred to two other reasons, *viz.*, (1) that, if the given act was done by the servant in the course of his employment, it was immaterial whether he was habitually careful or negligent; and (2) that the fact of a servant's being habitually careless did not prove that he was negligent on a particular occasion.

In *McBride v. St. Paul City R. Co.* (1898) 72 Minn. 291, 75 N. W. 231, the above case was followed, and an in-

claim is based should be clearly stated in the complaint, and this requirement is not satisfied unless it is so drawn as to show the defendant what particular description of negligence he is charged with.

Evidence going to show the competency of the defaulting servant is clearly admissible in the master's behalf, where he is expressly charged with a want of due care in hiring or retaining that servant. It may be that such evidence is also admissible in defense, where the complaint includes a general averment that the master was negligent in the conduct of his business.¹¹ But the better opinion probably is that the competency of the servant is a matter which should be treated

struction that the competency or incompetency of the trainmen had no bearing upon the liability of the defendant, and that all evidence and argument of counsel in respect thereto must be disregarded, was held to have been rendered erroneous by the introduction of the qualification that the jury might consider any fact that concerned the competency of these servants, which tended to show that the gates of the car in which the plaintiff was caught and injured were not handled in a reasonably careful manner.

In *Patrick v. The J. Q. Adams* (1853) 19 Mo. 73, an action against a steamboat owner to recover for injuries sustained in a collision with the boat, alleged to be due to the negligence of the pilot, it was held to be prejudicial error to allow a witness to testify respecting the character of such pilot, that, as regards recklessness, in many instances he had not, to the witness's own knowledge, used the care he should have used.

¹¹ In *Ficken v. Jones* (1865) 28 Cal. 618, where a judgment for the plaintiff in an action brought to recover for personal injuries inflicted by the cattle of one of the defendants while they were being driven by his employees through the streets of a city was reversed on the ground that the trial judge had refused to admit evidence that the employees were persons of competent skill, the defendants' liability was viewed as turning simply upon the questions whether the drivers were negligent in handling the cattle, and whether the employers were negligent in the conduct of their business. The court observed that the defendants might have exonerated themselves "by showing that the defendant

who had the business in charge at the time performed his duty with proper care and skill; and tending to this end it was admissible to show that he was a person of experience in the business, and had therein proved himself to be prudent, careful, and of competent skill, and in every respect qualified for the duties which he undertook to perform. The proof of this, standing alone, might not have been of much force, but as connected with the facts and circumstances that transpired in driving the cattle through the city, and in the endeavor to capture the steer after his separation from the herd, it might properly have had some weight. As it was incumbent on the defendants, in order to overcome the prima facie case made out against them, to establish that the injury to the plaintiff did not result from want of due care and skill on their part, they should have been permitted to have shown, in the first place, the important fact that Jones was competent, careful, and skilful in the conduct and management of that kind of business. It was competent to make such proof, because the law exacts of those engaged in the business of driving such cattle through a city, by which lives and limbs of people are imperiled, the utmost care and circumspection. If it had been proved that Jones possessed the qualities requisite for the business in which he was employed, then it would to that extent have appeared that the defendants exercised due care, though that alone might not have amounted to enough to have exonerated the defendants from all liability. Whether Jones's assistants were also competent and skilful, and of a number reasonably sufficient, under all the circumstances, it may be, might

as lying outside the scope of the inquiry, unless it is the subject of a specific allegation.¹² If the complaint includes no allegation of that tenor, it would seem that the action should be tried upon the hypothesis that it was intended to base the claim solely upon the doctrine of *respondere superior*. In this point of view the admission of evidence of the servant's incompetency could be justified only under a doctrine which should affirm the right of a jury to infer from it that he was not culpable in respect of the particular act which caused the injury. For such a doctrine there is no authority.

e. Liability considered with relation to the principle, Respondere superior.—As the right to recover against a master on the ground of the incompetency of the servant whose act occasioned the given injury exists independently of the operation of the doctrine, *Respondere superior*, it follows that, in an action in which the claim is specifically based upon the ground of the master's negligence, it is not necessary to allege or prove that the given tort was committed within the scope of the duties of the servant in question.¹³ On the other hand, where the action proceeds upon the theory of vicarious liability, the plaintiff need not allege or prove that the servant in question was employed by the defendant with a knowledge of his incompetency.¹⁴

have been a proper subject of inquiry." No attempt was made to deal with the arguments of counsel,—*viz.*, that evidence of competency was inadmissible because there was no express allegation of a want of care in respect of selecting the employee in question (see note 9, *supra*), and that, if he was really negligent as to the driving of the cattle at the particular moment when the injury was sustained, the fact of his being competent would constitute no defense to an action against his employer. Assuming that the employees in question were servants, and not independent contractors (a point which, it must be admitted, is not entirely clear from the opinion of the court), this ruling is irreconcilable with the decisions cited in the next note, and would probably not be approved in any other jurisdiction.

¹² *Young v. Crystal Ice Co.* (1910) 83 Conn. 718, 76 Atl. 514; *American Straw Board Co. v. Smith* (1901) 94 Md. 19, 50 Atl. 414.

In *Hayes v. Millar* (1874) 77 Pa. 238, 18 Am. Rep. 445, the court made the following remarks: "It is very important that the principle of *respondere superior* should be upheld and maintained for the sake of the general se-

curity of society, yet it is often attended with much seeming hardship. To visit a man with heavy damages for the negligence of a servant, when he is able to show that he exercised all possible care and precaution in the selection of him, is apt to strike the common mind as unjust. Hence, unless a party claiming to recover for a loss arising from the acts or omissions of the servant chooses himself to make his incompetency one of his grounds of recovery, there is very great danger that a jury will be misled by such evidence from the true point of the controversy, and give entirely too much weight to the evidence of character. They will not confine it to its true bearing upon the fact of negligence in the particular case, but set it up as *per se* a justification of the master. We think, therefore, that the evidence in this case was erroneously admitted."

Compare also the cases cited in note 2 to the preceding section.

¹³ *Missouri, K. & T. R. Co. v. Freeman* (1903) — Tex. Civ. App. —, 73 S. W. 542. For facts, see note 1, *supra*.

¹⁴ See cases cited in § 2224, note 10, *post*.

2223. Liability of master predicated on the ground of negligence in regard to other matters.—The cases in which the master's liability has been considered in this point of view have had reference to the following situations:

(1) Failure to employ proper means for the performance of the work, from which the injury complained of resulted.¹

(2) Failure to give the defaulting servant certain information or instructions regarding the performance of his duties.²

¹In *Geer v. Darrow* (1891) 61 Conn. 220, 23 Atl. 1087, the defendant was employed by a city to build a retaining wall, for the purpose of widening the traveled part of a street. The work required the use of a heavy derrick, supported by four guy ropes, one of which crossed the street at nearly right angles, but so placed as not to obstruct travel. In lifting heavy stones over the street, the guy rope, unless supported by a prop, would slacken and drop so as to interfere with travel for a few moments, and when the stone was dropped in its place the rebound of the derrick would tighten the rope with considerable force. In so rebounding it caught the top of a vehicle in which the plaintiff was riding, and overturned it, and injured her. Held, that the failure to have the guy ropes supported by a prop, which was essential to the safety of travel on the street, was personal negligence on the part of the defendant in conducting the work.

In *Johnston v. Stevens* (1908) 123 App. Div. 208, 108 N. Y. Supp. 407, a dismissal of the complaint was held to be error, where the evidence tended to prove that, owing to the unsafe and unstable character of a wagon, a portion of the load fell upon the team and caused it to run away.

In *Cutler v. Morrison* (1910) 43 Pa. Super. Ct. 55, where the fall of a bucket of hot pitch was caused by the fall of a workman who lost his balance while carrying the bucket, it was held that, although the occurrence was a mere accident as regards the workman, his employer would be responsible for the injuries inflicted upon a child by the pitch, if it appeared that the accident happened from his negligence in failing to provide a reasonably secure way for the workman to travel upon.

In *Marande v. Texas & P. R. Co.*

(1900) 42 C. C. A. 317, 102 Fed. 246, where a fire broke out among cotton stored on defendant's wharf, and could have been extinguished before it spread to the cars containing plaintiffs' cotton, if defendant's watchman, in his excitement, had not failed to fully uncoil the hose before turning on the hydrant, it was held that such facts were not sufficient to show that defendant was negligent in not providing proper appliances and exercising reasonable diligence for the extinguishment of the fire.

In *Martin v. Richards* (1892) 155 Mass. 381, 29 N. E. 591, an action against a landlord for damages caused by the discharge of unhealthy odors from a privy vault, the court, advert- ing to the question whether, taking the evidence excluded and which should have been admitted, there would be enough to warrant the jury in finding that, at the time of letting, the defendant knew the source of danger, and knew or ought to have known that the danger existed, observed: "On this question the evidence excluded has a very important bearing. If the condition of the vault in 1886 was a dangerous one, and the defendant's attention was called to it, and he undertook to remedy it, and used means which were ineffectual for that purpose, and which he knew or ought to have known were ineffectual, he cannot escape liability by employing a servant to do the work, or escape the consequences of that servant's neglect to do the work properly. The knowledge of the condition of the vault which the servant had must be imputed to the master."

²In *Mitchell v. Boston & M. R. Co.* (1894) 68 N. H. 96, 34 Atl. 674, where the defendant was held liable for injuries received by a person who, after alighting from a stationary car, in which he had been examining some cattle, was struck by an engine while he was on

(3) Failure to take precautions appropriate to prevent the commission of acts, or the occurrence of events, similar to that which caused the injury complained of.³ The New York decision referred to in

a footpath which crossed an adjoining track, the court reasoned thus: "The engineer's personal ignorance of the situation would not excuse the defendants. If they knew the use made of the pathway, it would not be important whether their servant, the engineer, knew it or not. If he knew it, and, in view of it, failed to act as a person of average prudence would, his individual fault was that of the defendants' servant, for which they are responsible. If he neither knew, nor reasonably could have known, the situation, and was therefore personally without fault, the negligence was more immediately and directly that of the defendants, in not informing him of the pathway and of its use. A master is as responsible for injuries caused by his negligence in not informing his servant of danger known to him, and not known by the servant, as he is for injuries caused by the personal negligence of the servant. He is not less responsible for his own negligence than he is for that of his servants."

In *Carman v. New York* (1862; Super. Ct.) 14 Abb. Pr. 301, an action brought to recover damages for trees which the defendant's workmen had by mistake cut down on the plaintiff's land, a complaint was held not to be demurrable which alleged that the defendant, owner of land adjoining the plaintiff's land, employed workmen to cut trees on his own land, but omitted to employ competent persons to superintend the work, or properly to instruct them, so that they might distinguish his boundaries.

In *Watkins v. Pennsylvania R. Co.* (1892) 21 D. C. 1, the plaintiff had bought from the railway company a ticket which entitled him to be carried over a connecting line. It was specially arranged that, when he reached the point of transfer, he was to be forwarded by a certain train, upon which, in the absence of that arrangement, he would not have had any right to travel. When he undertook, at the point of transfer, to go on the platform from which the train started, he was forcibly stopped by the gatekeeper, acting in

pursuance of directions which he had received to enforce a general rule which prohibited passengers from passing through the gate unless their tickets entitled them to travel by a particular train which was ready. For the assault thus committed the defendant company was held liable on the ground that it had failed to inform the gatekeeper of the special circumstances which entitled the plaintiff to go through the gate.

³ In *Fletcher v. Baltimore & P. R. Co.* (1897) 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35, the servants of a railway company had been in the habit of throwing sticks of wood for their own use from the train which brought them back each day from the place where they worked. Held that, although such acts were beyond the scope of their employment and totally disconnected therefrom, the company's liability for an injury received by a person who was injured by one of the sticks thrown might properly be predicated on the ground of its having knowingly permitted the continuance of a dangerous practice. The court thus commented on *Walton v. New York Cent. Sleeping Car Co.* (1885) 139 Mass. 556, 2 N. E. 101, which had been cited by counsel for defendant: "In that case there was but a single act, that of throwing the bundle from the train by the porter of the parlor car; there was no evidence that any officer of the company on the train had the least reason to suppose the porter intended to do the act or that it had been habitually done before; no evidence of any custom known to the defendant by which, at that or any other particular point, the porter of the car habitually and frequently threw bundles from the moving train. Acquiescence on the part of the defendant after knowledge of the custom could not, from the one act, be imputed to it. Very probably, a single act so performed by the porter without the knowledge or assent of the defendant—performed for his own purposes, and not in the scope of his employment, unexpected and wholly disconnected from his duties—would not render the

the foot note indicates that the circumstances presented by a case which falls under this head may sometimes be such as to admit of the

defendant liable for the injuries resulting to a third person from such act. If, however, it had been proven in that case that it was the custom on the part of the porters on that car to throw these bundles off while the train was in motion, and that this custom was known to the officers of the company, and was permitted by them, with the simple injunction that the porters should take care and not hurt anybody, and if the jury found that the act was one dangerous in its nature, we think there is no doubt that the defendant would be liable for the injuries resulting from any one of such acts.

. . . Upon the whole, we think it was a question for the jury to say whether the custom was proved; whether, if proved, it was known to and acquiesced in by those in charge of the train as servants of the company; whether it was a dangerous act, from which injury to a person on the street might reasonably be apprehended, and if so, whether there was a failure on the part of the defendant to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act." The conclusion arrived at was that the action of the trial judge in directing a verdict for the defendant had been erroneously sustained by the court of appeals for the District of Columbia. See (1895) 6 App. D. C. 385. There the decision was put upon the ground that the relation of master and servant had been suspended for the day, when the return journey of the negligent workman began, and that the act in question was independent of the duties imposed upon him by his employment.

In *Hogle v. H. H. Franklin Mfg. Co.* (1910) 199 N. Y. 388, 32 L.R.A.(N.S.) 1038, 92 N. E. 794, affirming (1908) 128 App. Div. 403, 112 N. Y. Supp. 881, an action for injuries sustained by a person who, while in her garden, was struck by a piece of iron thrown from an adjoining factory, the evidence was that the defendant's workmen had daily, for a year or more, thrown pieces of iron from the windows of the factory into the garden; that the master had been informed of the practice, and that the precautions he had taken to prevent

it were not effective. Held, that the defendant might properly be found liable, although the act which caused the injury had been done maliciously, and not within the scope of the employment of the tort-feasor; that he could not complain of an instruction that a master, knowing that a servant habitually throws stones at another, must do what he reasonably can to prevent the practice; that the jury must find whether the master used reasonable efforts to prevent the practice by his servants; and that the court had properly refused to rule that there could be "no recovery in this case unless the jury should find that this piece of iron was thrown upon plaintiff's premises as a necessary consequence of the work being carried on there, or as an incident to it." In delivering the opinion of the court Vann, J., said: "While we all think that the recovery should be sustained, we differ somewhat as to the exact theory upon which it should be based. No request that the plaintiff should elect between the theory of nuisance and that of negligence was made at the trial, and the complaint was adapted to either. The trial judge did not name the action, but treated it as an action on the case. If the evidence established a cause of action for negligence in failing to take reasonable precautions to suppress the evil practice, such as closing the windows, or screening them with wire netting, or setting a watch upon the men, or some other of like character, the defendant cannot complain. Such negligence would rest not on the throwing of the missiles, as they were not thrown in furtherance of the master's business, but on not using reasonable care to prevent them from being thrown. In other words, it would rest on a relative, and not on an absolute duty. If, on the other hand, the evidence established an action for nuisance, the rulings of the court were more favorable to the defendant than it was entitled to, because the liability for injury from a nuisance is not relative, but absolute, and proof of negligence on the one hand, and the absence thereof on the other, is not required. The line between protracted and habitual negligence and nuisance is

master's being charged with liability on the ground either of negligence or of nuisance.

not easily drawn, and facts may exist which call for damages on either theory when the pleadings are appropriate, as in this case, to either kind of relief. High authority is not wanting to sustain the judgment below on the ground of negligence pure and simple." The court thus referred to the *Fletcher Case*, *supra*, and proceeded thus: "The defendant had reason to believe that missiles would be thrown from its premises upon those or the plaintiff in the future, as they had been continuously in the past, and that they might hurt someone. It took some precautions to prevent the evil, but they were not effective, and the defendant knew they were not. It could not remain quiet and let the practice go on. The jury could properly say that, in the exercise of reasonable care in the management of its own property so as to prevent an injury reasonably to be expected to its neighbor's property and persons, it should have taken further precautions, and that it was negligent in not having done so. This would lead to an affirmation on the ground of negligence,—the real ground upon which the case was sent to the jury. I am personally of the opinion, however, that the practice complained of was a nuisance as matter of fact, if the jury so found. *Sic utere tuo ut alienum non lædas* is an old maxim of the law, which applies both to the use made and the use knowingly suffered to be made of one's own property while he is in full control thereof. It is a trespass for the owner of one lot to throw anything upon the adjoining lot of his neighbor. The defendant furnished the place from which and the means with which habitual trespasses, calculated to inflict personal injury, were committed on the adjoining premises of the plaintiff. The defendant knew of the practice, and knew that it had existed a long time, and while some efforts were made to prevent it, the evil continued, and even grew worse. An occasional trespass of this kind committed by the defendant's workmen would not warrant a jury in finding it guilty of suffering or maintaining a nuisance, but when the practice became habitual, and the injury was direct, substantial, and well known, I think

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the duty of the defendant became absolute, and that it was guilty of suffering a nuisance to continue on its land if it did not prevent the evil. In a recent case, without attempting a general definition of a nuisance, we said that 'if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to almost a certainty, it should be held a nuisance as matter of law.' *Melker v. New York* (1908) 190 N. Y. 481, 488, 16 L.R.A.(N.S.) 621, 83 N. E. 565, 13 Ann. Cas. 544. See also *Sullivan v. Dunham* (1900) 161 N. Y. 290, 47 L.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923, 7 Am. Neg. Rep. 126; *McCarty v. Natural Carbonic Gas Co.* (1907) 189 N. Y. 40, 13 L.R.A.(N.S.) 465, 81 N. E. 549, 12 Ann. Cas. 840. While that definition implies that the act is that of the defendant, I think the same rule should apply when a series of acts extending over many months is committed by men in the employment of the defendant, to its knowledge, with its personal property and while standing on its premises, even if the acts are without the line of its business. Although the defendant did not commit the injuries nor sanction them, it suffered them to continue for so long a period as to make them its own, or so at least the jury could find." On the first appeal to the supreme court, a new trial had been ordered, on the ground that the verdict was not sustainable, because it was based upon the theory that the act which caused the injury was done by a servant in the course of his employment, whereas there was no specific evidence to show whether the tort-feasor was a servant or a chance visitor. See (1907) 105 N. Y. Supp. 1094.

In *Lowndes v. City Nat. Bank* (1909) 82 Conn. 8, 22 L.R.A.(N.S.) 408, 72 Atl. 150, the directors of a bank were so negligent in respect of their duty of supervision and control that they permitted the cashier to have complete control over the business, the consequence

being that he was able for a long time to commit various irregularities. Amongst other improper acts he had, in the name of a company of which he was manager, issued certain worthless checks, which were paid by the bank and eventually taken up by him in exchange for his checks, on the account of an estate of which he was administrator. Two notes of his company being presented for payment when the company had no money on deposit, they were not paid by the bank; but the cashier took them up by drawing on the account of the estate. The liability of the bank for the sum so drawn was affirmed on the ground that, although it had received no benefit from the transactions, the directors' negligence was accountable for the cashier's opportunity to commit irregularities.

In *Baker v. Kinsey* (1869) 38 Cal. 631, 99 Am. Dec. 438, where the plaintiff while passing the toll house at a bridge was bitten by a dog belonging to the toll gatherer, two of the arguments put forward on behalf of the plaintiff were: (1) That the defendant, being one of the proprietors of the bridge, had control over it, and could have forbidden and prevented the keeping of a vicious dog by his servant in possession of the bridge, and ought to have done so if he knew the dog was vicious, which, as was further argued, must be held to have been the actual situation, because his agent knew the disposition of the dog; and (2) that, being one of the proprietors of the bridge, he was bound to see that it was kept in repair and clear of obstructions, and in all respects safe and fit for the use of the public; which duty, as was further argued, included the further duty of seeing that no vicious dogs were allowed to be about the toll house, rendering an approach to it, for the purpose of paying toll, dangerous to the persons of travelers. But the court said: "The control which Kinsey had over the bridge and toll house was not such an immediate or actual control as would constitute him the keeper or harbinger of such domestic animals as might at any time be found on the premises. In *Wilkinson v. Parrott* (1867) 32 Cal. 102, it was claimed that the dog, although kept and harbored upon the premises where Parrott resided, and over which he therefore had complete dominion, was so kept by one of his

servants; yet, it appearing that Parrott knew that the dog was kept about his premises, and that he was vicious, the fact that the property in the dog may have been in the servant was not considered as relieving Parrott from responsibility. The facts here, however, are widely different. Kinsey was not in the actual possession and control of the toll house, nor did he know that the dog was being kept or harbored there by his servant, nor did he know the character of the dog. The facts, therefore, and all of the facts upon which Parrott was held to be a keeper of the dog, within the meaning of the law, are entirely wanting in this case. Nor do we think that the dog can be considered as an obstruction to safe traveling across the bridge, within any rule of law as to the obligation of Kinsey to keep the bridge in a safe condition. But, accepting the dog as an obstruction, the plaintiff must still fail of a case, for the obstruction is not shown to have been put there by Kinsey's direction, and the nature of Dyer's employment, for aught that appears, was not such as to authorize or require it. Suppose Dyer had wilfully taken up a plank in the bridge, without any occasion to do so, for the purpose of repairs, or otherwise, and without the knowledge or direction of Kinsey, and, by reason thereof, the plaintiff had sustained his injury, could there have been any pretense for holding Kinsey responsible? There could not, is clear from the cases already cited, for the act would not have been within the general scope of Dyer's duty or employment, nor within any express authority given by Kinsey."

In *Doran v. Thomsen* (1908) 76 N. J. L. 754, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, where the defendant was sued for an injury caused by his automobile, it was instructed that, if the machine had been bought for his children's use, the mere fact that, at the time when the injury was inflicted, it was being operated by one of them for his own amusement, would not protect the defendant, if the evidence were such as to charge him with personal fault in respect of having intrusted a dangerous machine to an incompetent person. Under such circumstances the right of action would be predicated not upon the ground of a vicarious responsibility for the negligence of a

(4) Failure to prevent the commission of the actual tort which caused the injury.⁴

The right to recover upon any of the grounds above enumerated is, of course, conditional upon the evidence being such as to warrant the conclusion that the negligence as proved was the juristic cause of the injury complained of.⁵

servant, but upon the ground of the defendant's own negligence.

⁴In *M'Laughlin v. Pryor* (1842) 4 Mann. & G. 58, 4 Scott, N. R. 655, Car. & M. 354, 11 L. J. C. P. N. S. 169, where the master had sat upon the box seat of the carriage, and seen, without remonstrance, the postboys' attempt to force their way into a line of carriages, he was held liable in trespass for the injury done by them.

In *Boulard v. Calhoun* (1858) 13 La. Ann. 445, the defendant's manager had, with the assistance of some of the slaves, destroyed property belonging to the plaintiff. The evidence was that the defendant had been warned by certain persons that the tortious act was contemplated by his manager, but that he himself disapproved of the project, and that he had no notice of the intention of his manager to employ any of his slaves in its execution. Held, that he might properly be held liable on the ground that, after having been warned as to the manager's purpose, he ought to have peremptorily forbidden the taking the slaves, and that, as he had not done this, he was responsible for the damage sustained by the plaintiff.

In *Thompson v. Cabot* (1907; N. S. W.) 24 W. N. 40, an action for trespass, it appeared that the defendant had directed her servant, B, to get wood and water. The plaintiff's horse, which was in the yard with the defendant's horses, was taken for this purpose by B., and drowned while it was being used. The defendant saw B. so using the horse,

and took no steps to stop him. Held, that defendant was liable for the act of her servant.

⁵In *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun, 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107, where some unknown person sent out onto the main track of a railway an engine which had been left on a siding, it was urged on behalf of the plaintiff, a passenger on a train with which the engine collided: "Conceding the engine was moved maliciously by an employee of the defendant, or other person, yet the negligent act of the defendant in leaving where it was, a dangerous machine with fire in it, and without an attendant, was one of the concurring or proximate causes of the injury to the plaintiff, and hence that plaintiff was entitled to recover." But the court said: "The injury was not the natural or ordinary result of such an act. It could not have been foreseen. Between the alleged negligence of defendant and the accident intervened a wilful, malicious, and criminal act of a third person, which caused the injury and broke the connection between defendant's negligence and the accident. In fact, some person stole defendant's engine, and sent it flying up the track, and this wicked, criminal act was the cause of the injury to the plaintiff, and defendant's act in leaving the engine where the criminal could start it was in no sense the proximate cause of the injury, or an act which ordinarily or naturally could have produced it."

CHAPTER XCII.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER TO THIRD PERSONS IN RESPECT OF THE TORTS OF HIS SERVANTS. INTRODUCTORY CHAPTER.

- 2224. General rule stated.
- 2225. Judicial statements of the general rule.
- 2225a. Text-book statements judicially approved.
- 2226. Various phrases used in defining the acts to which the master's liability extends.
- 2227. Same subject further discussed.
- 2228. Liability of a master for torts committed by his slaves.
 - a. Liability in common-law jurisdictions.
 - b. In civil-law jurisdictions.
- 2229. Imputation of a servant's knowledge to his master.
- 2230. Misconduct of a servant as a bar to an action by the master.
- 2231. Indemnification of master by defaulting servant.
- 2232. Conflict of laws.

2224. General rule stated.—The rule applied in nearly all the jurisdictions with which we are concerned in the present treatise may be formulated thus: A master is responsible for injuries occasioned to third persons by any negligence or wilful misconduct of which his servants are guilty while acting within the scope of their employment.¹ The responsibility thus predicated has been designated as “vicarious,”² or “constructive.”³ It has also been designated by the

¹ “The most general rule is, *Culpa tenet suos auctores*, which is a rule deeply founded in justice, that he who is in fault should alone be liable for the consequences. But then there has been clearly established an exception to this general rule, indicated by the maxims, *Qui facit per alium facit per se*, and *Respondeat superior*.” Lord Benholme in *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282.

² A very convenient expression used in Pollock on Torts, Webb's Am. ed. p. 97, and already adopted to some extent by the courts. See, for example, *Mire v. East Louisiana R. Co.* (1890) 42 La. Ann. 385, 7 So. 473; *Ploof v. Putnam* (1909) 83 Vt. 252, 26 L.R.A. (N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277.

³ *Whitfield v. Le Despencer* (1778) Cowp. pt. 2, p. 763, adverts to “constructive negligence by the act of serv-

terms "imposed" and "imputed."⁴ It is recognized by courts both of law and equity.⁵ It exists "wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master."⁶ Nor does it depend in any wise upon the stipulations of the contract of hiring.⁷

As the liability predicated under this rule is an inseparable legal incident of the relationship between the master and the servant, it follows that, in a case where the tort complained of is shown to have been within the scope of the tort-feasor's employment, none of the following circumstances affect the right of recovery: "The presence or absence of the master when the wrongful act is committed, and whether it is done with or without direct authority;"⁸ the motive with which the wrongful act was done;⁹ the master's knowledge or ig-

nance," and to "neglect in the master by his own act, or constructively so, by the fault of his servant."

This terminology was adopted by Mr. Paley in his treatise on Agency. See for example p. 306 (principal's liability limited to acts done under his "constructive command") and p. 299 ("constructive negligence or misconduct.") But in spite of its manifest aptness in relation to the subject-matter, it has very seldom been used by the courts.

⁴ *Penas v. Chicago, M. & St. P. R. Co.* (1910) 112 Minn. 203, 30 L.R.A. (N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926, 929.

⁵ Lord Kenyon in *Doe ex dem. Willis v. Martin* (1790) 4 T. R. 39, 66, 2 Revised Rep. 324. The statement was made with reference to the relationship of principal and agent; but it is obviously applicable to that of master and servant also.

⁶ *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 485, 14 L. ed. 502, 509.

⁷ *Ward v. Young* (1884) 42 Ark. 542, quoting with approval the statement in Cooley on Torts, * 532, that it is "immaterial to the injured person what the contract of service is, how long it is to continue, what compensation is to be paid for it, or what mutual covenants the parties had for their own protection."

⁸ *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 891; *Marcus v. Gimbel Bros.* (1911) 231 Pa. 200, 80 Atl. 75.

For other cases in which the immateriality of the factor of the master's

presence or absence was asserted, see *Keith v. Keir, F. C.* 1810-12, p. 679 (Sc. Ct. of Sess.); *Shaw v. Reed* (1845) 9 Watts & S. 72; *Geer v. Darrow* (1891) 61 Conn. 220, 23 Atl. 1087; *Wade v. Thayer* (1871) 40 Cal. 578; *Craven v. Bloomingdale* (1902) 171 N. Y. 439, 442, 64 N. E. 169; *Echols v. Dodd* (1857) 20 Tex. 191.

In *Korah v. Ottawa* (1863) 32 Ill. 121, 83 Am. Dec. 255, where the fact that the master of a canal boat was not on board the boat at the time an injury to a bridge resulted from the negligence of his crew, who were on board, was held not to excuse him from liability for their neglect, the circumstance that he was at the time on the towpath and in immediate command of the crew was the element specifically relied upon by the court as a ground for its decision upon this point. But under the doctrine applied in the decisions cited above, it was clear that the element was wholly immaterial.

⁹ "Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequence, regardless of the motives which induced the adoption of the means, even though the means employed were outside of his authority and against the express orders of the master." *Pittsburgh, O. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849. See also cases cited in § 2285.

norance of the given act;¹⁰ the master's freedom from personal fault, whether it be in respect of the hiring or retention of the servant in question,¹¹ or in respect of some other matter pertaining to the conduct of his affairs.¹²

¹⁰ *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Noble v. Cunningham* (1874) 74 Ill. 51; *Whaley v. Citizens' Nat. Bank* (1905) 23 Pa. Super. Ct. 531.

¹¹ *Haywood v. Hedrick* (1883) 94 Ind. 340; *Ewing v. Callahan* (1907) 32 Ky. L. Rep. 46, 105 S. W. 387, rehearing denied in (1907) 32 Ky. L. Rep. 537, 105 S. W. 978; *Culbertson v. Metropolitan Street R. Co.* (1897) 140 Mo. 35, 36 S. W. 834; *Shaw v. Reed* (1845) 9 Watts & S. 72; *St. Louis & S. W. R. Co. v. Miller* (1901) 27 Tex. Civ. App. 344, 66 S. W. 139 (instruction that the defendant was not liable if it had exercised due care in appointing its servants, held to have been properly refused); *Dansey v. Richardson* (1854) 3 El. & Bl. 144, 2 C. L. Rep. 1442, 23 L. J. Q. B. N. S. 217, 18 Jur. 721 (where the sole controversy between the members of an equally divided court was whether the general rule was applicable in an action to recover the value of property lost by a guest at a lodging house, owing to the negligence of the defendant's servant. See § 2339, *post*).

In *Spinney v. Boston Elev. R. Co.* (1905) 188 Mass. 30, 73 N. E. 1021, it was remarked that if the particular act of misconduct to which the claim has reference was within the scope of the servant's employment, the master must answer for it, "whether the servant was competent or incompetent and whether or not the master might reasonably have known of his incompetency."

In *Shafer v. Lacock* (1895) 168 Pa. 497, 29 L.R.A. 254, 32 Atl. 44, the court observed: "The proposition that if the defendants furnished a proper fire pot, and competent and careful workmen, they are not responsible to the plaintiff for the loss he sustained through the negligence of their servants, is not applicable to the case. The relation between the parties is not that of master and servant, and the duties which the former owes to the latter need no consideration in the decision of the questions involved in this issue."

In *Armil v. Chicago, B. & Q. R. Co.* (1886) 70 Iowa, 130, 30 N. W. 42, the

plaintiff's intestate, when walking on a street over which the defendant had a right of way, was run over by one of defendant's locomotives while it was in the hands of a "hostler" for the purpose of being cleaned. It was not claimed by plaintiff that defendant was negligent because it moved the engine, the grounds on which the recovery was sought being the negligent manner of moving it and the inexperience of the person in charge. Held, that the jury had been correctly instructed that if the engine was properly handled, and the usual signal given when it was moved, and the rate of speed was not too great, it was immaterial whether the person in charge of the engine was inexperienced or otherwise, except in so far as that may go to show whether proper signals were given or not. The first portion of the instruction was clearly unexceptionable for assuming that if the incidents of the transaction were those posited, the most experienced engineer could not, as the court remarked, have done any more than the hostler. But the qualification introduced with regard to the bearing of the hostler's inexperience upon the question whether he had given the proper signals was clearly erroneous. This objection was not adverted to by the court.

¹² In *Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 299, 95 Am. Dec. 489, it was laid down that the fact that a railroad company has rules and by-laws prohibiting the performance of wrongful and dangerous acts in the management of its locomotives and trains, or that particular instructions have been given as to how to do a particular thing, does not absolve the railroad company from liability for the improper performance of his duties by an employee in the performance of an act incident to his employment.

In *Healy v. Johnson* (1905) 127 Iowa, 221, 103 N. W. 92, an action for injuries caused by a runaway horse, it was held to be error to permit the defendant to show that he provided a hitching strap and weight by which to secure the horse when left in the street, and instructed

2225. Judicial statements of the general rule.—The language used by judges in enunciating the rule with reference to its affirmative aspects is exemplified by such statements as these.

"Though I am not bound by the act of a stranger in any case, yet if my servant doth anything prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business."¹

"The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."²

"A master is liable for the tortious acts of his servant done in the course of his employment and within the general scope of his authority."³

"At common law, the master is responsible for the wrongful acts of his servant done in the execution of the authority given by the master and for the purpose of performing what the master has directed, whether the wrong done be occasioned by the mere negligence of the servant, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner."⁴

"It has been established, on much consideration, as one of the gen-

the employee who attended to the delivery of goods to use it. The court said: "This was immaterial, and had the tendency to suggest to the jury that if the defendant had provided the proper means for fastening the horse when left in the street, and had given his employee proper directions in respect to it, he had done his full duty, and was not liable for the employee's negligence. This, as we have said, was not the law. So far as his personal conduct is concerned, he may have done all that prudence and care would suggest; but when he placed the horse and wagon in control of his servant, and sent him out to deliver goods, the servant's negligence in the performance of that duty was his negligence, and he cannot show his own personal care and prudence on defense to a claim for damages occasioned by such negligence on the servant's part."

¹Holt, Ch. J., in *Turbervil v. Stamp* (1698) Comb. 459.

²*Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. (Exch. Ch.) 259, 12 Eng. Rul. Cas. 298. This statement was cited with approval by Lord

Selborne in *Houldsworth v. Glasgow Bank* (1880) 5 App. Cas. 317, 42 L. T. N. S. 194, 28 Week. Rep. 677, by Bowen, L. J. in *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. 714, 717, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, and by Lord Brampton in *Whitechurch v. Cavanaugh* (1902) A. C. 117, 85 L. T. N. S. 349, 17 Times L. R. 746, 71 L. J. K. B. N. S. 400, 50 Week. Rep. 218. As to the significance of the qualification embodied in the phrase "for the master's benefit," see § 2395, *post*.

³*Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 891; *Marcus v. Gimbel Bros.* (1911) 231 Pa. 200, 80 Atl. 75.

⁴*George v. Gobey* (1880) 128 Mass. 289, 35 Am. Rep. 376. This phraseology, which was adopted from *Howe v. Newmarch* (1866) 12 Allen, 49, also occurs in *McCarthy v. Timmins* (1901) 178 Mass. 378, 380, 86 Am. St. Rep. 490, 59 N. E. 1038; *Rowell v. Boston & M. R. Co.* (1895) 68 N. H. 358, 44 Atl. 488.

eral principles of the law of agency, that the principal is liable civilly in damages for the torts of his agent done for his benefit in the prosecution of his business and within the scope of the agent's employment; and this rule has been extended to wilful trespasses, fraudulent misrepresentations, malicious prosecutions, and libels."⁵

"The . . . well-settled rule of this court, whatever may be the rule in other jurisdictions, [is] that a master is responsible for the torts of his servant, done in the course of his employment, with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done negligently or wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master."⁶

"For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible."⁷

"The rule, well established and recognized in all the cases, and to which there are no exceptions, is that, to charge the master for the wrongful acts of the servant, they must have been committed by the express authority of the master, or in his service, and within the scope of the employment and authority of the servant. If an act is done by a servant in the business of the master and within the scope of his employment, the master is liable to third persons for any abuse of the authority conferred, or injuries resulting from any error of judgment or mistake of facts by the servant, as well as for those resulting from a negligent or reckless performance of his duties."⁸

The scope of the doctrine in a negative point of view is illustrated by the following statements:

"The master is not liable for any negligence or tort of the servant

⁵ *Lothrop v. Adams* (1882) 133 Mass. 471, 43 Am. Rep. 528.

⁶ *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 106 Minn. 51, 18 L.R.A. (N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047; *Penas v. Chicago, M. & St. P. R. Co.* 112 Minn. 203, 30 L.R.A. (N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926.

⁷ *Stone v. Hills* (1877) 45 Conn. 47, 29 Am. Rep. 635; statement adopted in *Waller v. Great Northern R. Co.* (1904) 18 S. D. 420, 70 L.R.A. 731, 735, 112 Am. St. Rep. 794, 100 N. W. 1097.

⁸ *Isaacs v. Third Ave. R. Co.* (1872) 47 N. Y. 122, 7 Am. Rep. 418.

which is not in the course of the employment, for such negligence or tort cannot be considered as in any way the act of the master.”⁹

The master is “not responsible for the acts of persons who are not his servants in respect of particular acts,—that is, who are not acting within the scope of their employment in doing those acts.”¹⁰

“In regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do. The reason is that in respect to such matters he is not a servant.”¹¹

“If the servant goes outside the scope of his employment, and does a wrongful act for a purpose of his own, and not in the performance of his master’s business, the master is not responsible for such act.”¹²

“If the act is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible.”¹³

“Where a servant steps aside from his master’s business, and does an act not connected with the business, which is hurtful to another, . . . the master is not liable for such act, for the reason that, having left his employer’s business, the relation of master and servant did not exist as to the wrongful act.”¹⁴

“If . . . the wrongful act resulting in the injury was done by the servant outside of his employment, and not in pursuance thereof, but in order to gratify the ill will or malice of the servant, the master is not liable, although the servant may at the time be in his employment.”¹⁵

“In an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable.”¹⁶

“For a trespass committed by the servant wilfully, or of his own malice, under color of discharging the duties of his employment, or

⁹ Blackburn, J., in *Williams v. Jones* Mass. 378, 86 Am. St. Rep. 490, 59 N. (1865) 3 Hurlst. & C. 602, 610. E. 1038.

¹⁰ Collins, M. R., in *Sanderson v. Col-¹⁴ Pittsburgh, C. & St. L. R. Co. v. lins* [1904] 1 K. B. (C. A.) 628, 631. *Kirk* (1885) 102 Ind. 399, 52 Am.

¹¹ *Bryant v. Rich* (1870) 106 Mass. Rep. 675, 1 N. E. 849.

188, 8 Am. Rep. 311.
¹⁵ *Marcus v. Gimbel Bros.* (1911) 231 Pa. 200, 80 Atl. 75.

¹² *George v. Gobey* (1880) 128 Mass. 289, 35 Am. Rep. 376.
¹⁶ *Howe v. Newmarch* (1866) 12 Al-

¹³ *McCarthy v. Timmins* (1901) 178 len, 49.

where he has gone beyond the line of his duty to commit a trespass, the master will not be liable.”¹⁷

“For the wilful, wanton, or reckless acts of the servant, not committed in the service of the master, and not within the line of his duty or the scope of his employment, the master is not liable.”¹⁸

“The principal is civilly responsible for some, but not for all, acts of his agent. This responsibility extends to the tortious acts of the agent, but only where they are committed for the principal’s purposes and by his authority, either actual or apparent, or where he ratifies them, or accepts and retains some benefit from them.”¹⁹

2225a. Text-book statements judicially approved.—Some statements of the rule by text writers have been judicially approved.

“It is a general doctrine of law, that, although the principal is not ordinarily liable (for he sometimes is), in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentation, torts, negligences, and other malfeasances or misfeasances and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, *Respondet superior*.”¹

“Though a principal is not, in general, liable criminally for the act of his agent, yet he is civilly liable for the neglect, fraud, deceit, or any other wrongful act of his agent in the course of his employment, though in fact the principal did not authorize the practice of such acts.”²

“The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit.”³

¹⁷ *Haver v. Central R. Co.* (1898) 62 10,922; *Fifth Ave. Bank v. Forty-second N. J. L.* 282, 43 L.R.A. 84, 72 Am. St. *Street & G. Street Ferry R. Co.* (1893) Rep. 647, 41 Atl. 916. 137 N. Y. 231, 19 L.R.A. 331, 33 Am.

¹⁸ *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 126, 7 Am. Rep. 418. St. Rep. 712, 33 N. E. 378; *Stranahan Bros. Catering Co. v. Coit* (1896) 55

¹⁹ *Bradford v. Hanover F. Ins. Co.* (1900) 49 L.R.A. 530, 43 C. C. A. 310, Ohio St. 398, 4 L.R.A. (N.S.) 506, 45 N. E. 634.

¹ Story on Agency, § 452, quoted in *McGowan & Co. v. Dyer* (1873) L. R. 8 N. Y. 595, 82 Am. Dec. 380.

² *Q. B.* 141; *Pendleton v. Kinsley* (1871) 3 Story, Agency, § 456, quoted in *Coleman v. Riches* (1855) 16 C. B. 104,

³ *Cliff.* 416, 424, 425, Fed. Cas. No. 3

2226. Various phrases used in defining the acts to which the master's liability extends.—From an examination of the passages quoted in the preceding sections and various other judicial statements, it is apparent that the different forms of expression which have been employed for the purpose of defining, either from an affirmative or from a negative standpoint, the acts of a servant in respect of which a master is answerable to third persons, may be assigned to three distinct categories, determined by the particular notions which are most prominently reflected in them.

(1) *Phrases denoting the nature and extent of the duties which the servant was hired to perform.* The two phrases belonging to this category which are most frequently found in the reports are these:

"Within the scope of the employment."¹

"In the course of the employment."²

120; *McGowan & Co. v. Dyer* (1873) L. R. 8 Q. B. 141, 21 Week. Rep. 560.

¹See for example *Seymour v. Greenwood* (1861) 6 Hurlst. & N. 359, 30 L. J. Exch. N. S. 189, 9 Week. Rep. 518; *Limpus v. London General Omnibus Co.*

(1862) 1 Hurlst. & C. (Exch. Ch.) 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; *Walker v. South Eastern R. Co.* (1870) L. R. 5 C. P. 640, 643, 39 L. J. C. P. N. S. 346, 23 L. T. N. S. 14, 18 Week. Rep. 1032;

Bayley v. Manchester, S. & L. R. Co. (1873) L. R. 8 C. P. 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115; *Whiteley v. Pepper* (1877) L. R. 2 Q. B. Div. 276, 46 L. J. Q. B. N. S. 436, 25 Week. Rep. 607, 36 L. T. N. S. 588; *Sanderson v. Collins* [1904] 1 K. B. (C. A.) 628, 631, 73 L. J. K. B. N. S. 358, 52 Week. Rep. 354, 90 L. T. N. S. 243, 20 Times L. R. 249; *Barry v. Dublin United Tramways Co.* (1888) 26 Ir. Rep. 150; *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518; *Steele v. May*, (1902) 135 Ala. 483, 33 So. 30; *Eaton v. Lancaster* (1887) 79 Me. 477, 10 Atl. 449; *Howe v. Newmarch* (1866) 12 Allen, 49; *Perlstein v. American Exp. Co.* (1901) 177 Mass. 530, 52 L.R.A. 959, 59 N. E. 194; *McCarthy v. Timmins* (1901) 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Hayes v. Wilkins* (1907) 194 Mass. 223, 9 L.R.A.(N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449; *Vernon v. Cornwell* (1895) 104 Mich. 62, 62 N. W. 175; *Higgins v.*

Watervliet Trump. & R. Co. (1871) 46 N. Y. 23, 7 Am. Rep. 293; *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418; *Collins v. Butler* (1904) 179 N. Y. 156, 71 N. E. 746.

An unimportant variant of this phrase is, "Within the general scope of the employment." *Young v. South Boston Ice Co.* (1890) 150 Mass. 527, 23 N. E. 326; *Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392; *City Delivery Co. v. Henry* (1903) 139 Ala. 161, 34 So. 389.

²See for example *Bartons Hill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 769, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107, per Lord Cranworth; *Joel v. Morison* (1834) 6 Car. & P. 501; *Williams v. Jones* (1865) 3 Hurlst. & C. 602, 609; *Whatman v. Pearson* (1868) L. R. 3 C. P. 422, 37 L. J. C. P. N. S. 156, 18 L. T. N. S. 290, 16 Week. Rep. 649; *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 7 C. P. 415; *Citizens' Life Assur. Co. v. Brown* (1904) A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176; *Sanderson v. Collins* [1904] 1 K. B. 628, 73 L. J. K. B. N. S. 358, 52 Week. Rep. 354, 90 L. T. N. S. 243, 20 Times L. R. 249; *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 14 L. ed. 502; *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922; *Bryant v. Rich* (1870) 106 Mass. 188, 8 Am. Rep. 311; *Cressy v. Republic Creosoting Co.* (1909) 108 Minn. 349, 122 N. W. 484; *Garretzen v. Duencel* (1872) 50 Mo.

Other phrases expressive of a similar notion are the following:

"Within the scope of the servant's duty."³

"Within the scope of the business intrusted to the servant."⁴

"In the course of the service."⁵

"In the course of the servant's duty."⁶

"In the line of the servant's duty."⁷

"Within the line of the servant's duty under his employment."⁸

"In some way connected with the service."⁹

"In or about the duties assigned to the servant."¹⁰

"Pertaining to the duties which the servant was hired to perform."¹¹

104, 11 Am. Rep. 405; *Haehl v. Wabash R. Co.* (1893) 119 Mo. 325, 24 S. W. 737; *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518; *Aycrigg v. New York & E. R. Co.* (1864) 30 N. J. L. 460; *McCann v. Consol. Traction Co.* (1896) 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888; *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380; *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597; *Stranahan Bros. Catering Co. v. Coit* (1896) 55 Ohio St. 398, 4 L.R.A. (N.S.) 506, 45 N. E. 634; *McFarlan v. Pennsylvania R. Co.* (1901) 199 Pa. 408, 49 Atl. 276; *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 89; *Forsythe v. Canadian P. R. Co.* (1905) 10 Ont. L. Rep. (C. A.) 73.

"The general rule is that the master is answerable for the negligence of his servants while engaged in offices he employs them to do." Lord Campbell in *Dansey v. Richardson* (1854) 3 El. & Bl. 144.

"The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them." *Ellis v. Turner* (1800) 8 T. R. 531.

³ *M'Kenzie v. M'Leod* (1834) 10 Bing. 385, 4 Moore & S. 249, 3 L. J. C. P. N. S. 79.

⁴ *Higgins v. Waterliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 293.

⁵ *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. (Exch. Ch.) 526, 32 L. J. Exch. N. S. 34, 9 Jur. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; *Barwick v. English Joint Stock Bank* (1869) L.

R. 2 Exch. (Exch. Ch.) 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298; *Whitechurch v. Cavanagh* (1902) A. C. 117, 85 L. T. N. S. 349, 17 Times L. R. 746, 71 L. J. K. B. N. S. 400, 50 Week. Rep. 218.

⁶ *Ward v. London General Omnibus Co.* (1873) 42 L. J. C. P. N. S. (Exch. Ch.) 265, 28 L. T. N. S. 850.

⁷ *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418; *Govaski v. Downey* (1894) 100 Mich. 429, 59 N. W. 167; *Birmingham R. & Electric Co. v. Baird* (1901) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456 ("in the line of duty imposed by the employment").

A master is not liable for an act done by a servant "outside the line of his duty." *McFarlan v. Pennsylvania R. Co.* (1901) 199 Pa. 408, 49 Atl. 270.

In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the court referred to acts which are "foreign to the objects of the employment."

⁸ *Holler v. Ross* (1902) 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472.

⁹ *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85.

¹⁰ *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 636, 15 Am. St. Rep. 753, 11 S. W. 139.

The master's liability is "confined to abuses perpetrated in the line of the duties assigned" to the servant. *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328; *Case v. Hulsebush* (1898) 122 Ala. 212, 26 So. 155.

¹¹ *Johanson v. Pioneer Fuel Co.* (1898) 72 Minn. 405, 75 N. W. 719.

"In the execution of the servant's duty."¹²

"In the discharge of the servant's duty."¹³

"In furtherance of the duty of the servant to the master."¹⁴

"In furtherance of the object of his employment."¹⁵

"In the sphere of the servant's appropriate duties."¹⁶

"In the performance of the servant's official duties."¹⁷

"Incident to the employment."¹⁸ It may be mentioned that in a few instances this phrase has been treated as connoting torts which were wholly disconnected with the actual work for which the servant was hired. See § 2288, note 11.

"Acts not committed in the service of the master, and not within the line of his duty or the scope of his employment."¹⁹

"Outside of his employment, and not in pursuance thereof."²⁰

"Where the servant has gone beyond the line of his duty to commit a trespass."²¹

"Matters wholly disconnected from the service to be rendered."²²

(2) *Phrases embodying the notion of an authority conferred upon, or withheld from, the servant, with regard to the performance of certain functions.* In this category are included the following phrases:

"Within the scope of the servant's authority."²³

¹² *Betts v. De Vitre* (1868) L. R. 3 Ch. 429, 442, 37 L. J. Ch. N. S. 325, 18 L. T. N. S. 165, 16 Week. Rep. 529.

¹³ *Northwestern R. Co. v. Hack* (1872) 66 Ill. 238.

¹⁴ *Tier v. Miller* (1911) 80 N. J. L. 691, 79 Atl. 417, 418.

¹⁵ *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 602.

¹⁶ *Green v. Southern Exp. Co.* (1871) 41 Ga. 515.

¹⁷ *Wade v. Thayer* (1871) 40 Cal. 578.

¹⁸ *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518; *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166.

"Although a definition is difficult, I should say that the act for which the master is to be held liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform." Grove, J., in *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318. Elsewhere the learned judge refers to acts which are "incident to the ordinary duties of the servant's employment." *Stevens v.*

Woodward (1881) L. R. 6 Q. B. Div. 318.

The ratio decidendi in one case was that the acts complained of were not "fairly or reasonably incident to the nature, character, or purpose of the business in which the servant was employed." *Wiltse v. State Road Bridge* (1899) 60 Kan. 513, 57 Pac. 98; *Mc-*

A negative phrase used in *Ruddiman v. Smith*, *supra*, was "something which has no reference to his employment."

¹⁹ *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418.

²⁰ *Marcus v. Gimbel* (1911) 231 Pa. 200, 205, 80 Atl. 75.

²¹ *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916.

²² *Bryant v. Rich* (1870) 106 Mass. 188, 8 Am. Rep. 311.

²³ *Atty. Gen. v. Siddon* (1830) 1 Tyrw. 41, 1 Crompt. & J. 220, 9 L. J. Exch. 7; *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 8 C. P. 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115; *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518; *Barry v. Dublin United Tramways Co.* (1888)

"Beyond the scope of the agency." ²⁴

(3) *Phrases referring to the master's business as a sphere of action.*

Under this head the following phrases may be mentioned:

"In the business of the master." ²⁵

"About the master's business." ²⁶

"In furtherance of the master's business." ²⁷

"For the purpose of furthering the master's business." ²⁸

"With a view to the furtherance of the master's business." ²⁹

"In the ordinary course of the master's business." ³⁰

"In the prosecution of the master's business." ³¹

"In the execution of the master's business." ³²

Ir. L. R. 26 *C. L.* 150; *Citizens' Life Assur. Co. v. Brown* (1904) *A. C.* 423, 73 *L. J. C. P. N. S.* 102, 90 *L. T. N. S.*

739, 20 *Times L. R.* 497, 53 *Week. Rep.* 176; *Aycrigg v. New York & E. R. Co.* (1864) 30 *N. J. L.* 460; *Haver v. Central R. Co.* (1898) 62 *N. J. L.* 282, 43 *L.R.A.* 84, 72 *Am. St. Rep.* 647, 41 *Atl.* 916.

²⁴ *Coleman v. Riches* (1855) 16 *C. B.* 104, 3 *C. L. R.* 795, 24 *L. J. C. P. N. S.* 125, 1 *Jur. N. S.* 596, 3 *Week. Rep.* 453.

²⁵ *Issacs v. Third Ave. R. Co.* (1871) 47 *N. Y.* 122, 7 *Am. Rep.* 418.

²⁶ *Mitchell v. Crassweller* (1853) 13 *C. B.* 237, 243, 22 *L. J. C. P. N. S.* 100, 17 *Jur.* 716, 1 *Week. Rep.* 153, 17 *Eng. Rul. Cas.* 252.

²⁷ *Williams v. Jones* (1865) 3 *Hurlst. & C. (Exch. Ch.)* 602, 11 *Jur. N. S.* 843, 13 *L. T. N. S.* 300, 12 *Week. Rep.* 1023; *Edwards v. London & N. W. R. Co.* (1870) *L. R. 5 C. P.* 445, 39 *L. J. C. P. N. S.* 241, 22 *L. T. N. S.* 656, 18 *Week. Rep.* 834; *Laird v. Farwell* (1899) 60 *Kan.* 513, 57 *Pac.* 98; *McDermott v. American Brewing Co.* (1901) 105 *La.* 124, 52 *L.R.A.* 684, 83 *Am. St. Rep.* 225, 29 *So.* 498; *Barmore v. Vicksburg, S. & P. R. Co.* (1905) 85 *Miss.* 426, 70 *L.R.A.* 627, 38 *So.* 210, 3 *Ann. Cas.* 594; *Miller v. Wanamaker* (1908) 111 *N. Y. Supp.* 786; *Berry v. Carolina, C. & O. R. Co.* (1911) 155 *N. C.* 287, 71 *S. E.* 322; *Waalor v. Great Northern R. Co.* (1908) 22 *S. D.* 256, 18 *L.R.A.(N.S.)* 297, 117 *N. W.* 140.

"In furtherance of the master's business, and the accomplishment of the object for which the servant is employed." *International & G. N. R. Co. v. Anderson* (1891) 82 *Tex.* 516, 27 *Am. St. Rep.* 902, 17 *S. W.* 1039.

²⁸ *Sweedon v. Atkinson Improv. Co.* (1910) 93 *Ark.* 397, 27 *L.R.A.(N.S.)* 124, 125 *S. W.* 439.

A master is not chargeable with an act not "calculated to facilitate or promote the business for which the servant was employed." *Little Miami R. Co. v. Wetmore* (1869) 19 *Ohio St.* 110, 2 *Am. Rep.* 373.

²⁹ *Smith v. Munch* (1896) 65 *Minn.* 256, 68 *N. W.* 19.

In *North Chicago City R. Co. v. Gastka* (1889) 128 *Ill.* 613, 4 *L.R.A.* 481, 21 *N. E.* 522, the action was held to be maintainable on the ground that the tort was committed by the servant "while engaged in the master's business, with a view to the furtherance of that business."

³⁰ *Edwards v. London & N. W. R. Co.* (1870) *L. R. 5 C. P.* 445, 39 *L. J. C. P. N. S.* 241, 22 *L. T. N. S.* 656, 18 *Week. Rep.* 834.

³¹ *Cain v. Hugh Nawn Contracting Co.* (1909) 202 *Mass.* 237, 88 *N. E.* 842; *Cosgrove v. Ogden* (1872) 49 *N. Y.* 255; 10 *Am. Rep.* 361; *Tierney v. Syracuse, B. & N. Y. R. Co.* (1895) 85 *Hun.* 146, 66 *N. Y. S. R.* 85, 32 *N. Y. Supp.* 627; *Geraty v. National Ice Co.* (1897) 16 *App. Div.* 174, 44 *N. Y. Supp.* 659.

"In the prosecution of the business which the servant was employed to do." *Cosgrove v. Ogden* (1872) 49 *N. Y.* 255, 10 *Am. Rep.* 361.

³² *Maier v. Randolph* (1855) 33 *Kan.* 340, 6 *Pac.* 625; *Davis v. Houghtelein*, 33 *Neb.* 582, 14 *L.R.A.* 737, 50 *N. W.* 765.

"In the course of the master's business and for the master's benefit." ³³

"Incident to the master's business." ³⁴

"In the interest of the master." ³⁵

"Not connected with the master's business." ³⁶

2227. Same subject further discussed.—It is clear that, in a logical point of view, the connotation of the phrases belonging to the first and second of the categories specified in the preceding section may properly be regarded as identical, provided those which embody the notion of an authority conferred are understood as having reference to the class of acts which the servant was engaged to perform, and not merely to the particular act which caused the given injury.¹ Properly speaking, therefore, statements in which both descriptions of phrases are included must be regarded as tautological. Such are the following:

"In the course of his employment and within the general scope of his authority." ²

"In the master's service and within the scope of the employment and authority of the servant." ³

"In the execution of the authority given by the master, and for the purpose of performing what the master has directed." ⁴

³³ *Barwick v. English Joint Stock Bank* (1869) L. R. 2 Exch. (Exch. Ch.) 259, 266, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298.

³⁴ *Sweeden v. Atkinson Improv. Co.* (1910) 93 Ark. 397, 27 L.R.A.(N.S.) 124, 125 S. W. 439.

"In the furtherance of his master's interest." *Johanson v. Pioneer Fuel Co.* (1898) 72 Minn. 405, 75 N. W. 719.

³⁵ *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 7 C. P. 415.

³⁶ *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849.

¹ "Within the scope of his authority, or, what is the same thing, within the scope of his employment." *Citizens' Life Assur. Co. v. Brown* (1904) A. C. 423.

In *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, 320, Grove, J., remarked: "No doubt this question is a very nice one, and there may be cases close to the line between the liability

and nonliability of a master for the act of another person done in the 'course of his employment' if he is servant, or within the 'scope of his authority' when he is an agent, for . . . such is the mode in which those terms have been applied by the courts, although the words 'scope of authority' may cover both cases." The assumption of the learned judge that there is a real distinction between the two classes of acts adverted to would seem to be, as a matter of theory, unsound; and, as is shown by the remark just quoted from a more recent case, a different view has been taken by the privy council."

² *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 891; *Marcus v. Gimbel Bros.* (1911) 231 Pa. 200, 80 Atl. 75.

³ *Isaacs v. Third Ave. R. Co.* (1872) 47 N. Y. 122, 7 Am. Rep. 418.

⁴ *Howe v. Newmarch* (1866) 12 Allen, 49; *George v. Gobey* (1880) 128 Mass. 289, 35 Am. Rep. 376.

"Within the scope of his authority, and in the supposed furtherance of his duty towards the master." ⁵

"Wrong done by a servant without the master's authority, and not for the purpose of executing his orders, or doing his work." ⁶

But in practice the application of the two criteria which are indicated by the phrases in each of these categories has produced a considerable number of essentially inconsistent decisions. Concerning this subject some further observations will be made in a later section.

With regard to the phrases in the third category, they do not supply a complete or adequate test of liability or nonliability. A master clearly cannot be held responsible for a tort committed in furtherance of his business, unless it is shown to have also been committed in the course of the appointed duties of the tort-feasor. No statement, therefore, which includes one of the phrases in this category can be formally correct unless it also includes one of those in the first and second categories. Combinations of this character are exemplified by such statements as the following:

"Torts done for the principal's benefit in the prosecution of his business and within the scope of the agent's employment." ⁷

Acts done "in the course of his master's service, and for his master's benefit, within the scope of his employment." ⁸

"Torts done in the course of his employment, with a view to the furtherance of his master's business." ⁹

"Acts done with a view to the furtherance of the master's business, within the line of the servant's duty." ¹⁰

Torts committed by a servant "in furtherance of his master's business, within the scope of his employment." ¹¹

"Acts committed for the principal's purposes, and by his authority." ¹²

"Acts done by the servant in the execution of the master's business, within the scope of his employment, and acts in any sense warranted by the express or implied authority conferred upon him." ¹³

⁵ *Vara v. R. M. Quigley Constr. Co.* (1905) 114 La. 262, 264, 38 So. 162.

⁶ *Howe v. Newmarch* (1866) 12 Allen, 49; *Rowell v. Boston & M. R. Co.* (1895) 68 N. H. 359, 44 Atl. 488.

⁷ *Lothrop v. Adams* (1882) 133 Mass. 471, 43 Am. Rep. 528.

⁸ *Evans v. Davidson* (1879) 53 Md. 245, 36 Am. Rep. 400.

⁹ *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 106 Minn. 51, 56, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047.

¹⁰ *Crandall v. Boutell* (1905) 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122.

¹¹ *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940.

¹² *Bradford v. Hanover F. Ins. Co.* (1900) 49 L.R.A. 530, 43 C. C. A. 310, 102 Fed. 48.

¹³ *Stone v. Hills* (1877) 45 Conn. 47, 29 Am. Rep. 635; *Waler v. Great Northern R. Co.* (1904) 18 S. D. 420, 70 L.R.A. 731, 735, 112 Am. St. Rep. 794, 100 N. W. 1097.

2228. Liability of a master for torts committed by his slaves.—

Slavery is now extinct in all the countries and states with which this treatise is concerned; but as a part of the history of the subject it will be desirable to advert briefly to the cases which bear upon the nature and extent of the liability to which a master was subject while the institution still existed.

a. Liability in common-law jurisdictions.—Some remarks with regard to the responsibility of a master for the acts of his villein, during the earlier periods of English history, have been made in § 1, *ante*.

The doctrines adopted in the various American states seem to have been determined mainly, if not entirely, by considerations of expediency and public policy, rather than by any conscious recurrence to the principles which regulated the right of recovery against a master for injuries caused by the acts of his villein.¹ The earliest reported case which the author has found was decided in South Carolina. According to one version of the judgment, its effect was that a master could not be held liable for a tort committed, without his knowledge or approbation, by any description of slaves except those employed as tradesmen or engaged in some such public occupation as that of a ferryman or carrier.² According to another version,³ the court laid it down broadly that a master was "liable for a civil injury occasioned by the misfeasance or neglect of his slave." This was the doctrine which finally prevailed in South Carolina itself.⁴ But the law as

¹ See case cited in following note.

² *Snee v. Trice* (1802) 2 Bay, 345 (action not maintainable for damages caused by the spread of fire which the defendant's slaves were using while at work in the defendant's field). The master's nonliability was distinctly predicated upon grounds of public policy.

In *Wingis v. Smith* (1825) 3 M'Cord, L. 400 (master not liable for damages done by his horses, which had been left unattended by his coachman, and had run away), the court explained the exception admitted in the case of certain occupations as being based upon the consideration that the master, by inviting others to repose a confidence in the slaves, became security for the faithful performance of their duty, and should therefore be answerable for their misconduct.

³ 1 Brev. 178.

⁴ *Parker v. Gordon* (1838) Dud. L. 270. In that case, where the injury M. & S. Vol. VI.—420.

was caused by the negligent navigation of a sloop, the court laid it down that the maxim, *Qui facit per alium facit per se*, applies in full force to every act which slaves do in the course of their employment. The circumstance that the court chose to proceed upon this broad ground is the more significant, because, upon the given facts, liability might have been imputed even under the doctrine repudiated. In fact, the portion of that doctrine which affirmed the master's liability for slaves engaged in public employment was again stated as the opinion. That doctrine would also have sufficed to affect the master with liability in another case decided in the same year, *Drayton v. Moore*, (1838) Dud. L. 268, where the action was brought to recover for damage done to a wharf by a negro. But the more general doctrine was necessary to sustain a third case decided in the same year, *O'Connell v. Strong* (1838) Dud. L. 265, where the plaintiff recovered

declared in the earlier version of the leading case was adopted in Mississippi, Tennessee, and Texas.⁵ In Alabama the liability of a master for the acts of his slaves seems to have been determined on precisely the same footing as where free servants were concerned.⁶ In Missouri the unwritten law imposed no general responsibility upon the master, but by statute he was declared liable for certain specified offenses to an extent not exceeding the value of the slave.⁷

b. In civil-law jurisdictions.—It is stated elsewhere (§ 2251, *post*), that under the Roman law a master was absolutely liable for the delicts of his slaves, but could escape the payment of damages by delivering up the delinquent to the injured person. This principle was adopted in a modified form in the Louisiana Code, the effect of arts. 180, 2300, being that the master was liable for all the wrongful acts of his slave, whether they were done under his authority or not. But this distinction was recognized,—that in respect of acts done without

for damage done by a fire which escaped control after it had been lighted by negroes for the purpose of clearing land.

⁵ Recovery was denied in *Leggett v. Simmons* (1846) 7 Smedes & M. 348 (manslaughter by slave); *Wright v. Weatherly* (1835) 7 Yerg. 367 (similar act).

In *Sweat v. Rogers* (1871) 6 Heisk. 117, an allegation to the effect that the defendant knew that the slave in question was of vicious habits and given to stealing, and yet permitted him to go abroad; was not sufficient to show that the defendant was liable for damages in respect of property destroyed or stolen by the slave. This ruling limited the effect of the following remark made, *arguendo*, in *Wright v. Weatherly*, *supra*: "There are but two classes of cases known to the common law which have any analogy to this case. Either we must look upon the slave as occupying the same relation to the master as the servant does in England, or we must regard him in the light of property only, and hold the master liable as he would be for mischief which might be committed by a vicious domestic animal. These are the analogies the common law furnishes us, and by the application of neither of these can this action be supported. To consider the slave as property only, the owner would only be liable in case he were acquainted with the vicious propensities

and habits of his slave, and, with such knowledge, should permit him to run at large."

In *Ingram v. Atkinson* (1849) 4 Tex. 270, the following instruction given in an action to recover for the wilful drowning of a person was held to be substantially correct: "The owner of a slave is not responsible in damages for the trespasses of his slave, unless where the slave is engaged in employment requiring care, skill, or prudence, and the wrong done results from his servant's negligence, unskillfulness, or imprudence in such employment, or unless the master be cognizant of the act or implicated in the trespass or wrongful act."

⁶ See *Cawthorn v. Deas* (1835) 2 Port. (Ala.) 276, where an instruction that it was only necessary to prove that the property in question was destroyed by the negligence of the defendant's slaves was held erroneous as being in conflict with the true principle, *viz.*, that a master was not liable in respect of the negligent conduct of a slave, except in so far as he was acting in the master's employment or under his authority.

⁷ *Baker v. Haldeman* (1857) 24 Mo. 219, 69 Am. Dec. 430, citing *Ewing v. Thompson* (1850) 13 Mo. 132, where it was held that the master was not liable for the wilful and wanton acts of his slave.

his authority he was entitled to exonerate himself by surrendering the slave to be sold for the indemnification of the aggrieved party.⁸ In cases where an injury was caused by a slave who had been hired out to another person, an action might be maintained against the hirer as well as the owner.⁹ But the responsibility of the hirer was not absolute, like that of the owner, the misconduct of the slave being imputable to him only under circumstances which would have enabled the plaintiff to recover if the tort-feasor had been a free servant.¹⁰

2229. Imputation of a servant's knowledge to his master.—In any case where proof that the defendant was aware of the conditions which caused the alleged injury is an essential prerequisite to recovery, he is deemed to be chargeable with any knowledge of those conditions that his servant may have acquired in the course of his employment.¹ It is clear that there are specially strong reasons for applying this rule with respect to a corporation; for such a body "cannot know anything ex-

⁸ *Guerrier v. Lambeth* (1836) 9 La. 339.

⁹ *Fitzgerald v. Ferguson* (1856) 11 La. Ann. 396 (lessee of slave liable in the first instance for injuries caused by his negligent driving); *Poree v. Cannon* (1859) 14 La. Ann. 506 (manager of plantation entitled to recover for wound inflicted by slave under his control).

¹⁰ *Gaillardet v. Demaries* (1842) 18 La. 490. In that case, where the plaintiff's gig had been upset by the defendant's dray, the court thus disposed of the defendant's contention that the owner was alone responsible for any damages occasioned by a slave: "It appears to us that defendant's liability in this case rests on grounds altogether distinct from those which are the basis of the responsibility of the owners of slaves under the foregoing provisions of our Code [arts. 180 & 2300]. The liability of the masters of slaves is a consequence of their ownership. It is one of the burthens of this species of property; it is absolute, and exists whether the slave is supposed to be acting under their authority or not; the only difference lies in the extent of this responsibility. . . . The provision of law on which plaintiff relies as applicable to this case is article 2299 of the Louisiana Code. It provides that 'masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the

functions in which they are employed.'

The circumstance of the person employed being a slave instead of a free person cannot, in our opinion, vary or change the responsibility of the employer; for it rests on the ground of express or implied authority from him; but in order to hold the employer liable, the damage must be done through the neglect of the slave hired, while he is actually engaged in the functions or duties intrusted to him. If the negro in this case had wilfully and wickedly run his dray against plaintiff's gig, instead of doing it through neglect or unskilfulness, defendant could not have been made liable, because the damage could not be said to have been done in the course of his employment or under any implied authority from him. When the acts of an agent which do injury to others are wilful and deliberate, he must answer for his own misbehavior. If he be a slave, against whom no action can lie, the law substitutes for his responsibility that of his master; but when the damage has been done by the imprudence, unskilfulness, or ignorance of a person employed by another to do a certain thing, the employer is responsible whether the agent is a free person or a slave. In this case the plaintiff had, we think, an action against both the owner and employer of the slave."

¹ See cases cited *passim* in the following notes.

cept by its servants; it must be liable for their knowledge, or not liable at all."² Most of the cases in which the rule has been laid down have involved direct damage to person or property. But as knowledge is one of the essential elements of fraud,³ it is obvious that a master cannot be held liable on the ground of the commission of a tort by his servant without in effect imputing to the former the knowledge of the latter. This aspect of the master's liability is not infrequently brought into prominence by the form in which rulings have been made in actions for deceit.⁴

In order to warrant the imputation of constructive knowledge to the master it is necessary that these facts should be established:

(1) That the position held by the servant was such as to constitute him a proper person to receive notice in behalf of the master. Where the alleged injury was caused by some animal or by some inanimate agency, it must be shown that, either as a result of his being intrusted with duties of superintendence, or as a result of the special functions deputed to him, the servant in question had charge of that animal or that agency.⁵ Where the alleged injury resulted from the manner in

² *Penhallow v. Mersey Dock & H. Board* (1861) 30 L. J. Exch. N. S. 329. This remark is not found in the report of this case in 9 Week. Rep. 812. Several cases involving corporations are cited in the following notes.

As to the imputation to corporations of the knowledge of their agents, see, generally, *Clark & M. Priv. Corp.* §§ 718 *et seq.* Many of the cases cited do not relate to servants.

³ See Webb's ed. *Pollock, Torts*, p. 355.

⁴ In *Locke v. Stearns* (1840) 1 Met. 560, 35 Am. Dec. 382, an action against a firm of manufacturers, it was laid down that if their foreman, acting within the scope of his authority, sold the article in question, knowing that it was of an inferior quality, this knowledge would bind them, and be the same as if they themselves possessed it.

In *Atlantic Cotton Mills v. Indian Orchard Mills* (1888) 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496, where the treasurer of a corporation paid his deficit in his accounts with it by drawing checks upon another corporation, of which he was also treasurer, it was held that the treasurer's knowledge of the true character of the transaction was imputable to the corporation receiving the checks, and that it was ac-

cordingly bound to repay the amount for which the checks were drawn.

In *Lowndes v. City Nat. Bank* (1909) 82 Conn. 8, 22 L.R.A.(N.S.) 408, 72 Atl. 150, a bank was held to be chargeable with the knowledge of a teller and bookkeeper that certain transactions in regard to checks were fraudulent as regarded a depositor.

In *Jeffrey v. Bigelow* (1835) 13 Wend. 518, 28 Am. Dec. 476, where an agent authorized to sell a flock of sheep sold a portion of it, with knowledge that the sheep were diseased, and did not communicate the fact to the purchaser, it was held that his principals, though they had no actual notice of the fraud, were responsible to the purchaser for the damages caused by the communication of the disease to the rest of his flock.

⁵ (a) *Injuries caused by animals.*—In *Stiles v. Cardiff Steam Nav. Co.* (1864) 33 L. J. Q. B. N. S. 310, 12 Week. Rep. 1080, the grounds upon which the plaintiff was held to have been properly nonsuited in an action for injuries caused by the bite of a dog were thus stated by Blackburn, J.: "It is essential in this action that there should be evidence of *scienter*. This is clearly settled law, whether wisely or not, it is not for me to inquire. That

which certain work was performed or certain business was transacted by the servant, the knowledge of the servant cannot be imputed to his

the defendants are a corporation makes no difference either way. Anything which is notice to a person, being the proper person to take notice in that department, is notice to the company. But all that is proved is that this dog had sprung at a man in the yard, and bitten, or tried to bite, him, and that one or two servants of the company were there at the time, and saw it, and that about a month afterwards the plaintiff was bitten, and that the company's servant came round and spoke of the former attack. This last piece of evidence was, I think, admissible, because, if they were persons capable of making an admission for the company, what they said on that occasion would be proper evidence of their knowledge. If, therefore, they had been proper persons to have notice for the company, there would have been sufficient evidence of the *scienter*, but the real difficulty is that there was no evidence that they were such persons. If the person who had a general control of the business of the company, if even the person who had control of the yard, or perhaps even of the dog, had been shown to have knowledge, it would have done. But the evidence, at the utmost, is that they were persons who were looking after the horses. It is not even shown that they fed the dog. The instance of a huntsman or whipper-in was put, but that employment would, I think, not be sufficient. The evidence here is much slighter, and it is not shown that the management of the dog was at all within the scope of the servants' employment." Crompton, J., said: "It would have been sufficient to show knowledge in the manager, or in some person having the control of the yard. I had some doubt whether the knowledge must not be brought home to some person who kept and had care of the dog, and had power to put an end to the keeping of it, but perhaps it would be enough if he had the care of the dog. But all that was found is that some persons who appear rather to have had the care of the horses had seen or had heard that the dog had bitten a person before. It is more like the case of a gardener or a cook hearing that their mistress's lap-dog was given to bite, and I think that

the evidence wholly fails to bring home the knowledge to any person whose knowledge in point of law would be that of the defendants."

In *Gladman v. Johnson* (1867) 36 L. J. C. P. N. S. 153, the court observed that the knowledge which is acquired by a servant of the owner, or even by his wife, regarding the vicious propensities of a dog, is not in all cases imputed to him. But the plaintiff was held to have been improperly nonsuited upon evidence which tended to show that the wife of the owner assisted him in his business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to the dog was there made to her.

In *Baldwin v. Casella* (1872) L. R. 7 Exch. 325, C owned a mischievous dog which was kept at his stables under the care and control of his coachman, who knew the dog to be mischievous. C supposed the dog to be quite harmless. B having been bitten by the dog, and having brought an action for the injuries, the judge directed the jury that there was evidence of the *scienter*, since the knowledge of such a servant was enough to make the master liable. Held, that the direction was right. Bramwell, B., said, "It appears to be the rule of law that the possibility of loss and injury arising to others from things which are likely to be dangerous raises, on the part of those who have them under their control, a duty to inform themselves about them. So, one who employs others to climb ladders in a place where people are passing is bound to take care that no injury arises to the passersby; and if he delegates to a foreman or servant the duty of seeing that the ladders are sound, the negligence of the foreman or servant is the negligence of the master. So, all dogs may be mischievous; and therefore a man who keeps a dog is bound either to have it under his own observation and inspection, or, if not, to appoint someone under whose observation and inspection it may be. The defendant has appointed his coachman to that duty; the coachman knew of the mischievous propensities of the dog; and his knowledge is the knowledge of the master."

In *Applebee v. Percy* (1874) 43 L. J. C. P. N. S. 365, L. R. 9 C. P. 647, 30 L. T. N. S. 785, 22 Week. Rep. 704, it was held that the case should have gone to the jury, where the evidence tended to show that a complaint as to the ferocity of the defendant's dog had been made to barmen who were on the premises where the dog was kept, and managed the owner's business in his absence.

In *Corliss v. Smith* (1881) 53 Vt. 532, where the plaintiff was bitten by a dog which the owner had committed, with other things, to the care, control, and agency of a person engaged in the management of his farm and property thereon, it was held that the trial judge had properly admitted evidence which tended to show (1) that this person had knowledge of the dog's vicious propensities, and (2) that these were known to the other servants.

In *Fye v. Chapin* (1899) 121 Mich. 675, 680, 80 N. W. 797, where a child was injured by a dog belonging to defendant, which two of his servants had brought with them when they called on the child's parent, it was held that defendant was liable under 2 Mich. Comp. Laws 1897, § 5593 (declaring the owner of a dog which worries a domestic animal or a traveler on a highway to be liable without proof of *scienter*), notwithstanding the dog was taken by the servants out of the defendant's inclosure, and into the child's presence, in direct disobedience of the defendant's orders.

In *Buck v. Brady* (1909) 110 Md. 568, 132 Am. St. Rep. 459, 73 Atl. 277, evidence that a servant in charge of the dog which bit plaintiff had told the defendant on more than one occasion that the dog was acting strangely, and that he thought it was developing rabies, was held to be admissible as bearing on the observance of due care by the defendant.

In *Clowdis v. Fresno Flume & Irrig. Co.* (1897) 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373, the liability of the defendant for injuries caused by a ferocious bull was affirmed on the ground that the persons employed to drive him along a highway were aware of his vicious nature and failed to secure him. The contention that the defendant could not be held liable, for the reason that the drovers only acquired their knowledge of the bull's dispo-

sition while they were driving him, and that therefore the master had no knowledge, was rejected on the ground that their knowledge at the time of the injury was the defendant's knowledge.

In *Baird v. Graham* (1852) 14 Sc. Sess. Cas. 2d series, 620, a servant sent with a horse to be sold at a fair placed it in a stable, with knowledge that it was diseased with glanders. The other horses in the stable were thereby infected with the disease, and died. Held, that a claim of damages was relevant against the master, although his personal knowledge of the horse being diseased was not alleged. Lord Boyle said: "If the servant's knowledge of the disease be not made out, the pursuer has no case. But if his knowledge of the disease be made out, seeing that the servant was following out the defender's orders, and that it was necessary to the execution of these orders that he should stop on the road for a night, it does appear to me that his putting the horse into the pursuer's stable was an act within the scope of his duty."

In *Campbell v. Trimble* (1889) 75 Tex. 270, 12 S. W. 863, it was held that the owner of a vicious horse which kicked and injured the horse of another person could not escape liability therefor on the plea that at the time the injury was inflicted, the horse inflicting it had, without the owner's consent, been temporarily put in charge of another person by the servant of the owner who had charge of him.

See also *Ficken v. Jones* (1865) 28 Cal. 618 (issue of defendant's *scienter* was abandoned because it was clear from the evidence that the steer which caused the injury was not vicious in disposition); *Meilke v. Schabble* (1909) 159 Mich. 163, 123 N. W. 552 (owner of farm chargeable with the knowledge of his manager that a dog kept on the farm was vicious); *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S. W. 764 (butcher chargeable with the knowledge of his manager that a cow was vicious); *Lutz v. Forbes* (1858) 13 La. Ann. 609 (principal responsible for the act of his agent in selling a horse which he knew to be affected with a contagious and incurable disease which would be likely to be communicated to other stock belonging to the purchaser).

In *Taylor v. Graham* (1886) cited in *Tasmania Digest*, vol. 4, it was laid

master, unless it appears that he was hired for the purpose of performing that work or transacting that business.⁶ With regard to this situ-

down that a master is affected with the knowledge of his servant that a horse is addicted to kicking, if that servant is one kept for the special purpose of looking after the master's horses, but not if the servant is merely a general one. But the antithesis here is scarcely satisfactory. There seems no sufficient reason for denying that the knowledge, even of a general servant, is imputable to his master, if a portion of his functions have reference to the care of his master's horses.

(b) *Injuries caused by inanimate agencies.*—In *Parker v. Boston & H. S. B. Co.* (1872) 109 Mass. 449, where a passenger was injured through the fall of a plank in a gangway leading to a steamboat, evidence that the servants working at the gangway had been warned, shortly before the accident, that the plank was unsafe, was held to be admissible to prove negligence on the part of the steamboat company.

In *Schaaf v. St. Louis Basket & Box Co.* (1910) 151 Mo. App. 35, 131 S. W. 936, where plaintiff was injured through the negligence of the defendant's servants in allowing a cable to swing over a path in which he was walking, it was held that the knowledge of such servants that the pathway was ordinarily used by pedestrians generally was imputable to the master.

In *Strack v. Missouri & K. Teleph. Co.* (1908) 216 Mo. 601, 116 S. W. 526, where a person telephoned to the office of a telephone company to notify them that a wire had sagged dangerously, it was held that the company was not chargeable with the knowledge thus imparted to the girl who received the message.

See also *Denver, S. P. & P. R. Co. v. Conway* (1888) 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142 (station agent's knowledge of danger created by cartridges stored at station was held to be imputable to the railway company in an action to recover for injuries caused to person and property by the explosion of the cartridges); *Alexandria Min. & Exploring Co. v. Irish* (1896) 16 Ind. App. 534, 44 N. E. 680 (evidence of information given to one of the employees who had control of a pipe line was held competent to show that the owner had notice of its unsafe condition); *Baries*

v. Louisville Electric Light Co. (1905) 118 Ky. 830, 80 S. W. 814, 85 S. W. 1186 (employee of electric company, whose duty it was to look after the withdrawal of the electric current from houses that were being painted, knew that painters were working in a certain house).

⁶ In *Thornton v. Hogan* (1903) 82 App. Div. 500, 81 N. Y. Supp. 544, the inference that stevedores engaged in unloading a vessel into a lighter were chargeable with notice of the careless way in which their employees were doing the work was not warranted by evidence which merely showed that one of the men who was working with plaintiff in the hold of the vessel, but was not in control of the work, had spoken about the matter to one of the stevedores' men.

In *Chicago, R. I. & P. R. Co. v. Planters' Gin & Oil Co.* (1908) 88 Ark. 77, 113 S. W. 352, where a railway company had about forty employees in a freight office, only three of whom were authorized to make shipping contracts, it was held that notice to the company of the damages likely to result from delay in forwarding a shipment might be inferred from evidence which showed that notice of this risk had been given to the employee who caused the bill of lading to be executed, and who was put forward to transact the business for the company.

In *Little Pittsburgh Consol. Min. Co. v. Little Chief Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655, an action in respect of ore taken from a mine adjoining that of the defendant, one of the grounds upon which recovery was allowed was that the defendant could not "be heard to say that it did not know that its superintendent was trespassing upon the premises of another." The court said: "If Bearce had such authority in the premises as to make him appellant's superintendent, then, by the rule of law which holds him to be the principal as to third persons, the question of notice is excluded from the case; but if he was less than a representative, and was directed and controlled by his principal, the latter is estopped to say it did not know that

ation, it has been laid down that, where an agency is continuous and made up of a long series of transactions of the same general character, knowledge acquired by the agent in one or more of the transactions is notice to the agent and the principal, which will affect the latter in any other transaction in which the agent, as such, is engaged, and in which the knowledge is material.⁷

(2) That the alleged notice was received by the servant in the course of his employment. Whether this condition precedent is satisfied is a matter to be determined from the particular circumstances involved in the given case.⁸

which its agent knew. The law is thoroughly settled that, as between the principal and a stranger, the former does know whatever his agent knows, learned while acting for such principal in the particular transaction."

In *Denver, S. P. & P. R. Co. v. Conway* (1888) 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142, where damages were caused to person and property by the burning of a railway station, which was set on fire by an explosion of cartridges stored in it, the knowledge of the station agent that the cartridges were so stored was held to be imputable to the railway company.

Knowledge communicated to the conductor of a train, that a passenger is feeble and will need assistance in getting off, is notice to the carrier; and it is not necessary to notify every other conductor and train hand that may be in charge of the train. *Foss v. Boston & M. R. Co.* (1890) 66 N. H. 256, 11 L.R.A. 367, 49 Am. St. Rep. 607, 21 Atl. 222.

On the other hand, notice to a conductor who has no authority over the baggage man on a train, that he is in the habit of carrying drills for a lime company and putting them off near its quarry, is not notice to the company. *Walker v. Hannibal & St. J. R. Co.* (1894) 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360.

In *Sherman v. Delaware & H. Canal Co.* (1899) 71 Vt. 325, 45 Atl. 227, the plaintiff, in the employ of a contractor engaged to inspect and repair cars, notified a fireman, apparently in charge of an engine, not to start it because he was about to measure a ventilator on one of the cars attached to it. Held, that such notice was sufficient to render defendant liable for injuries inflicted on

plaintiff through the careless starting of the engine without warning.

In *Western U. Teleg. Co. v. Henderson* (1910) — Tex. Civ. App. —, 131 S. W. 1153, an action against a telegraph company for damages caused to cattle detained in cars, owing to the nondelivery of a message sent by a shipper of cattle, requesting the addressee to meet the cattle at the station to which they were sent, knowledge which the defendant's agent acquired as railroad agent was held to be admissible as evidence of defendant's negligence.

In *Council v. St. Louis & S. F. R. Co.* (1907) 123 Mo. App. 432, 100 S. W. 57, a railway company was held to be chargeable with notice which the conductor of a train carrying live stock had received from the shipper with respect to the danger of switching the train onto a track which ran into a district infected with cholera.

In *Martin v. Richards* (1892) 155 Mass. 381, 386, 29 N. E. 591 (see § 2223, note 1, *ante*), the defendant was held to be chargeable with the knowledge of an employee (precise functions not stated) who had let his house, that the premises were in an unsanitary condition.

See also the cases cited in notes 4, and 5 (b), *supra*.

⁷ *Holden v. New York & E. Bank* (1878) 72 N. Y. 286 (bank chargeable with fraud of its president in transferring, through a third person, certain shares owned by him from himself individually to himself as executor of an estate, he knowing, at the time of the transfer, that the bank was insolvent).

⁸ In one point of view all the cases cited in the preceding notes may be regarded as illustrations of this rule.

2230. Misconduct of a servant as a bar to an action by the master.—

The liability of a master for the tortious acts of his servant is ordinarily considered with reference to the right of a third person to maintain an action against the master. The imputation of the servant's culpability to his master may, however, sometimes operate so as to preclude the master from recovering damages from a third person.¹

The right to recover the indemnity stipulated under a contract of insurance cannot be defeated by showing that the loss or damages in respect of which the claim is made was caused by the misconduct of the claimant's servants.²

For a case in which liability was denied, see *Goodwin v. Columbia Teleph. Co.* (1911) 157 Mo. App. 596, 138 S. W. 940 (lineman of telephone company, while not on duty, was told that a wire was not properly insulated).

Principals were held not to be liable in respect of knowledge acquired by agents in *Merchant's Nat. Bank v. Lovitt* (1892) 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825; *Benton v. German-American Nat. Bank* (1894) 122 Mo. 332, 26 S. W. 975; *National Bank v. Fitze* (1898) 76 Mo. App. 356; *Kyle v. Gaff* (1904) 105 Mo. App. 672, 78 S. W. 1047.

¹In *The Bernina* (1887) L. R. 12 Prob. Div. 58, 62, one of the propositions formulated by Lord Esher was this: "If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which . . . caused the accident, the plaintiff cannot maintain an action against any one." This statement was approved, on appeal, by Lord Herschell (1888) L. R. 13 App. Cas. 1, p. 9.

In *Page v. Hodge* (1885) 63 N. H. 610, 4 Atl. 805, a servant left a team of horses attached to a mowing machine while it stood upon a highway, and engaged in a personal encounter with a third person. The horses ran away and injured the mowing machine. The master sued the third person for the damage and the court said: "By entrusting his team to the servant for the purpose of driving it home, the plaintiff put it in the servant's power to manage the team negligently, and must be deemed to have assumed the risk of the servant's negligence in the execution of the trust so committed to him; and moreover, as in the contemplation

of the law, he who does a thing by the agency of another does it by himself. The case further stands in respect of the servant's negligent act in leaving the team unhitched and unattended in the public highway, precisely as it would if that act had been done by the plaintiff himself."

In *La Riviera v. Pemberton* (1891) 46 Minn. 5, 48 N. W. 406, it was held that the negligence of a servant in allowing cattle unnecessarily to go at large in the vicinity of a frozen lake where they are accustomed to drink, with knowledge that there may be openings in the ice dangerous to the cattle, was a good defense to an action by the master for the negligence of a third person in cutting a hole in the ice, and thus causing two of his cattle to be drowned.

In *Robinson v. Detroit & C. Steam Nav. Co.* (1896) 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 883, the ground on which an action for the death of the managing owner of a tug, caused by its collision with another vessel, was held not to be maintainable was that he knew the tug was without a lookout and shorthanded.

In *Pine Bluff Water & Light Co. v. Schneider* (1896) 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547, a claim for injuries caused by the explosion of gas in a store was held not to be enforceable, for the reason that the person left by the plaintiff in charge of the store, and another employee, had been guilty of contributory negligence.

²A rule frequently applied in insurance cases is that "mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though

2231. Indemnification of master by defaulting servant.—It is fully settled that the servant “is answerable to his master for any damage which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master.”¹

2232. Conflict of laws.—Where a person has suffered injury from the act of a servant in a foreign country, three conditions must be fulfilled in order to entitle him to maintain a suit against the tort-feasor’s master in an English or American court:

(1) The wrong must have been of such a character that it would have been actionable if committed within the jurisdiction of the court in question.¹

the direct cause of the fire, are covered by the policy.” May, Insurance, § 408.

In *Charleston & W. C. R. Co. v. Devlin* (1909) 85 S. C. 128, 67 S. E. 149, the defendant was granted permission to erect a warehouse on the premises of the plaintiff railway company, in consideration of his covenanting to hold the company harmless from any damage or liability that might arise from the destruction of the warehouse by fire, “whether the same should be attributable to the negligence of the employees of the railway company” or not. The warehouse having been destroyed through the negligence of the company, an action was held to be maintainable against the licensee for the money which the company was compelled to pay the owners of the property stored. The court said: “It was immaterial from what causes the fire originated, provided it was not the result of reckless or wilful misconduct on the part of the plaintiff, as it would be against public policy for him to recover if the injury was caused by his own recklessness or wilfulness. But this exemption from liability does not extend to acts of wantonness or recklessness on the part of the plaintiff’s servants, as they owed him a duty, against the breach of which he had the right to insure, and in such cases the doctrine, *Qui facit per alium, facit per se* has no application.”

¹ *Parsons v. Winchell* (1850) 5 Cush. 592, 52 Am. Dec. 745.

“In any case of collusion in which the master takes no part, he has his remedy against the servant for misconduct and breach of authority as between them, although a third person injured by the wrongful manner of an act done

by the servant in the course of his employment has his remedy against both the servant and the master.” *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 7 C. P. 415, 419, 420.

In *Linwood v. Hathorn* (1817) 3 Bligh (H. L.) 193, agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

For other cases which sustain the first portion of the statement in the text, see *Costa v. Yochim* (1900) 104 La. 170, 28 So. 992; *Purviance v. Angus* (1786; Pa. Err. & App.) 1 Dall. 180, 1 L. ed. 90; *Mack v. Allan* (1832) 10 Sc. Sess. Cas. 1st series, 349, 7 Fac. 262.

¹ In *The Halley* (1868) L. R. 2 P. C. 193, 5 Moore, P. C. N. S. 262, 37 L. J. Prob. N. S. 33, 18 L. T. N. S. 879, 16 Week. Rep. 998, the privy council pronounced against a suit in the admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner

(2) The servant's act must not have been justifiable by the law of the place where it was done.²

(3) The vicarious liability of a master must have been adopted as one of the substantive doctrines of that law. "It appears to me that the rule that a particular person is not to be liable, although somebody else possibly may be liable, is a part of the substantive law of the country where the act is committed; and therefore if, by the substantive law of the country where the act is committed, a defendant is not liable, then he would be discharged altogether."³

was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law.

² Willes, J., in *Phillips v. Eyre* (1870) L. R. 6 Q. B. 1, 10 Best & S. 1004, 40 L. J. Q. B. N. S. 28, 22 L. T. N. S. 869. See also *Machado v. Fontes* [1897] 2 Q. B. (C. A.) 223, where it was held that an action for a libel published in Brazil might be maintained in an English court. Lopes, L. J., quoted the following remark made by James, L. J., in the case cited in the next note: "It is settled that, if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the legislature, then this court will take into consideration that state of law,—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused, for the thing done, he will not be answerable here."

³ Mellish, L. J., in *The Moxham* (1876) L. R. 1 Prob. Div. (C. A.) 110, (which reversed [1875] L. R. 1 Prob. Div. 43). An English company possessed of a pier in a port in Spain instituted a cause of damage against an English ship for negligently injuring the pier. The shipowners by their answer pleaded that by the law of Spain the master and mariners of a ship, and not the owners, were liable for negligent navigation. Held, reversing the decision of the judge of the admiralty division, that the case was governed by the law of Spain, and that that part of their answer ought not to be struck out. The language quoted in the text was used with reference to the argument of counsel that, although it was an admitted principle that "if the act itself was not by the law of Spain considered to be

wrongful, no action could be brought in this country, yet inasmuch as it is by the law of Spain considered a wrongful act as far as the master is concerned, therefore the question whether the master alone is liable, or the ship and the owners are also liable, is not to be governed by the law of Spain, but by the law of England." The following passage from the judgment of James, L. J., may also be quoted: "It was properly conceded by Mr. Benjamin in his argument, that the present question must be tried exactly in the same way as if it were being tried in Spain, and he admitted that he could not successfully argue in support of the decision of the court below unless he could make out that it would be the duty of the Spanish court, if the action had proceeded there, to apply what he called the principles of English law to the case. The principle of English law applicable to the case, according to him, is that the master and the crew of the vessel, being the servants of English owners, are, by the English law, themselves liable, and, upon the principle *respondet superior*, make their principals responsible for their negligence. And, further, that they carry with them this doctrine, so that it extends to every foreign country and every foreigner who is brought in any way into contact with them, whether by way of contract or tort, in which the masters and servants as the agents of the owner are concerned. No authority was cited for that proposition, and I am really unable to follow the principle. One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent *qua* agent with foreigners; that is to say, it may affect the nature and extent

of his agency; but the liability of one man to answer for the acts of another in matters of tort seems a thing which cannot be carried by the agents into a foreign country. If I take my coachman to France, and he in driving my carriage injures a carriage in France, I do not take with me the law of *respondeat superior*, so as to make me liable. It seems to me that the law of the country in which we are trying the question does not apply, but it is the law of the place where the act is done which does apply. Now, it is the law of Spain, according to the allegation, that where the wrongful act is done by a servant of this particular kind, the owner of the ship has not that wrong imputed to him, and that the rule of *respondeat superior* does not apply so as to make him answerable for that which was, in fact, the wrongdoing of his servants. If that be so, why is he not entitled to the benefit of the Spanish law?"

One of the authorities relied upon by Mellish, L. J., in the above case was *General Steam Nav. Co. v. Guillon* (1843) 11 Mees. & W. 877, 895, 13 L. J.

Exch. N. S. 168, a case of an injury done on the high seas by a French ship. Parke, B., observed: "The injury complained of is averred to have arisen on the high seas, out of the jurisdiction of England, and not to have been committed by the defendant personally, but by a third person, who was master of a French vessel, the defendant being a French subject. So far, the plea is free from obscurity. If the defendant was not liable for the acts of that other by that law which is to govern this case, he has a good defense to the action; and for the defendant it is contended that the plea means to aver that by the law of France he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant, and not the servant of the individuals composing that body; and if such be the true construction of this plea, we are all strongly inclined to think that there is a good defense to this action."

CHAPTER XCIII.

HISTORICAL DEVELOPMENT OF THE PRINCIPLE, RESPONDEAT SUPERIOR.

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2233. Review of the early authorities.—In order to show the extent to which the torts of a servant were deemed to be imputable to his master during the more remote periods of the development of the common law, it will be advisable in the first place to set forth chronologically such information as is available.¹ The collection of authorities

¹ Most of the statements of the Year ticle in 7 Harvard L. Rev. 330, of Book decisions which are contained in which the present writer has, by the the following summary are taken from courtesy of the publishers, been permitted to make free use.

which is here presented may not be absolutely exhaustive, but it is believed to be so nearly complete that nothing which could affect the general conclusions which should be drawn has been omitted.

The earliest work which throws any light upon the subject is Bracton's treatise *De Legibus et Consuetudinibus Angliæ*, which takes us back to the middle of the thirteenth century. In one passage f. 158b, where he is discussing wrongs committed by servants, he uses the following language :

(a) "But what if the servant of any one, in the absence of his lord, has seized the cattle of any tenant of his lord, and the tenant himself complains concerning the servant that he has seized his cattle unjustly, and detained them against bail and surety, and that servant has called the court of his lord to warrant, and the court has warranted to him concerning the service? The servant shall be released, and the court shall answer for his own act. But cannot the court answer without the lord, when the service touches the lord himself? Yes, so that the judgment be amended. But if the cattle be seized without a judgment of the court and have been claimed by the lord himself when he was present, and he himself has refused them on bail and not surety, each shall be liable, as it appears, the one for the seizure and the other for the refusal of release. And although the lord himself has avowed the seizure of his servant, he does not acquit the servant, but he charges himself, and each is liable for the act of the servant, because he seized it, and the lord doubly, because he avows the act of his servant, and because he refuses (the release of the thing seized). . . . Likewise, let it be that nothing has been done by the court, nor by the lord of the court, but only by the servant, as if the servant without the lord or without the court has levied a tax upon the tenants of his lord as villeins who are free, or who say that they are perchance when they are serfs, and afterwards, when he has of his own authority made a distress, and the cattle, upon the complaint of the tenant, have been released by the viscount upon bail and surety, and a complaint has been made only respecting the servant without the lord, it is asked whether the servant can or ought to answer without the lord, and to bring the case to judgment without him? In which case it will have to be inquired from the lord, whether he will avow the act of his servant or not, but if not, then the lord may amend it, but if he has avowed, or not amended it, he makes the injury his own, if there has been any injury." (The version here used is taken from Macdonnell on *Mast. & S.* 2d ed. p. 263.)

In another place (f. 204b) he observes with regard to actions for disseisin by servants: "But if they (the masters) have disavowed the deed of their men, and, when they shall have been sued in any respect by any man or in any mode, they shall not have made amends (*emendaverint*), they are still liable, so long as they are present and have freely placed themselves on the assize, although they are not named in the writ. But, if they shall have made amends for the deed of their men, whether before demand or after, as long as it was before the taking of the assize, they shall free themselves and their men from the penalty of the disseisin. But if the masters are occupied in parts remote, so that they cannot be made parties, and if they have not known anything about

the disseisin, for this reason the assize shall not be stayed." Almost the same principles are further expounded at f. 171a and f. 172b.

In 2 Pollock & Maitland's History of English Law, chap. 8, p. 529, these statements regarding disseisin are thus commented upon: "In Henry III.'s day disseisin was still for the King's court the one interesting misdeed that did not involve felony, and it is only about disseisin and wrongful distraint that Bracton has given us anything that can be called a doctrine of employer's liability. If we understand him rightly [de Corona, f. 158], he holds that if X's servants are guilty of disseising A, then X cannot at once be charged with a disseisin; but it is his duty to make amends to A, and if X, after the facts have been brought to his knowledge, refuses to make amends, then he is a disseisor and can be sued. It is our misfortune that in this context we read only of disseisin and wrongful distraint, for these are wrongs of subtraction, and it is easy to say that if a man, when he knows what has happened, refuses to give up the land or beasts that his underlings have grabbed for him, he ratifies or 'avows' their act and becomes a participator in the wrong. We are not sure that Bracton means more than this. What he would have said had the wrong consisted, not in the subtraction of a thing for the master's use, but in some damage to person, lands, or goods, we cannot say for certain, but we imagine that he would have absolved the master if he neither commanded nor ratified the wrongful act. The only action to which such damage could have given rise was the penal *quare vi et armis*. Soon after his day this action came to the fore and for some centuries it reigned over our law of torts. Throughout the Year Books men are 'punished' for trespasses, and, when we are to be told that an action of trespass will not lie against the master, we are told that the master is not to be 'punished' for his servant's trespasses—*quia quis pro alieno facto non est puniendus*." The learned authors also mention that "in a book of precedents for pleas in manorial courts which comes from the last half of the thirteenth century we find that a defendant, who is charged with the act of two men who cut stubble in the plaintiff's close, pleads that these men were not of his mainpast, but labourers hired from day to day." p. 529. [The doctrine which is here apparently assumed, *viz.*, that the defendant would have been liable if the trespassers had been of his "mainpast," is scarcely consistent with the statement in ¶ (b), *infra*.] On a subsequent page (532), they remark: "Our common law when it took shape in Edward I.'s day did not, unless we are much misled, make masters pay for acts that they had neither commanded nor ratified. Had it done so, it would have 'punished' a man for an offense in which he had no part."

(b) (1302) Y. B. 30 Edw. 1, 1863 ed. p. 202. A poor woman complained that B. had deforced her by frequent distress, and had taken from her a hundred shillings. B. Not guilty. The inquest said that the woman's son, whom she was bringing up at home, committed damage in B.'s wood, and that B. came and took two shillings from the woman. Berrewik, J. And inasmuch as he did wrong to distraint the woman on account of her "mainpast," therefore the court adjudges that she do recover her two shillings, and her damages of sixpence; and that B. be in mercy.

(c) (1353) By Stat. 27 Edw. III., chap. 19, it was enacted that no merchant nor other man, of what condition that he be, "shall lose or forfeit his goods nor merchandises for the trespass or forfeit of his servant, unless he do it by

the command or procurement of his master, or that he hath offended *in the office that his master hath put him in*, or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as in some places it is used." The precise import of the words italicized is not clear; but having regard to the early date of the statute, they can scarcely be susceptible of the construction that the master was to answer for the trespasses which should, in the modern phrase, be committed "within the scope of his servant's employment."

(d) In *Beaulieu v. Pinglam* (1401) Y. B. 2 Hen. IV. 18, pl. 6, the declaration alleged that every person by the custom of this realm shall keep his fire safely and securely, and is bound so to keep it, lest any damage happen to his neighbor in any manner, and that Roger so negligently kept his fire that for want of due keeping, his fire spread to the house of William, and William's goods were burned. Markham, J., said: "A man is bound to answer for the act of his servant or of his guest in such case, for if my servant or my guest puts a candle in a window, and the candle sets light to the thatch (another version is "puts a candle on a beam, and the candle falls in the straw"), and burns my house down, and the house of my neighbor also, in this case I shall answer to my neighbor for the damage he sustained." "I shall answer to my neighbor for him who enters my house by my leave or knowledge, where he is guest to me or my servant, if he acts, or either of them acts, in such a way with the candle or other things that my neighbor's house is burned. But if a man outside my household, against my will, sets fire to the thatch of my house, or does otherwise *per quod* my house is burned, and also the houses of my neighbors, I shall not be held to answer to them, because this cannot be said to be ill or 'through ill-doing' on my part, but against my will."

(e) (1431) Y. B. 9 Hen. VI. 53, pl. 37. Action for selling bad wine. Plea that he sold it through his servant. Martin, for the plaintiff: "Of your own knowledge you have deceived him (the plaintiff)." Rolf, for the defendant: "If I have a servant who is my merchant, and he goes to a fair with an unsound horse to sell it, shall the party have an action of deceit against me? No." Martin: "You are right; for you did not order him to sell the thing to the other, nor to any particular person; but if your servant by your covin and commandment sells bad wine [the buyer] shall have action against you; for it is your own selling; and if the case is that you did not command your servant to sell to that person, then you may allege that you did not sell to the plaintiff." The decision is not reported; but the law has been generally understood to be as stated by Martin. In 1 Rolle, Abr. p. 95, the case is cited (together with Y. B. 9 Hen. VI. 53B), in support of these propositions: If a servant sells an unsound horse or other merchandise belonging to his master to a third person at a fair, no action lies against his master, because he does not command the servant to sell it to anyone in particular. But if the servant, by command of the master, sells it to a particular man, if it is unsound, an action on the case lies against the master, for the sale is his. If the servant at a tavern sells to another person wine which is bad, an action on the case lies against the master, though he does not command the servant to sell it to that particular man. See also Noy's Laws of England, Blythewood's ed. *95; D'Anver, Abr. "Act. on Case," fol. 184; Lilly's Practical Register, "Deceit;" 1 Comyns's Dig. 354 (360); Bacon, Abr., "Master and Servant," p. 536.

(f) (1443) Y. B. 21 Hen. VI. 39, pl. 6. Trespass for grass trodden and spoiled by the defendant's beasts. Markham for defendant: "We say that the plaintiff, with the intent of damaging the defendant, commanded one of his own servants to drive the defendant's beasts into the [plaintiff's] grain, wherefore he [the servant] by his commandment drove them into the said grain, and the defendant, as soon as he had notice of it, drove them out of the said grain and grass." Yelverton for the plaintiff: "This plea amounts only to not guilty; for if one by my covin and commandment, takes the goods of another person or beats him in any commandment the writ is maintainable against him who did it and me . . . ; thus here by his [the defendant's] own statement the plaintiff himself did the trespass. . . ."

(g) (1471) Y. B. 10 Edw. IV. 18, pl. 22. Trespass for false imprisonment: plea, that the defendant handed the plaintiff over to the authorities; objection, that he was still responsible for the subsequent letting at large. Choke, J.: "And if the defendant had delivered the plaintiff to jail by [the hands of] his servant or other man, who had suffered the plaintiff to go at large, etc., never should the plaintiff have action against the defendant, etc., *quod curia concessit*."

(h) (1472) Y. B. 11 Edw. IV. 6, pl. 10. Action of deceit on a guaranty as to the length of cloth bought of the defendant. Plea, that the cloth was B's, and was sold by the defendant as servant of B. Choke, J.: "Here the sale is the sale of the master, and the guaranty the act of the servant, wherefore on this guarantee I shall not have an action against the servant. If a man takes upon himself to cure me of a certain illness, if he gives such medicine that I am injured, I have an action on my case against him; but if he undertakes as above, and then commands [maunde: order, command] his servant to administer the medicine to me, and he emplasters or medicates me, by which I am injured, I shall not have an action against the servant, but against the master. And so if he undertakes to shoe my horse, and orders [his] servant [to do it] who 'nails' [the horse], the action lies against the master." Littleton, J., was opposed: "Although this sale is the sale of the master, yet it is done by the servant," etc. Brian, J., agreed with Choke: "But, sir, it seems that the action of deceit does not lie in this case, for it is the sale of the master."

(i) (1497) Keilw. 3, pl. 7. Where my wife or my servant, without my knowledge, puts my beast on another's land, who brings a writ of trespass against me for depasturing his grass with my beasts, if I plead not guilty, I cannot give the special matter in evidence, because it is contrary to the issue . . . which was conceded by the whole court. And it was besides said at the same occasion that where my beasts, of their own wrong, without my will and knowledge, breake into another's close, I shall be punished, for I am the trespasser with my beasts, which was also agreed to as law, because I am bound by law to keep my beasts without doing harm to any one. (The situation thus contrasted emphasizes, as Prof. Wigmore remarks, the significance attached to the element of consent.)

(j) (1498) Y. B. 13 Hen. VII. 15, pl. 10. It was held in common bench, if my servant, against my desire, chases my beasts into the land of a stranger, I shall not be punished for this, but my servant; otherwise if my beasts escape against my desire, for I shall there be punished. *Quære*, if I keep a dog, and my servant, against my desire, incites and causes the dog to bite and kill the beasts of a stranger, whether I shall be punished for this.

(k) (1505) Y. B. 20 Hen. VII. 13, pl. 23. Trespass for false imprisonment; justification as bailiff by command of the sheriff under a writ. The sheriff had neglected to return the writ, and this was objected to as defeating the plea. Rede, Ch. J., to the contrary. "For there is no default in the bailiff. . . . For suppose that the master commands the servant to distrain, and so he does it and takes [the distress] to his master, and the master misuses it, is it reason to punish the servant? No, surely; and so no more here. And if the master commands the servant to distrain and the servant does so, it is not reason, if the servant misuses the distress, that the master should be punished by cause of his command, which was lawful in the beginning; wherefore, on the other hand [in this case also] the law should be all one."

(l) (1506) 21 Hen. VII. 22, pl. 21. Same facts as in 20 Hen. VII., *supra*; probably the same case adjourned. Rede, Ch. J., held the defendant excused "since every bailiff and every servant is bound to do the precept of his master in all that is legal," and showing that "there is a defendant in his master, in whom the default is," says: "As if I command my servant to take a distress for my rent, and he does it and leads the distress to me, and I kill it, or do other illegal thing with it, in this case the servant is excused; and, on the other hand, where I command my servant to take the distress legally, and he rides on the distress, in this case he shall be punished, and I excused, for that when I command him to do a thing legally, and he does contrary to the commandment, he does a wrong to which I did not assent [agree]; it is reason to punish him and to excuse me, and so here. . . ."

(m) As being in accord with the above case, Prof. Wigmore refers to (1469) Y. B. 8 Edw. IV. 17, pl. 24; and (1410) Y. B. 11 Hen. IV. 91, pl. 47 (1410); where, on the defendant's writ against J., the bailiff erroneously took the horse J. was riding, which was in fact the plaintiff's, and both judges declared that the error was not to be charged against the defendant without an allegation that it was "by covin and contrivance" of him; or "at his showing or request."

(n) In the treatise entitled "Doctor and Student," II., chap. 42 (Muchall's ed. p. 233), which was published in 1518, we find the following statements: "For trespass of battery, or wrongful entry into lands or tenements, ne yet for felony or murther, the master shall not be charged for his servant, unless he did it by his commandment. . . . Also if a man send his servant to the market with a thing, which he knoweth to be defective, to be sold to a certain man, and he selleth it to him, there an action lieth against the master; but if the master biddeth him not to sell it to any person in certajn, but generally to whom he can, and he selleth it according, there lieth no action of deceit against the master."

(o) *Ibid*, p. 234. "If a man desire to lodge with one that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, his master shall not be charged for the robbing; but if he had been a common hostler he should have been charged. . . . But that an host or keeper of a tavern shall answer for their guests, unless it be done by their assent and commandment, I do not remember that I have read it in the laws of England."

(p) *Ibid*, p. 237. Also, if a man be gardein of a prison wherein is a man that is condemned in a certain sum of money, and another that is in prison for felony, and a servant of the gardein that hath the rule of the prison under him, wilfully letteth them both escape; in this case the gardein shall answer for the

debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the servant only shall be put to answer to the felony for the wilful escape.

(q) *Treatise on Subpœna*—date about 1525. (1 Hargrave, *Law Tracts*, 347) "Also if a man's servant thro' negligence of his master, tho' it be not by his commandement or assente, but for lacke of correction, do offenses and trespasse to his neighbour, whereby the master is bound in conscience to make restitution if his servante be not able, yet there lieth no subpœna againste the master to compel him to it."

(r) *Lord North's Case* (1558; Exch. Ch.) 2 Dyer, 161a, pl. 45. King Edward VI. sold a quantity of lead to A., and appointed Lord North, who was then chancellor of his court of augmentations, to take bond for the payment of the money. Lord North appointed one B., who was his clerk, to take the bond; which was done. B. delivered it to Lord North; and he delivered it back again to B., in order to carry it to the clerk of the court of augmentations: B., conspiring with the obligee, suppressed this bond. Held, by all the judges, that Lord North was chargeable to the King; because the possession of the bond by his servant, and by his order, was his own possession.

(s) (1573) *Brooke*, Abr. "Trespas," pl. 245. If the servant pledges the beasts of his master for corn which comes to the use of his master, this is good; and trespass does not lie for the master, nor can he retake them; and because he retook, therefore the other recovered against the master by writ of trespass.

(t) *Seaman v. Browning* (1589) Leon, pl. 4, p. 123. Debt on an obligation with a condition for peaceable enjoyment of lands, and a breach assigned in that trees were cut down. "It was found that a servant of the said Marshall [the obligor] had entered and cut them, and that in the presence of the said Marshall, his master, and by his commandment; it was the opinion of the court that the condition was broken, and that the master was the principal trespasser."

(u) *Waltham v. Mulgar* (1606) F. Moore, 776 (No. 1076). The owner of a privateer was held not to be liable for the wrongful act of the crew in seizing a ship which belonged to the subjects of a friendly state. A civilian, who argued the case together with a common lawyer, stated that, under the Civil Law, a master was responsible in all "public affairs," and contended that "he who has put a ship in traffic should provide servants who will not commit public offenses." But Popham, Ch. J., said: "Where the master directs his servant to do an illegal act, the master shall answer for the servant if he mistakes in the doing of the act; but where he directs his servant to do a legal act, as here to take the goods of the King's enemies, and he has taken the goods of friends, the master shall not answer. As if one sent his servant to a market to buy or sell, and he robs or kills by the way, the master shall not answer; but if he sets him to beat someone, and he kills him, or mistakes the person and beats another, the master is a murderer. So with rescous or trespass."

(v) *Gibson's Case* (1611) Lane, 90. A. and B., affirming themselves to be servants to the deputy aulneger, unpacked a parcel of drapery belonging to J. S., pretending to search for certain stuffs called new drapery, and laid it in the dirt, whereby the goods became unsaleable. It was agreed that if they, as servants to the deputy, without his precedent appointment, do seize the plaintiff's goods, and their master approves the seizure, tho' they without his consent abuse the goods, yet their master is a trespasser *ab initio*. And tho' the first seizure be admitted lawful, yet the abusing makes the original seizure wrongful,

and trespass lies; and tho' the master did not appoint or was privy to the abuse, yet he shall answer damages.

(w) *Southerne v. Howe* (1618) 2 Rolle, Rep. 5, 26, Cro. Jac. 468, Popham, 143, J. Bridg. 126. Case was brought for sending by the defendant's servants to the plaintiff some jewels, known to be counterfeit (worth £80, the jury said, but the price was £800), for sale to the King of Barbary, by which the plaintiff fared ill at the hands of the said King when the cheat was discovered. For the plaintiff it was argued that, where the vendor knows the fault, the fact that he has a servant do it is immaterial, the authorities cited being *Reg. v. Saunders* (1574) 2 Plowd. 473, of the poisoned apple (a criminal case), and Y. B. (9 Hen. VI.,—see ¶ [e], *supra*). The defense argued that the master did not order the servant to commit the fraud, that he was "sans privy;" and that, although a general authority to a factor suffices to charge the master, yet not if the factor commits a fraud. Coventry, for the defense, said that the jeweler was personally guilty of no intention to commit fraud, for the jewels were worth £80, and proceeded thus: "There is a distinction between the master's command of a lawful and of an unlawful thing, as if I command my servant to disseise J. S. and he disseises him with force, I shall be punished for the force; but if I command him a lawful thing and he exceeds his authority, I shall not be punished for the excess;" citing Y. B. 11 Edw. IV. pl. 6; Y. B. 9 Hen. VI. pl. 53; Doctor and Student, 137, 233; Y. B. 13 Hen. VII. pl. 15. (See *supra*.) Mountague, Ch. J., agreed with Coventry "*en tout*." Doderidge, J., said: "One appoints his servant to sell plate for him, which is in value below the standard,—the standard is 5s. per ounce and the plate is worth only 2s.—and he commands him to sell according to the standard [but he really sells below it]; shall the vendee not have an action on the case?" This, as Prof. Wigmore remarks, was in effect a contrary opinion.

(x) *Shelley & Burr* (1625) 1 Rolle, Abr. 2, pl. 7, it is laid down: "Action on the case does not lie against man and wife for negligently keeping their fire in their house, by which the house of the plaintiff was burned, for that the action lies upon the general custom of the realm against the paterfamilias, and not against a servant, or a feme-covert, who is in the nature of a servant."

(y) *Water's Case* (1634) cited in Clayt. 5, where a servant takes a sheep for an amercement, and the master agrees, he is equally liable to trespass as the servant, and both are liable.

(z) (1641) Noy's Laws of England, chap. 44, Blythewood's ed. *93. "For murder, felony battery, trespass, borrowing or receiving money in his master's name by a servant, the master shall not be charged, unless it be done by his command, or come to his use by his assent."

(aa) *Id.* If a man's servant who keeps his shop, or who is accustomed to sell for him, shall give away his goods, he shall have trespass against the donee. But if I deliver my goods to another to keep to my use, and he give them away, I shall not; for the donee had no notice whose goods they were, as in the case of the servant.

(bb) *Id.* A man "is chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his Majesty's liege people."

(cc) *Id.* *95. I command my servant to distrain, and he rode on the horse taken for the distress, he shall be punished, not I.

(dd) (1655). In an anonymous case reported in Hardres, 31, counsel argued thus: "If a man's servant take toll where it is not due, he himself shall answer it, and not his master, by the common law. . . . If a master commands his servant to distrain for rent, and he abuse the distress, the servant shall answer for it; and the reason of all these cases is, because the party that committed the tort ought in reason to answer for it, and make it good."

(ee) (1668) 2 Rolle, Abr. "Trespass," 553, pl. 435. If my servant, without my notice, put my beasts on another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there, without my assent, he gains a special property for the time, and so to this purpose, they are his beasts. (Citing Y. B. 12 Hen. VII., Keilway, 3). (This was one of the authorities relied on by Lord Kenyon in *M'Manus v. Crickett* (1800) 1 East, 106. See § 2239, note 1, *post*).

(ff) *Cremer v. Humberston* (1668) 2 Keble 352. It was ruled thus: "The high sheriff and under sheriff is one officer; and if one delivers White Acre on *habeas facias possessionem* of Black Acre, the high sheriff is chargeable; but otherwise of a common servant, who is a trespasser if he takes one man's goods as another's for which I sent."

(gg) In *Michael v. Alestree* (1677) 2 Lev. 172, 3 Keble, 650, the servant of A. brought a coach and two ungovernable horses of his master's to Lincoln's Inn Fields in London, a place much frequented by people, and there drove them to make them tractable, and fit them for a coach. The horses being unruly, and for want of care, etc., ran upon the plaintiff, and hurt him. In an action brought both against master and servant, it was held that it well lay; and that "it shall be intended the master sent the servant to train the horses there." It should be observed, however, that in the report in 1 Vent. 295, this point is not mentioned.

(hh) *Kingston and Booth* (1685) Skin. 228. The defendant commanded his servant to pull down a little wooden house which the plaintiff had carried upon wheels onto the land of the defendant, to trick him out of possession. The servant was told to take care not to hurt the plaintiff, but wounded him while the appointed work was in progress. Held, that "in trespass and assault of wounding" the master "might plead 'not guilty' and give this in evidence, for that he was not guilty of the wounding, and the pulling down the house was a lawful act." The law was laid down as follows: "If I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased."

2234. General remarks concerning the early authorities.—From the foregoing summary it is abundantly evident that, up to the closing years of the seventeenth century, no definite theory as to the vicarious liability of a master for the acts of his servant had been formulated.

Most of the authorities, it will be observed, relate to the commission of some kind of wilful trespass; and they show clearly that, speaking generally, the only grounds upon which he could be sued for a tort of this description were a prior authorization or a subsequent adoption of

the servant's act.¹ The only exceptions to which, so far as appears, this rule was subject, were those admitted where the responsibility of the master was enlarged by custom,² or where the servant's act involved a breach of some absolute duty imposed upon the master,³ or where a servant made a wrongful disposition of a chattel of which he had possession as a servant.⁴

That the notion of a constructive responsibility, predicated upon the existence of the relationship of master and servant, was unknown to the courts during the period in question, is also indicated by the footing upon which the few cases that involved negligent acts were argued and determined. In two of those cases, where the damage complained of was caused by the spreading of a fire from the defendant's premises, the rationale of the decision was obviously an assumed absolute obligation, arising from his occupancy of the premises, to see that his servants were reasonably careful in regard to dealing with fire while they were engaged in their duties.⁵ In another case, we find a *dictum* which seems to import that a master who undertakes to perform certain work in respect of a chattel intrusted to him as bailee impliedly stipulates that the work shall be carefully performed by any servant to whom he may delegate it.⁶ In another case the actual ground upon which recovery was allowed seems to have been personal fault on the master's part.⁷ But as this case was decided very near

¹ In 7 Harvard L. Rev. p. 391, Prof. Wigmore observes: "In view of the almost uniform language of the courts, counsel, and text writers in these records of the sixteenth and seventeenth centuries, it seems necessary to believe that the test, as it came to be accepted in those centuries, was none other than that of command (*i. e.*, before the deed), or consent (assent) (*i. e.*, before or after the deed). In one specific case it is fairly clear that, for reasons not here important, and not now needing to be set out, the old strict liability continued down through the seventeenth century; *viz.*, the case of a fire started by the servant within the house. But apart from this exceptional case, and possibly one or two others, involving the persistence of extraneous traditions, it may be inferred that the command or consent test was the natural and universal one."

² See § 2233, ¶ (c), *ante*.

³ This seems to be the rationale of the passage in Doctor and Student regarding the liability of "gardein" of a prison. See § 2233, ¶ (p), *ante*.

⁴ See Lord North's Case, § 2233, ¶ (r), *ante*.

⁵ See § 2233, ¶¶ (d) and (x), *ante*. With regard to the case cited in the former of these paragraphs, *Beaulieu v. Finglam*, Mr. Beven remarks: "This case is cited as the authority for the statement in Comyn's Digest, Action on the Case for Negligence (A 6), and in Viner's Abridgment, Action (B) for Fire, that by the common law a man in whose house a fire originated, though by no act or fault of his, and even if it were accidental, was liable for whatever damage it caused to the house or goods of another. It is manifest that the liability there alleged does not necessarily arise independently of the negligence of master or servant or guest; further, negligence is alleged as the gist of the action. The point, then, that a man is liable for a purely accidental fire, is not made out." 1 Neg. (1895) pp. 588, 589. This criticism seems to be well-founded.

⁶ See § 2233, ¶ (h), *ante*.

⁷ See § 2233, ¶ (gg), *ante*. In 4 Harvard L. Rev. 353, Judge Holmes

the end of the period under review, its proper significance as a precedent is not a matter of much consequence in a historical point of view.

2235. Introduction of the principle, *Respondeat superior*.—Proceeding now to the second period in the development of the law, we find the principle, *Respondeat superior*, clearly recognized in several decisions rendered soon after the Revolution of 1688; that is to say, within a very few years after the last of those cited in § 2233, *ante*.

In the first case which calls for notice, where an action was held to be maintainable against the owners of a ship for goods spoiled through the negligence of the master, Holt, Ch. J., is stated in one of the reports to have laid down the broad doctrine: "Owners are liable in respect of the freight and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."¹ When we advert to the conceptions which had previously been current, this affirmation of a doctrine which, in the form in which it was enounced, seems to go to the extent of imposing upon a master the liability of a guarantor in respect of the conduct of his servants, is not a little remarkable. But it seems extremely doubtful whether the Chief Justice really used language of this unqualified tenor. The other reports merely represent him as defining the extent of a liability arising out of a contractual obligation on the part of the defendants, as carriers, to answer for the negligence of their servants in respect of the subject-matter of the bailment.² A similar restricted significance should probably be attributed, in spite of their generality, to certain statements which, according to one of the reports, were made by two other

doubts whether this case, *Michael v. Alestree*, is an example for the principle, *Respondeat superior*, and expressed the opinion that it was a case in which the damage complained of was the natural consequence of the very acts commanded by the master.

¹ *Boson v. Sandford* (1689) 2 Salk. 440. The actual decision of the court as a whole was that all the owners were liable, "for they were charged in point of contract, as employers," and that an action could not be maintained against a portion of them.

² In 1 Shower, K. B. 29, he is reported to have said that the action "doth certainly lie against the owners, because they have the profit; by the civil law the owners are liable; not as owners, but as employers." In the same report

(p. 101), he is said to have laid it down at the adjourned hearing of the case, that "the part owners are chargeable, because they take upon them the fitting of the ship and have the benefit of it; the part owners are answerable as employing and having the benefit of the voyage. . . . The action is grounded upon the trust, and that doth imply a contract. . . . All the misfeasance in this case is but for a breach of trust." The corresponding passage in Comb. 118, is as follows: "Here it is found that the profits came to the owners, and therefore they are chargeable. In Justin, Inst. title *Exercita Navis*." The reports in Carth. 61, and Skinner, 278, do not contain any account of this part of his judgment.

judges.³ But the fact that the principle of a vicarious responsibility was recognized in the case, even to this limited extent, is enough to render it a precedent of the highest importance in a historical point of view. It may well be regarded as having furnished the bridge by which, as will presently be seen, an advance was made to the assertion of such a responsibility as existing independently of contract. That the judges who decided it were almost, if not quite, prepared to take this additional step may not unreasonably be inferred from the fact that one of them fortified his opinion by an appeal to various decisions in which the element of a contractual obligation was not involved.⁴ It is true that none of those decisions can properly be said to be an authority for the doctrine, *Respondeat superior*, in the sense in which that phrase is now understood. But that circumstance is not material for the purpose of the present discussion. The essential point with which we are here concerned is that cases which did not relate to the effect of contractual obligations were deemed appropriate to cite in support of the theory of a vicarious liability predicated as an incident of an obligation of that character.

Whatever may be the precise significance of the above case in respect of the transition from the earlier conceptions of a master's liability to those which now prevail, it is clear from two other judgments delivered not long afterwards, that Chief Justice Holt had by that

³ In 1 Shower, K. B. 101, Eyres, J.—“It is plain the act on default of the servant shall charge the owner.” Gregory, J.—“The master's act doth bind the owners.”

⁴ In support of his assertion that “there are many cases in which the act of the servant shall bind the master” (see report in 3 Mod. 321), Eyres, J., cited *Lord North's Case*, Dyer, 161 (which really turned upon the theory that the possession of the servant was the possession of the master; see § 2233, ¶ (r), *ante*); a case in 2 Dyer. 238-b (which affirmed the penal liability of the customer of a port for his deputy's false certification of certain customs, —a decision manifestly based upon the conception of an absolute duty on the customer's part); *Seaman v. Browning* (1590) 4 Leon. 123 (decided upon the ground that the given tort was committed in the master's presence and by his command; see § 2233, ¶ (t), *ante*); *Waltham v. Mulgan*, F. Moore, 776 (which proceeded upon the doctrine that the illegal acts of a servant were

not imputable to the master except in cases where the master directed them to be done; see § 2233, ¶ (u), *ante*).

Another of the authorities cited, an anonymous case referred to by counsel in *Keniger v. Fogossa* (1816) 1 Plowd. 11, involved merely the binding effect of a contract made by the defendant's bailiff. See § 2233, ¶ (s), *ante*, where its effect is stated.

The learned judge made no reference to a case which had quite as much bearing upon the matter under discussion as any of those cited, *viz.*, *Cally v. Fish* (1625) Noy, 77, the effect of which is thus stated in 15 Viner, Abr. p. 314: Upon evidence the case was thus: A. had three several closes, 1st, arable, 2d, pasture, 3d, meadow; B. pretends a right to all, and enters and makes a lease of all to try the title. The servants of A. with carts about their master's business enter into one of the closes; and by the court that is an ejectment of all, although there be not any proof of the command by their master.

time adopted a theory of constructive responsibility essentially identical with that which is applied by modern courts.

In one of the cases referred to,⁵ an action for damage caused by a fire which spread from a field, the argument upon which, according to Skinner's report, the defendant's counsel relied, was that "it does not appear in this case to be done by the command of the master, and then it being out of his house, he is not responsible." In Comberbach's report the remarks of the chief justice are stated thus: "It differs from the case of a house, for everyone ought to take care of that; and tho' I am not bound by the act of a stranger in any case, yet if my servant doth anything prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business." Lord Raymond's report of the corresponding passage runs thus: "If my servant throws dirt into the highway, I am indictable. So, in this case, if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet his master shall be liable; . . . for it shall be intended that the servant had authority from his master, it being for his master's benefit." In the other case, it was laid down that an action might be maintained (1) where a pawnbroker's clerk took a pawn and lost it, and the owner demanded it; (2) where A's servant with his cart ran against another cart; (3) where a carter's servant ran over a boy with a cart. "The act of a servant is the act of his master, where he acts by authority of the master."⁶ In both of these cases the "authority" which was regarded as being the criterion of liability was manifestly one which had relation, not to the particular act which caused the given injury, but to the class of acts which the servant had been hired to perform. In other words, the master was considered to be liable or not liable, according as the act complained of was or was not within the scope of the servant's employment, in the sense which is now ascribed to that phrase.

At the commencement of the eighteenth century the new doctrine as to the vicarious liability of a master was extended to the domain of wilful torts by two rulings of Holt, Ch. J. One of these was to the effect that a master might be held accountable for the fraud of his servant.⁷ The accountability in this instance, however, was predicated not upon the ground of an implied authority,—a conception

⁵ *Turberwill and Stamp* (1698) Skin. 681, Comb. 459, 1 Ld. Raym. 264.

⁶ *Jones v. Hart* (1699) 2 Salk. 441.

⁷ It should not be forgotten, however,

that the right of action against the master for a tort of this description was not finally settled until our own times. See § 2382, *post*.

which perhaps was felt to be somewhat incongruous in such a connection,—but upon the consideration that, “seeing somebody must be a loser by the deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger.”⁸ About the same time it was held that trover would lie against a master in respect of property converted by his servant.⁹ In the cases cited the existence of a remedial right was taken for granted, the only point determined being the proper form of action. In a somewhat later case the liability of a master for a tort of this character was affirmed on the ground that the master had “given a credit” to the servant in question.¹⁰ But it would seem that the liability may also, and perhaps preferably, be explained as being a proper deduction from the doctrine that property which comes into the possession of a servant, while acting in the course of his employment, is deemed to be constructively in the possession of his master. See § 241, *ante*. In this point of view any subsequent wrongful disposition of the property by the servant may, it is apprehended, be regarded rather as an incident of the master’s personal control over it than as an act done by the servant in his representative capacity. Some authority for this theory is furnished by one of the cases which was decided before the adoption of the principle, *Respondeat superior*.¹¹ The law with respect to wilful torts of other descriptions continued, until a comparatively recent date to be the same as it had been during the earlier period reviewed in § 2233, *ante*. This anomalous situation seems to have resulted mainly, if not entirely, from the operation of the technical rules of common-law pleading. See § 2239, *post*.

Two other cases belonging to this period illustrate the extent of a servant’s authority to obligate his master to the performance of a contractual duty, rather than the vicarious liability of the master in re-

⁸ *Hern v. Nichols* (1701) 1 Salk. 289 (defendant held answerable for the fraud of his factor beyond sea in selling cloth of wrong quality).

In *Wayland’s Case* (1702) 3 Salk. 234, the reason assigned for holding the master to be chargeable for the fraud of his servant in keeping money given him to pay tradesmen was, that “the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen.”

In *Grammar v. Nixon* (1726) 1 Strange, 653, Eyre, Ch. J., held the de-

fendant to be liable for a false warranty by his servant; but the principle relied upon is not stated in the report.

⁹ *Jones v. Hart* (1699) 2 Salk. 441, 1 Ld. Raym. 738; *Taylor v.* (1702) 2 Ld. Raym. 792.

¹⁰ *Armory v. Delamirie* (1722) 1 Strange, 505, 10 Mor. Min. Rep. 66. See also *Mead v. Hammond* (1722) 1 Strange, 505 (Pratt, Ch. J.).

¹¹ *Lord North’s Case* (1558; Exch. Ch.) Dyer 161 a, pl. 45. The tort there involved, if not technically conversion, was so closely allied to it that the analogy of the case may justifiably be considered as decisive.

spect of torts.¹² But in view of the date at which and the grounds on which they were decided, they are deserving of notice in the present connection.

2236. Rationale of the change of doctrine.—The meager reports of the cases reviewed in the preceding section unfortunately afford no information as to the reasons which were deemed to warrant a new departure in doctrine which, having regard to the earlier decisions, must be regarded as judicial legislation of an exceedingly sweeping character. Any explanation, therefore, which may be offered with regard to the subject, must be purely conjectural.

a. Industrial and commercial progress of the nation.—The most plausible theory seems to be that the rapid growth of the commerce of England after the Restoration of the Monarchy in 1660¹ had brought about certain social and economic conditions which were deemed to render it expedient, in the interests of the community, to enlarge the responsibility of masters in regard to the acts of their servants.² In this point of view the adoption of the rule, *Respondeat superior*, presents itself simply as an illustration of the process by which current notions of what is fitting have been reduced to juristic forms. Courts which have felt themselves impelled to resort to this process have never been at a loss for legal concepts more or less appropriate to serve as rational foundations for doctrines demanded by public opinion. In the present instance Chief Justice Holt, influenced, no doubt, by a desire to preserve as far as possible the continuity of the chain of precedents, chose to stand upon the notion that a general

¹² In *Middleton v. Fowler* (1699) 1 Salk. 282, where the owner of a stage-coach was held not to be liable for the loss of a trunk delivered to the driver, Holt, Ch. J., laid it down that "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master."

In *Boucher v. Lawson* (1734) Cas. T. Hardw. 194, where gold taken on by a shipmaster at a Portuguese port, contrary to Portuguese law, was missing when the ship arrived in London, the arguments of counsel for defendant were, that if the servant of a carrier carry goods without the privity of his master, or his receiving a reward for taking them, the master is not chargeable; . . . that a master is not answerable for the acts of his servant but where he acts in execution of any authority given him by his master.

The shipowner was held not to be liable. "For anything that appears in this case, this might be a ship sent to Lisbon for a special purpose; and if so, no one can say that the master, by taking in goods of his own head, could make the owners liable."

¹ See Hume's *History of England* (1823 ed.) vol. 8, p. 328.

² Prof. Wigmore (7 *Harvard L. Rev.* 393) pertinently remarks that "the conditions of industry and commerce were growing so complicated, and the original undertaker and employer might now be so far separated from the immediate doer, that the decision of questions of masters' liability must radically affect the conduct of business affairs in a way now for the first time particularly appreciated. . . . It was therefore natural that the judges should find themselves forced to consider the practical expediency of the traditional test of liability."

authority to perform functions of a certain description might be deemed to import by implication the giving of a particular direction in regard to any act which the servant might do while engaged in the discharge of those functions. The implication thus entertained furnished a convenient method of bridging the gap between the older doctrine and that which was deemed to be requisite, and the fiction which it involved was not more violent than others by means of which the development of the law has been worked out.

b. Influence of the civil law.—It seems quite possible that, if full reports of Chief Justice Holt's reasoning had been preserved, we should find that he fortified his position by a reference to the doctrines of the Roman law, under which the principle of vicarious liability was recognized with regard to certain classes of persons and certain classes of acts. See § 2251, *post*. From his judgment in a celebrated case, it is apparent that he was familiar with some portions of that system;³ and there is, to say the least, no inherent improbability in the supposition that he may have resorted to so convenient a storehouse of authorities, when it was found expedient to break away from the older English precedents. Such a supposition is to some extent corroborated by the circumstance that the case in which he first enounced the rule, *Respondeat superior*, involved the liability of a shipowner,⁴ and that this liability was declared by him on the same absolute terms as those employed by Roman jurists.⁵

The author has not been able to ascertain at what date the circumscribed doctrines of the Roman law (see § 2251) were superseded in France by the broad principle of vicarious liability which Pothier enunciated in the eighteenth century. (See § 2253 *a post*). But if that principle was already recognized in the previous century, it may possibly have influenced Chief Justice Holt.

In a Massachusetts case, the following observations were made by Holmes, J., *arguendo*: "It is hard to explain why a master is liable to the extent he is for the negligent acts of one who, at the time, really is his servant, acting within the general scope of his employment. Probably master and servant are 'feigned to be all one person' by a fic-

³ *Coggs v. Bernard* (1704) 2 Ld. Raym. 909.

⁴ *Boson v. Sandford* (1691) 2 Salk. 440, 3 Mod. 321.

⁵ In § 2235, note 2, *ante*, it is shown that, according to one of the reports, he actually did rely upon the prætorian edict mentioned in § 2251, *b, post*.

He may also have been acquainted with and influenced by a very old case

(decided in 1351, with reference to the laws of Oleron) in which a shipmaster was held liable in trespass *de bonis asportatis* for goods wrongfully taken by the mariners, and it was laid down that he was answerable for all trespasses on board his ship. *Brevia Regis* in Turr. London, T. 24 ed. III, No. 45, Bristol, printed in Molloy's *De Jure Maritimo*, Bk. 2, chap. 3, § 16.

tion which is an echo of the *patria potestas* and of the English frank pledge.”⁶ But this explanation of the doctrine, *Respondeat superior*, is open to the serious objection that there is, so far as appears, no definite historical evidence to support it. None of the early common-law cases in which the right to maintain an action against a master in respect of the torts of his servant is upheld show any clear case of the acceptance of a theory of identification similar to that which was worked out by Roman jurists with relation to the *patria potestas*.

c. Relation of the doctrine, Respondeat superior, to that of a master's liability for the acts of his slaves.—Under the law of ancient Rome,⁷ and that of the Germanic tribes,⁸ a master was responsible for the acts of his slaves; and the view has been propounded that there

⁶ *Dempsey v. Chambers* (1891) 154 Mass. 331, 13 L.R.A. 219, 26 Am. St. Rep. 249, 28 N. E. 279.

⁷ See § 2251, *post*.

⁸ In 2 Pollock & Maitland's *History of English Law*, p. 527, it is remarked: "It is hardly to be doubted that, if we go back far enough, we shall see a measure of responsibility far severer than that which we now apply to 'masters' or 'employers,' applied to some superiors. A man was absolutely liable for the acts of his slaves,—though some penal consequences he might be able to escape by a noxal surrender,—and a householder was, in all probability, liable for what was done by the free members of his household, etc., etc. At the end of the twelfth century almost every vestige of the lord's liability had disappeared. Anything that we could call slavery was extinct. The mere relationship between lord and vassal did not make the one responsible for the acts of the other."

With regard to the Germanic law generally, Prof. Wigmore quotes (7 *Harvard L. Rev.* 330), in support of his assertion that "there certainly was a time when the master bore full responsibility for the harmful acts of his serf or his domestic," the following passages from Professor Brunner's chapter on "Territorial Lordship," in his *Deutsche Rechtsgeschichte* (1892), II. § 93; see also I. 71, 98: "As regards the origin of territorial lordship, we have to distinguish in the Frankish Empire a lordship by Germanic law, and one by Roman law. The starting-point of the former is the responsibility of the lord for his people. According to Germanic law, as above remarked, the housemaster was responsible to third persons for those

attached to his house. This responsibility extended not merely to bondsmen, but also to half-free and free persons. If a free but landless man remained for some time in the house of another, he acquired a relation of dependency which established the responsibility of the housemaster. . . . The liability of the master extended not merely over bondsmen living in the house, but over those settled on the land, and even over those elsewhere, so long as the master kept his ownership and no third person became responsible by receiving the man. . . . The responsibility of the master for free persons extended at least to those living in his house, followers and vassals not excepted. How far it extended without the circle of actual members of the household is doubtful. . . . For misdeeds of the bondsmen the master originally bore full responsibility towards third persons. He had, as the party to the suit, to represent him and to render satisfaction for him. . . . The responsibility for free persons shows itself in the form of a duty upon the master to answer for the freeman's misdeeds." In another place the learned author observes that "the primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants; that, in later Germanic times, the master could exonerate himself by surrendering the offending person, and at the same time taking an exculpatory oath, *se non conscium esse, quod pura sit conscientia sua*; that, on English soil, in the early Anglo-Norman period, this idea of responsibility appears in the shape of exoneration for deeds of the servant not commanded or consented to."

is a derivative relation between the responsibility and the common-law rule respecting the vicarious liability of a master for his servants.⁹ But it seems impossible to find any satisfactory ground upon which such a theory can be reconciled with the circumstance that, as is shown by the authorities discussed in § 2233, *ante*, that rule was not

⁹ Judge Holmes observes in his Common Law (p. 227): "It is familiar that the status of a servant maintains many marks of the time when he was a slave. The liability of the master for his torts is one instance." So also in 4 Harvard L. Rev. 363, he refers to a certain line of cases as affording striking "independent evidence that the law of master and servant is a survival from slavery or other institution of like effect for the present purpose."

The following passages from the same essay may also be quoted: "Looking at the whole matter analytically, it is easy to see that if the law did identify agents with principals, so far as that identification was carried, the principal would have the burden and the benefit of his agent's torts, contracts, or possession. So, framing a historical hypothesis, if the starting-point of the modern law is the *patria potestas*, a little study will show that the fiction of identity is the natural growth from such a germ. There is an antecedent probability that the *patria potestas* has exerted an influence, at least, upon existing rules. I have endeavored to prove elsewhere that the unlimited liability of an owner for the torts of his slave grew out of what had been merely a privilege of buying him off from a surrender to the vengeance of the offended party, in both the early Roman and the early German law. I have shown, also, how the unlimited liability thus established was extended by the prætor in certain cases to the misconduct of free servants. Holmes, Common Law, pp. 9, 15-20. Of course it is unlikely that the doctrines of our two parent systems should have been without effect upon their offspring, the common law. . . . Ulpian says that the act of the family cannot be called the act of the *pater familias* unless it is done by his wish. Dig. 43, 16, 1, §§ 11-13. But as all the family rights and obligations were simply attributes of the *persona* of the family head, the summary expression for the members of the family as means of loss or gain would be that they sustained that *persona*, *pro hac vice*. For that purpose

they were one with the *pater familias*. Justinian's Institutes tell us that the right of a slave to receive a binding promise is derived *ex persona domini*. Inst. 3, 17, pr. 18. . . . And with regard to free agents, the commentators said that in such instances two persons were feigned to be one. D. 45, 1, 38, § 17, Elzevir ed. Gothofred. note 74. Cf. D. 44, 2, 4, note 17: Such a formula, of course, is only derivative. The fiction is merely a convenient way of expressing rules which were arrived at on other grounds. The Roman prætor did not make innkeepers answerable for their servants because 'the act of the servant was the act of the master,' any more than because they had been negligent in choosing them. He did so on substantive grounds of policy, because of the special confidence necessarily reposed in innkeepers. So, when it was held that a slave's possession was his owner's possession, the practical fact of the master's power was at the bottom of the decision. Holmes, Common Law, 228. But when such a formula is adopted, it soon acquires an independent standing of its own. Instead of remaining only a short way of saying: that when, from policy, the law makes a master responsible for his servant, or, because of his power, gives him the benefit of his slave's possession or contract, it treats him, to that extent, as the tort-feasor, possessor, or contractee, the formula becomes a reason in itself for making the master answerable and for giving him rights. If 'the act of the servant is the act of the master,' or master and servant are 'considered' as one person, then the master must pay for the act if it is wrongful, and has the advantage of it if it is right. And the mere habit of using these phrases, where the master is bound or benefited by his servant's act, makes it likely that other cases will be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words have brought about. . . . I think I now have traced sufficiently the history of agency in torts. The evidence satisfies me that the common law

recognized during the centuries which immediately succeeded the abolition of villeinage in England.¹⁰ Having regard to this circumstance, there is apparently only one footing upon which, for the purposes of English jurisprudence, a connection between that rule and the liability of a master for the wrongful acts of his slaves might conceivably be established; *viz.*, that Chief Justice Holt, in adopting the rule,¹¹ may have been influenced in some degree by the provisions of the Roman law which affected a master with liability for the delicts of certain descriptions of free servants (see preceding subsection), and that these provisions may themselves have been an offshoot of the master's liability for the delicts of his slaves.¹² But this is pure speculation.

has started from the *patria potestas* and the frithborh,—whether following or simply helped by the Roman law, it does not matter,—and that it has worked itself out to its limits through the formula of identity." Pages 349–364. For another expression of the learned essayist's opinion that the ancestry of the doctrine of a master's vicarious liability goes back to the law of ancient Rome, under which the wife, children, and servants of a citizen were his slaves, see 7 Am. L. Rev. 61.

¹⁰ The following passage from 2 Pollock & Maitland's History of English Law, chap. 8, § 3, pp. 528, 531, is worth quoting in this connection: "At the end of the twelfth century almost every vestige of the lord's liability had disappeared. Anything that we could call slavery was extinct. The mere relationship between lord and villein did not make the one responsible for the acts of the other. The lord was not even bound to produce his villein in court. . . . Any theory, therefore, that would connect our 'employer's liability' with slavery has before it a difficult task. Between the modern employer and the slave owner stand some centuries of villeinage, and the mediæval lord was not liable for the acts of his villein. . . . If we look for the best legal ideas of the thirteenth century to Edward I.'s statutes, we shall see no 'identification' of the servant with the master, and, what is more, no very strong feeling in favor of 'employer's liability.' It is true that a sheriff is in some cases absolutely responsible for the acts of his underlings, in particular he must account to the King for all that they receive; but we are never safe

in drawing inferences about general principles from the rigorous law that is meted out to royal officers or royal debtors. We see, however, that the lords of franchises are not made responsible for all the unauthorized acts of their bailiffs. If such a lord is guilty of taking outrageous toll, his franchise is to be seized into the King's hands; but if his bailiff does the like without commandment, the bailiff must pay double damages and go to prison for forty days. To us, however, at this moment, the chief interest of these statutes lies in their introduction of the phrase, *Respondeat superior*. In no case does this phrase point to an absolute liability of the superior for wrongs done by the inferior, or even for those done 'in the course of his employment.' In all cases it points to a merely subsidiary liability of the superior, which can only be enforced against him when it is proved or patent that the inferior cannot pay for his own misdeed."

¹¹ The only specific evidence concerning the reliance of this judge upon the Roman law is found in one of the reports of the case which involved the liability of a shipowner. See § 2235, note 2, *ante*. But the doctrine of the civilians with regard to that liability may well have influenced him in the subsequent cases, in which the common-law doctrine of vicarious responsibility was distinctly enunciated in a general form.

¹² Judge Holmes has given a lucid summary of the stages by which he considers the Roman law to have progressed from the notion of a vicarious liability, which was originally enforceable only in respect of the acts of

2237. Later history of the principle, *Respondeat superior*, as applied to negligent acts.—Under this head it is unnecessary to say more than that the applicability of the principle to negligent acts has, since the time when it was first adopted, been fully conceded as regards all classes of employers. The cases involving acts of that description are reviewed in chapters xcix. and c., *post*.

2238. — as applied to wilful acts. Generally.—In § 2235, *ante*, it has been mentioned that, in cases decided soon after the principle, *Respondeat superior*, was introduced into English jurisprudence, it was held to be applicable to such torts as fraud and conversion. During the middle of the nineteenth century there was much controversy, especially in England, as to liability of masters, especially corporations, to be sued in respect of the fraud of servants.¹ But the authority of the earlier cases was never definitely repudiated by any court. So far as regards conversion, the reports show that this liability was repeatedly recognized, both by the English and by the American courts, during the period when the theory discussed in the following section was universally accepted.²

From the foregoing statement it is clear that there is no adequate historical justification for the sharp distinction which has frequently been drawn, without any qualification, between negligent and wilful acts, by courts which have laid it down broadly that the master is chargeable with the former, but not with the latter.³ The only antithesis in this regard which the authorities actually warrant is one dis-

slaves, to the notion of such a liability extending in certain instances to the acts of freemen. Common Law, pp. 14, 15. His language seems to import that, in his opinion, the application of the principle of vicarious liability to certain classes of cases in which freemen were, or might be, the wrongdoers, was a conscious and deliberate extension of the older law regarding slaves. But the historical evidence for this theory seems to be scarcely adequate. For aught that appears, the later Roman doctrines may have been merely the offspring of social exigencies. In fact, the learned author seems to have modified his original view, for in an essay written after the publication of his Common Law (4 Harvard L. Rev. p. 351), he remarks: "The Roman prætor did not make innkeepers answerable for their servants, because 'the act of the servant was the act of the master,' any more than because they had been negligent in choosing them. He did so on substantive

grounds of policy,—because of the special confidence necessarily reposed in innkeepers."

¹ See §§ 2385, 2393, 2394, *post*.

² *Yarborough v. Bank of England* (1812) 16 East, 6, 14 Revised Rep. 272; *Eubank v. Nutting* (1849) 7 C. B. 797; *Dench v. Walker* (1780) 14 Mass. 500; *Storm v. Livingston* (1810) 6 Johns. 44; *Mount v. Derick* (1843) 5 Hill, 455; *Moir v. Hopkins* (1855) 16 Ill. 313, 63 Am. Dec. 312.

³ Many illustrations of this inaccuracy are furnished by the cases reviewed in the following sections. See for example the quotation from the opinion in *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 268, in § 2239a, note 2, *post*.

In *Glover v. London & N. W. R. Co.* (1850) 5 Exch. 66, 19 L. J. Exch. N. S. 172, an action for conversion, Parke, B., observed during the argument of counsel: "Assuming that the wrongful

tinguishing negligent acts from that particular class of wilful torts for which the appropriate remedy under the older forms of procedure is an action of trespass. There is no doubt that wilful torts of this description were for many years considered, both by the English and the American courts, to be outside the field of a master's vicarious liability.

2239. Doctrine predicating nonliability in respect of wilful trespasses. English and Scotch cases reviewed.—It seems impossible to fix precisely the date at which the theory adverted to at the end of the preceding section was first consciously recognized as one which operated so as to relegate the class of wilful torts there mentioned to a category different from the other wilful torts which, under the early decisions of Chief Justice Holt, were imputable to the master. But in the closing years of the eighteenth century it was settled law that an action of trespass could be maintained only against the immediate tort-feasor himself, or a person by whose orders or with whose assent the tort was committed.¹ This doctrine subsisted for more than

act was done by the servants of the company, there is no evidence that the company ordered or assented to the act of their workmen." These words would seem to indicate that, in the opinion of this very distinguished judge, the right to recover against a master for a conversion of property by his servant was determinable upon the same footing as in cases involving torts for which the appropriate remedy was an action of trespass. See next section. If this is the meaning of his *obiter dictum*, it is clearly opposed to the earlier English authorities.

¹In *Sanderson v. Baker* (1772) 3 Wils. 312, 317, a case involving the liability of a sheriff for the misfeasances of his bailiffs, one of the arguments relied on by counsel was the assumed doctrine that, if A. commanded his servant to distrain the goods of B., and the servant wrongfully took the goods of C, A was not liable.

In *Morley v. Gaisford* (1795) 2 H. Bl. 442, the court observed that it was difficult to put a case where the master could be considered as a trespasser for an act of his servant which was not done at his command.

In *Savignac v. Roome* (1795) 6 T. R. 125, it was held that a master was not liable in trespass for the act of his

servant in wilfully driving his coach against plaintiff's chaise.

In *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518, where the defendant was held not to be liable for the act of his servant in wilfully driving his carriage against the plaintiff's, Lord Kenyon, after referring to the statement of Holt, Ch. J., in *Middleton v. Fowler* (1699) Salk. 282, that "no master is chargeable with the acts of his servant but when he acts in the execution of authority given him," proceeded thus: "Now when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act. Such upon the evidence was the present case: and the technical reason in 2 Rolle, Abr. with respect to the sheep applies here; and it may be said that the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief

half a century.² It was even applied in two cases by an admiralty judge,³—a noteworthy fact, which indicates that its derivation from and dependence upon the technical rules of common-law pleading had by this time been forgotten. But it was repudiated in 1861.⁴ That

arising from the negligence or unskilfulness of his servant who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained; for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shows that where the servant is in point of law a trespasser, the master is not chargeable as such, though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant." Judge Redfield, in his work on Railways (§ 130, note 6), expressed the opinion that the case was never intended to decide more than that the master is not liable in trespass for the wilful act of the servant. This view of its *rationale* is doubtless correct. But the learned commentator apparently failed to realize fully that, in view of the theory which prevailed with regard to the appropriate domains of actions of trespass and actions on the case, such a decision necessarily involved the consequence that a master could not be held liable in any form of action for a wilful act, such as one in question. It is not amiss to observe that, upon the facts, the decision was correct even with reference to modern standards, because the act was done merely for the gratification of the servant's personal malice.

In *Ellis v. Turner* (1800) 8 T. R. 531, decided a few months before the case just cited, Lord Kenyon used this language, *arguendo*: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage."

² In *Timothy v. Simpson* (1834) 6 Car. & P. 499, 1 Cramp. M. & R. 757, 5 Tyrw. 244, 4 L. J. Exch. N. S. 81, it was ruled by Parke, B., that the defendant was not liable for an assault committed by his shopmen, during his

absence from the shop, upon a customer who had refused to leave the shop when ordered to do so. He laid down the rule broadly that, "if a person does not assist in a trespass, either in word or deed, he is not liable for it."

See also *Gordon v. Rolt* (1849) 4 Exch. 365, 18 L. J. Exch. N. S. 432, 7 Dowl. & L. 87 (master not liable on trespass, unless he ordered the servant to do the given act); *Dansey v. Richardson* (1854) 3 El. & Bl. 144, 2 C. L. Rep. 1442, 23 L. J. Q. B. N. S. 217, 18 Jur. 721 (master not liable for "wilful trespasses:"—Lord Campbell, Ch. J., *arguendo*); *Degg v. Midland R. Co.* (1857) 1 Hurlst. & N. 713, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. 395, 5 Week. Rep. 364 (master not liable for a "wilful act intrinsically wrong, by a servant:"—Bramwell, B., *arguendo*); *Green v. Macnamara* (1859) 1 L. T. N. S. 9 (master not liable for "wilful acts done contrary to orders").

³ *The Druid* (1842) 1 W. Rob. 392; *The Ida* (1860) Lush. In the former case Dr. Lushington adopted the doctrine under protest. See § 2378, note 8, *post*.

⁴ In *Seymour v. Greenwood* (1861) 7 Hurlst. & N. 355, affirming 6 Hurlst. & N. 359, 30 L. J. Exch. N. S. 189, 9 Week. Rep. 518, where it was held that the owner of an omnibus might be held responsible for unnecessary violence used by a guard in ejecting a disorderly passenger, Williams, J., in delivering the judgment of the exchequer chamber, said: "We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion; or, in other words, misconducted himself in the course of his master's employment, and therefore the master is responsible. . . . It is said that although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts

repudiation may possibly have been due, in some degree at least, to the circumstance that in 1852 the rules of pleading had been greatly altered by the common-law procedure act.⁵ But the author has not found any judicial statement to this effect, and from the language used in several cases decided after that statute came into force,⁶ it is clear either that the courts did not regard it as having produced any such consequence as that suggested, or that their attention was not directed to this phase of the matter. Probably, therefore, the change of doctrine simply reflected the development of an opinion that, from the standpoint of substantive law, the theory regarding the master's non-liability in respect of wilful trespass did not rest upon any rational foundation.⁷

But the abandonment of that theory might also have been justified on another ground. It was itself probably a mere legacy, transmitted through the operation of the rules of pleading, from the period dur-

himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible."

In *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 8 C. P. 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115 (forcible removal of passenger from a railway car) Blackburn, J., cited the above decision as having established the doctrine that where a servant acting within the scope of his employment does an act negligently, or with excessive violence, the master is responsible for the consequences. For further information regarding the *Bayley Case*, see § 2407, *post*, where other cases embodying the doctrine that a master is liable for acts involving the intentional use of force are reviewed. That doctrine was also recognized by the court of appeal in *Dyer v. Munday* [1895] 1 Q. B. 742, 64 L. J. Q. B. N. S. 448, 72 L. T. N. S. 448, 43 Week. Rep. 440, 14 Reports, 306, 59 J. P. 276. It has also been taken for granted in the numerous cases which have turned solely upon the ques-

tion whether certain employees were acting within the scope of their authority when they arrested or prosecuted the complainants. See §§ 2464 *et seq.*, *post*.

⁵ That act provided that no form of action need be mentioned in the writ of summons (§ 3), and that all forms of action (except ejectment and replevin) might be joined in one action (§ 41). The practical effect of this was to leave, as the only incident affecting forms of action, the various periods of limitation of time in respect of them. What was done was to "provide as far as possible that, though forms of action remained, there never should be a question what was the form." Bramwell, L. J., *Bryant v. Herbert* (1878) L. R. 3 C. P. Div. 389, 390.

⁶ See note 2, *supra*.

⁷ It is noteworthy, however, that, in the lower court, the liability of the master in the first case cited in note 4, *supra*, was affirmed by Pollock, C. B., on the ground that "there was evidence that the defendant's servant was executing his master's command, but with a want of care and consideration." This phraseology apparently illustrates merely the customary efforts of common-law judges to preserve ostensible continuity of doctrine, even in cases where the decision really imports a material change. An act which amounted to an assault manifestly involved something more than mere negligence.

ing which the accepted view was that a master could not be held responsible for any act whatever of his servant, except on the ground of a prior command or a subsequent adoption. So far as appears, that view had no relation to the requirements of technical procedure.⁸ In the earlier authorities reviewed in § 2233, *ante*, the liability of a master is always referred to by the courts and by text writers in phraseology appropriate to the expression of a doctrine of substantive law. But the circumstance that this liability, in the form in which predicated, was, so far as most descriptions of wilful torts were concerned, susceptible of enforcement only in actions of trespass, seems to have produced a situation in which the rules of pleading tended to become, and finally did become, an independent factor controlling the right of recovery.⁹ If these were actually the lines along which the evolution of doctrine had proceeded prior to the recognition of the principle *Respondeat superior*, it seems manifest that the alterations thus made in the substantive law should have been regarded as logically involving the abandonment of the rule of pleading with which the application of that law had been associated. But this aspect of the matter was never considered by the courts, and it was reserved for a more scientific era of jurisprudence to abolish the anomaly of holding a master to be liable for some wilful torts, and not for others.

In Scotland the liability of a master for a wilful trespass seems to have been always treated as being determinable with reference to the question whether the given act was or was not within the scope of the actor's employment.¹⁰

2239a. Same subject. American cases reviewed.—A discussion of the liability of a master in the United States for the wilful trespasses of his servant does not carry us back any further than the date of the leading English case in which, as was stated in the preceding section, it was laid down that an action in respect of such torts was not main-

⁸ It is significant that no cases of earlier date than the eighteenth century are cited in Chitty on Pleading as authorities for the rule that a master cannot be sued in trespass except on the ground of his being a principal tortfeasor.

⁹ In 7 Harvard L. Rev. p. 403, Professor Wigmore remarks: "By one of those misunderstandings not infrequent in our legal system, the language of the seventeenth century became, in the eighteenth, the basis of the rule that the form of action against the master

could be trespass in the case alone where the specific act had been commanded by him." But perhaps the historical evidence is scarcely strong enough to warrant so positive a statement. The present writer does not feel himself justified in going any further than to advert to the theory as being a plausible one.

¹⁰ *Hill v. Merricks* (1813) Hume, 397; *Young v. Colt's Trs.* (1832) 10 Sc. Sess. Cas. 1st series 666 (both of these cases involved trespass on real property; see § 2397, note 14, *post*).

tainable.¹ A perusal of the subjoined note will show that, as in England, the authority of that case remained unshaken during the first half of the nineteenth century, but that since then it has been discredited in an ever increasing number of jurisdictions, until at the present day the doctrine which it embodies has been repudiated by almost every court which has had occasion to express an opinion upon the subject. It would be a work of supererogation to extend the list of authorities so as to cover all the cases reviewed in the chapters relating to wilful torts (CR. TO CIV., *post*).² No decisions, therefore,

¹ *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518.

² *Federal courts*.—Master not liable for wilful trespasses. *Sunday v. Gordon* (1837) Blatchf. & H. 569, Fed. Cas. No. 13,616 (abduction).

Master liable for wilful trespasses. *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306 (liability for a homicide denied solely on the ground that it was prompted by a personal motive); *Western U. Teleg. Co. v. Catlett* (1910) 100 C. C. A. 489, 177 Fed. 71 (liability of a master for wilful torts was recognized by the court, *arguendo*).

Alabama.—The general rule that a master could not be held liable for the wilful trespass of his servant was applied in *Blackburn v. Baker* (1840) 1 Ala. 173 (servant cut plaintiff's timber); *Cox v. Keahey* (1860) 36 Ala. 340, 76 Am. Dec. 325 (held error to refuse to instruct the jury that the defendants, as owners of a steamboat which ran down the plaintiff's raft, were not liable if the collision was wilfully caused by the acts of their servants); *Selma, R. & D. R. Co. v. Webb* (1873) 49 Ala. 240.

But a change of views was announced in *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 268 (assault), where the court stated its position in the following words: "The case of *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518, is the leading authority on this question. That case drew the distinction between wilfulness and negligence, holding that when the servant, in the performance of his master's service, by his negligent act does an injury to another, the master is liable in damages; when, however, the act which produced the injury was intentionally done, although done while in the performance

of his master's service, then the master was not liable, unless he commanded the act, or was present and did not dissent from it. The rule, as stated above, has never been fully satisfactory. Since railroads have been introduced, and since they have monopolized, in large degree, the land traveled and transportation of the country, many of the revising courts of the country have modified the rule. The modification, however, is confined to acts which are within the range of the agent's employment, or delegated authority. The precise modification is that if the agent, while acting within the range of the authority of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then, for such abuse of the authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured. But if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not." For later expressions of opinion to the same effect, see *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328 (instruction inconsistent with rule properly refused); *Alabama G. S. R. Co. v. Frazier* (1891) 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303 (assault); *City Delivery Co. v. Henry* (1903) 139 Ala. 161, 34 So. 389 (rule laid down with a view to a new trial).

In *Robertson v. Louisville & N. R. Co.* (1904) 142 Ala. 216, 37 So. 831, a car in which a woman was directed by a conductor to take her seat was detached and left behind on a siding, where no accommodation could be procured, the consequence being that she was obliged to walk several miles, in

are cited in the subjoined note except such as proceed from jurisdictions in which that doctrine has been or is still accepted.

very cold weather, with a child in her arms. Held, that for the injury thus sustained through her having followed the erroneous instructions of the conductor as to the car to be entered the passenger was entitled to recover, whether his act was negligent, inadvertent, wilful, knowing, or malicious.

But under the doctrine that apparently still prevails a plaintiff cannot recover on a declaration in trespass without "proof of actual participation on the part of the defendant in the damni-fying act." *City Delivery Co. v. Henry* (1903) 139 Ala. 161, 34 So. 389; *Central of Georgia R. Co. v. Freeman* (1904) 140 Ala. 581-583, 37 So. 387; *Bessemer Coal, Iron & Land Co. v. Doak* (1907) 152 Ala. 166, 12 L.R.A. (N.S.) 389, 44 So. 627. The refinement of allowing a plaintiff to recover for wilful torts, provided he sues in an action on the case, is a curious modification of the original English rule.

Arkansas.—Master liable for wilful acts. *Duggins v. Watson* (1854) 15 Ark. 118, 60 Am. Dec. 560 (collision between steamboats; instruction predicating nonliability if act of officer was wilful, held erroneous).

Connecticut.—Master not liable for wilful trespasses. *Church v. Mansfield* (1850) 20 Conn. 284 (trespass on real property); *Thames S. B. Co. v. Housatonic R. Co.* (1855) 24 Conn. 40, 63 Am. Dec. 154 (cable of burning ship was cut by a watchman at a wharf); *Crocker v. New London, W. & P. R. Co.* (1855) 24 Conn. 249 (unjustifiable violence used in removing a trespasser from a train).

Georgia.—All the reported cases turn upon the operation of the Code provisions. See §§ 2261, 2262, *post*.

Illinois.—Master not liable for wilful trespasses. *Tuller v. Voght* (1851) 13 Ill. 277 (mismanagement of vehicle).

But the doctrine of later cases is that a master is answerable whether the servant's act was negligent or wilful. *Korah v. Ottawa* (1863) 32 Ill. 121, 83 Am. Dec. 255 (injury to bridge by canal boat); *Chicago, M. & St. P. R. Co. v. West* (1888) 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788 (ejection from train); *Illinois C. R. Co. v. King* (1899) 179 Ill. 91, 70 Am. St. Rep. 93,

53 N. E. 552 (ejection from train); *Western U. Teleg. Co. v. Satterfield* (1888) 34 Ill. App. 386 (trespass in cutting down trees); *Belt R. Co. v. Banicki* (1902) 102 Ill. App. 642.

Indiana.—Master liable for wilful trespasses. *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70 (ejection from train); *Terre Haute & I. R. Co. v. Graham* (1874) 46 Ind. 239 (complaint not demurrable which alleged that locomotive was "wilfully and purposely" run against plaintiff); *Indianapolis & V. R. Co. v. McClaren* (1878) 62 Ind. 568 (complaint not demurrable which alleged that engineer "wilful, carelessly, and with gross negligence ran locomotive against plaintiff"); *American Exp. Co. v. Patterson* (1881) 73 Ind. 430 (false imprisonment); *Banister v. Pennsylvania Co.* (1884) 98 Ind. 220 (complaint not demurrable which alleged that servants on a train "wrongfully, unlawfully, and purposely" killed plaintiff's mule); *Southern R. Co. v. McNeeley* (1909) 44 Ind. App. 126, 88 N. E. 710 (train despatcher gave order which led to a collision).

From the language used by the court in the *Baum Case*, *supra*, it would seem to have been of opinion that the doctrine established by *M. Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518, was that "a wilful and malicious trespass of the servant, not commanded or ratified by the master, but evidently perpetrated to gratify the private hate or malignity of the servant, under mere color of discharging the duty which he has undertaken for his employer" gives no cause of action against the master. But this was obviously a misapprehension of the effect of that case. Its actual rationale was the theory that no wilful trespasses at all could be imputed to the master. See § 2239, *ante*.

Kansas.—Master not liable for wilful trespasses. *Barlow v. Emmert* (1872) 10 Kan. 358 (rule recognized in discussing the sufficiency of a complaint).

Kentucky.—Master not liable for wilful trespasses. *Ferguson v. Terry* (1840) 1 B. Mon. 96 (fence pulled down, and hogs let into field); *Brasher v. Kennedy* (1849) 10 B. Mon. 28 (doctrine laid down as a rule of pleading

in a case where a slave had been carried across the Ohio).

Master held liable for wilful trespasses. *Smith v. Louisville & N. R. Co.* (1893) 95 Ky. 11, 22 L.R.A. 72, 23 S. W. 652 (ejection of trespasser from train); *Lexington R. Co. v. Cozine* (1901) 111 Ky. 799, 98 Am. St. Rep. 430, 64 S. W. 848 (assault); *Williams v. Southern R. Co.* (1903) 115 Ky. 320, 73 S. W. 779 (ejection of trespasser from train); *Mace v. Ashland Coal & J. R. Co.* (1904) 118 Ky. 885, 82 S. W. 612.

Louisiana.—That a master was not liable for the wilful acts of his servant was laid down in *Gaillardet v. Demaries* (1841) 18 La. 490 (*arguendo*); *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189 (assault).

In *Hart v. New Orleans & C. R. Co.* (1841) 1 Rob. (La.) 178, 36 Am. Dec. 689, the court refused to express a definite opinion as to the correctness of an instruction that a principal is not answerable for the wanton and malicious acts of his agent.

But the liability of a master for wilful trespasses was affirmed in *Joyce v. Duplessis* (1860) 15 La. Ann. 242, 77 Am. Dec. 185 (illegal seizure of property by agent appointed to collect debt); *Mouras v. The A. C. Brewer* (1865) 17 La. Ann. 82, and in *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, it was declared that a master is liable not only for the negligence of his servants, but also for their torts, when done "within the scope of their employment," or, in the language of the Code, "in the exercise of the functions in which they are employed." It matters not that the acts are wilful and tortious. The phraseology of the court, in the former of these sentences, which distinguishes between "negligence" and "torts," is clearly inaccurate. But the meaning is rendered clear by the second sentence.

As to the effect of the restrictive clause in the Code with regard to the ability of the master to prevent the act complained of, see § 2255, *post*.

Maryland.—In an early case it was laid down that "the master is answerable for all injuries arising from the negligence or unskilfulness of his servant in executing duties assigned him; but when he abandons his duty, and

wilfully becomes a wrongdoer, the master is exempt from all responsibility for such wrongful acts." *Brown v. Purviance* (1827) 2 Harr. & G. 316. Having regard to the early date of this decision, the doctrine thus formulated may reasonably be assumed to have been intended as an affirmation of the master's nonliability in respect of all wilful torts. It is very unlikely that the words are to be construed as embodying by implication the theory that wilful acts were imputable to the master in so far as they were done within the scope of the employment. That theory, however, has been distinctly adopted in more recent cases. *Cate v. Schaum* (1878) 51 Md. 309; *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940.

Massachusetts.—A few years after the commencement of the nineteenth century the broad doctrine was laid down, *arguendo*, that "masters are responsible, *civilliter*, for the misconduct, negligence, and defaults of their servants, while acting under the authority delegated to them." *Gray v. Portland Bank* (1807) 3 Mass. 364, 385, 3 Am. Dec. 156. The early date at which this comprehensive statement was made renders it noteworthy. But about thirty years later it was categorically declared that a master was not liable for the torts of his servants, if their acts were accompanied with force, for which an action of trespass *vi et armis* would lie, or were wilfully done, but was liable for their negligence or nonfeasance. *Lowell v. Boston & L. R. Corp.* (1839) 23 Pick. 24, 34 Am. Dec. 33. The same doctrine was applied in *Southwick v. Estes* (1851) 7 Cush. 385 (trespass on real property).

A change of doctrine is indicated by the decisions in *Moore v. Fitchburg R. Corp.* (1855) 4 Gray, 465, 64 Am. Dec. 83 (recovery was allowed in respect of wrongful ejection of a passenger from a train); *Hewett v. Swift* (1862) 3 Allen, 420 (master held liable for assault).

The whole subject was elaborately discussed in *Hove v. Newmarch* (1866) 12 Allen, 49. An instruction, requested by the plaintiff, but refused, to the effect that "if at the time of the injury the defendant's servant was engaged in the business of the defendant, and within the scope of his duty as such servant, and he drove the horse over the

plaintiff, and did him an injury, the defendant is responsible, whether the act was done wilfully or negligently, the plaintiff being in the exercise of due care himself," was held to have stated the law with substantial accuracy. The court said: "It makes the test of the defendant's liability, not the intention of the servant, but the fact that the injurious act was done while engaged in his master's business, and within the scope of his duty as a servant. If the act of driving over the plaintiff was done wilfully, still it may also have been done negligently in the view of the law; that is, in disregard of the plaintiff's rights, and neglect and omission of the precautions necessary to his safety. It is obvious that the test of the master's liability cannot be whether the servant is a trespasser; for he who uses force upon the person or property of another is a trespasser, whether his violence be accidental or intentional, if it is without lawful justification. But if the servant is strictly within the scope of his employment, doing his master's work, and, for the purpose of doing what he is employed to do, does it in a manner which violates the rights of another, it is difficult to see why the master should be exempted from responsibility because the servant knows that his act will be injurious and intends to do it. If the consent of the master is made the ground of his liability, the master is no more consenting to the thoughtless negligence of his servant than to his wilful negligence. The authorities all agree that, where an action is brought against the master for an injury occasioned by the servant's negligence in his service, it is no defense to show that the master directed the servant to be careful; or even that he cautioned him against the particular act of negligence which produced the injury." In the instruction given by the trial judge, it was stated that if the defendant's servant carelessly or negligently, but without the purpose or intention of driving against the plaintiff, urged on his horse, and so injured him, the defendant would be answerable; but that if the servant, "while acting as the servant of the defendant in driving from house to house and delivering bread, wilfully and intentionally drove the horse upon the plaintiff for the purpose of carrying out his wish to drive unlawfully upon the sidewalk opposite

the plaintiff's house, notwithstanding the remonstrance of the plaintiff, and thereby caused the injury complained of, and he did this without any previous direction or authority from the defendant, then the defendant was not responsible." The court said: "The objection to the latter branch of the instruction is that it gives the jury no guide for their action in case they should find that the servant was within the scope of his employment, and was intending to do his master's work, and that his intention to drive against the plaintiff was only as a means of doing it. We think that, upon the facts reported, the jury might have been satisfied that the servant's driving on, though intentional, was not merely for the purpose of injuring the plaintiff. He was already upon the sidewalk, and may have wished to go on for the purpose of continuing his journey and delivering bread to his master's customers, although he saw that in so doing he should drive against the plaintiff, who was resisting his progress. He would not then have been acting for a purpose of his own, losing sight of the object for which he was employed. With the views we have taken of the law, we think the instructions given were defective, and that they did not fully supply the rule which the case required. The rule may be stated thus: The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the author-

ity given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

For later decisions in which the doctrine thus established was applied or recognized, see *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200 (assault by conductor); *Haues v. Knowles* (1874) 114 Mass. 518, 19 Am. Rep. 383; *Wallace v. Merrimack River Nav. & Exp. Co.* (1883) 134 Mass. 95, 45 Am. Rep. 301 (trial judge erred in ruling that the plaintiff could not recover if the servants of the defendant company had wilfully and maliciously run its steamer against his yacht); *Levi v. Brooks* (1887) 121 Mass. 501 (assault); *Young v. South Boston Ice Co.* (1890) 150 Mass. 527, 23 N. E. 326 (management of vehicle); *McCarthy v. Timmins* (1901) 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038 (management of vehicle); *Aiken v. Holyoke Street R. Co.* (1903) 184 Mass. 269, 68 N. E. 238 (operation of street car by motorman).

Michigan.—In *Smith v. Webster* (1871) 23 Mich. 298, an action of trespass for destruction of trees on plaintiff's land, the court reversed the judgment of the trial court, who had ruled that there was no liability in this form of action unless the trespass was committed by the direction of the defendants or ratified by them. But the reversal was not based upon a disapproval of the doctrine thus laid down, the rationale of the decision being that "the acts complained of were done in the regular course of their [the servants'] employment, and not by wilful wrong. In such cases the master is bound to keep his servants within their proper bounds, and is responsible if he does not."

In *Cleveland v. Newsom* (1880) 45 Mich. 62, 7 N. W. 222, where a servant in charge of a carriage drove it over the plaintiff, the defendant requested the trial judge to charge that the liability of the master does not ensue when the servant has intentionally or recklessly stepped aside from his employment to commit a tort, which the master neither directed in fact, nor could be supposed, from the nature of

the employment, to have authorized or expected the servant to do. This instruction was refused, and the jury were directed that if the servant "drove in a careless and reckless manner, he would be acting within the scope of his master's employment; but, that if he wantonly, wilfully, and intentionally ran over the plaintiff, he would not be acting within the scope of his master's authority. But if he carelessly, unintentionally, and accidentally ran over the plaintiff, then the plaintiff should recover." The court said: "This instruction was all the defendant could reasonably ask. It stated the law correctly and fairly. If it was a case of intentional injury, defendant was not responsible. If it was a case of negligent disregard of the master's instructions, whereby the injury occurred, the defendant was responsible. Recklessness is only a high degree of negligence, and the degree has nothing to do with the master's responsibility."

In *Wood v. Detroit City Street R. Co.* (1884) 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124, where the plaintiff testified that, as he was turning his wagon out of the track of the defendant street railway company, the driver called out with an oath: "I can smash you anyhow," and that he let go the brake, and the car almost instantly struck the plaintiff's wagon and threw it over. The court said: "The inference from this might be that the driver purposely and in the anger excited by their altercation ran his car against the plaintiff's wagon; and if the action had been brought for the trespass, it might become necessary to decide whether, under cases like *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507, the defendant would be responsible. . . . If it were important to determine whether the injury was one purposely inflicted, and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury. *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597. But this is an action in case, and the ground on which it is sought to charge the defendant is that its servant negligently drove the car against the plaintiff's vehicle."

In *Sutherland v. Ingalls* (1886) 63 Mich. 620, 6 Am. St. Rep. 332, 30 N. W. 342, the rule that "a man who employs another innocently for a lawful

purpose is not usually liable for the employee's trespasses" was held to be applicable to the employment of an officer to execute lawful process.

An intention—not very explicitly declared—to abandon the maintenance of a distinction between negligent acts and wilful trespasses seems to be betokened by *Vernon v. Cornucell* (1895) 104 Mich. 62, 62 N. W. 175, where plaintiff was injured by a collision on the highway with a team under the charge of defendant's servant. The court charged that if the jury should find that the collision was caused by the wrongful act of the teamster, which act was beyond the scope of the defendant's business, and that such act was wantonly done, the verdict must be for defendant. Discussing the contention of the defendant's counsel, that the teamster was not acting within the scope of his employment at the time of the collision, the court said: "The most that can be said from the record upon this subject is that there was evidence tending to show that the teamsters were *voluntarily running* their horses, as they were returning from the city of Flint, where they had been with loads of grain for the defendant. We cannot say that this was conclusively established, even were we to hold that such fact would relieve the defendant from responsibility. . . . It being a question for the jury, left to them under the instructions asked by the defendant's counsel, who did not request a fuller explanation of the law in relation to what constitutes an act within the scope of employment, we discover no error upon this point. The teamster testified that he was unable to restrain his horses, and that they were running against his will; hence we cannot agree with counsel in the statement that 'it is indisputable that the damage was done by the wantonness of the teamster.'"

An unquestionable repudiation of the doctrine that a master is not liable for wilful trespasses is attested by the decision in *Hartigan v. Michigan C. R. Co.* (1897) 113 Mich. 122, 71 N. W. 452. The liability of a master for wilful trespasses was taken for granted, the only point disputed being whether the employee in question was authorized to eject a trespasser from a train.

In *Canton v. Grinnell* (1904) 138 Mich. 590, 101 N. W. 811, where an assault was committed by truckmen while

they were moving a piano at the request of plaintiff's husband, an instruction that defendants would only be liable for those acts which were committed by the truckmen in doing those things necessary in getting the piano was held to guard defendants' rights sufficiently. Having regard to the case last cited, this ruling may presumably be construed as showing that wilful trespasses, if within the scope of the servants' employment, were regarded by the court as being imputable to the master.

The doctrine that a master is liable for the wilful trespasses of his servant was taken for granted in *Randall v. Chicago & G. T. R. Co.* (1897) 113 Mich. 115, 38 L.R.A. 666, 71 N. W. 450 (only question actually discussed was the authority of a brakeman to eject trespassers); *Foster v. Grand Rapids R. Co.* (1905) 140 Mich. 689, 104 N. W. 380 (only question discussed was whether the special policeman who assaulted the plaintiff was, in respect of the assault, acting as a servant of the defendant or as a public officer); *Zart v. Singer Sewing Mach. Co.* (1910) 162 Mich. 387, 127 N. W. 272 (assault by employee deputed to obtain possession of a leased chattel); *Verlinde v. Michigan C. R. Co.* (1911) 165 Mich. 371, 130 N. W. 317 (decision to the effect that a brakeman had implied authority to eject a trespasser from a train).

Minnesota.—"The rule in this state is the general one, namely, the master is responsible for the torts of his servant, done with a view to the furtherance of the master's business, whether the same be done negligently or wilfully, but within the line of his duty." *Crandall v. Boutell* (1905) 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122. See also *Smith v. Munch* (1896) 65 Minn. 256, 68 N. W. 19; *Waalor v. Great Northern R. Co.* (1908) 22 S. D. 256, 18 L.R.A.(N.S.) 297, 117 N. W. 140.

Mississippi.—Master not liable for wilful acts. *McCoy v. McKowen* (1853) 26 Miss. 487, 59 Am. Dec. 264 (hired slave mortally wounded by overseer); *Ecum v. Brister* (1858) 35 Miss. 391 (servant cut plaintiff's timber); *New Orleans, J. & G. N. R. Co. v. Harrison* (1873) 48 Miss. 112, 12 Am. Rep. 356 (engineer forced boy to uncouple cars). But these cases were overruled in *Richberger v. American Exp. Co.* (1895) 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922 (assault); *Bar-*

more v. Vicksburg, S. & P. R. Co. (1904) 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594.

Missouri.—That a master is "not liable in trespass as principal for the unlawful and directly injurious act of his servant, unless he has commanded it," was laid down in *Douglass v. Stephens*, (1853) 18 Mo. 362.

In *McKeon v. Citizens' R. Co.* (1867) 42 Mo. 83, the court, in discussing an instruction relating to exemplary damages, used the following language: "If the conduct of this driver were wilful and malicious, with intent to injure the plaintiff, he might be liable to indictment for assault with intent to kill, or some other criminal offense; but his employer was not responsible for his crimes, nor liable for his acts of wilful and malicious trespass. The company was answerable only for his negligence, or his incapacity, or unskilfulness in the performance of the duties assigned to him."

But in *Perkins v. Missouri, K. & T. R. Co.* (1874) 55 Mo. 201, the court rejected the contention that the defendant was not liable for "wilful or malicious injuries," inflicted by a conductor while engaged in removing from a railway car a person who had refused to pay the fare demanded. The earlier cases were not referred to.

Those cases were also ignored in *Garretzen v. Duencel* (1872) 50 Mo. 104, 11 Am. Rep. 405, where the general rule was laid down, that a master is liable for "neglect, fraud, or other wrongful act." Among the authorities cited were *Howe v. Newmarch* (1866) 12 Allen, 49, and *Seymour v. Greenwood* (1861) 7 Hurlst. & N. 355, 20 L. J. Exch. N. S. 327, 4 L. T. N. S. 833, 9 Week. Rep. 785.

See also *Eckert v. St. Louis Transfer Co.* (1876) 2 Mo. App. 36 (44) (wagon driven against plaintiff), where the court, in discussing an instruction, observed that the question in cases of this kind "is not whether the act of the servant is negligent or wilful," but "whether the act was done in the course of the servant's employment. The argument that when the servant acts wilfully, he *ipso facto* leaves the employment of the master for the minute or so that his passion rages is rightly characterized as a specious fallacy. If an engineer of a road purposely runs over a cow, the road is as much liable as if he

did it carelessly. He is driving their locomotive and acting as their servant, with the means of mischief they have intrusted to him."

Yet in *Jackson v. St. Louis, I. M. & S. R. Co.* (1885) 87 Mo. 422, 56 Am. Rep. 460, the court, on the authority of the *McKeon Case*, *supra*, and Story, Agency, § 456, laid down the doctrine that a master is not liable for the servant's "acts of wilful and malicious trespass." The above-cited decisions to a contrary effect were not adverted to.

But in the last case which bears on the subject, *Emmons v. Quade* (1903) 176 Mo. 22, 75 S. W. 103 (assault), the liability of a master for wilful acts seems to have been taken for granted, the verdict for the plaintiff being reversed for certain errors of the trial judge.

Nebraska.—The master is liable for the acts of his servant within the general scope of his employment while about his master's business, though the acts be negligent, wanton, wilful, and malicious. *Chicago, R. I. & P. R. Co. v. Kerr* (1905) 74 Neb. 1, 104 N. W. 49 (syllabus written by court with reference to a case of assault).

New Hampshire.—Master not liable for "wanton and wilful trespasses on the person or property of others." *Wilson v. Peverly* (1823) 2 N. H. 548. The liability of a master for conversion was affirmed in *Arthur v. Balch* (1851) 23 N. H. 157. But such a ruling is indecisive in the present connection. See § 2238, *ante*.

New Jersey.—In the early case of *McCalla v. Wood* (1806) 2 N. J. L. 86, the court laid it down that one person cannot be made liable for the trespass of another, not commanded by him.

But this doctrine has now been abandoned. "The rule [*respondeat superior*] has been gradually extended until it may be said that the liability of the master for the wilful, wrongful, and malicious acts of the servant now extends to every case where the act of the servant is done with a view to the furtherance and discharge of his master's business, and within the scope and limits of his employment." *Holler v. Ross* (1902) 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472. See also *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916.

New York.—Under the doctrine which

at first prevailed in this state, the wilful trespasses of a servant were not imputable to his master. The earliest reported case in which this position was taken seems to be *Garvey v. Dung* (1836) 30 How. Pr. (N. Y. C. P.) 315 (damage to property). But the leading case on the point is *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507. There the plaintiff's son, a young lad, had taken hold of the side of the defendant's wagon for the purpose of getting on to it, as the driver had invited him to do. The driver was cautioned by a bystander that if he did not stop his team he would kill the boy. He paid no attention to this warning, but whipped his horses into a trot, the consequence being that the boy fell and was run over. A verdict for the plaintiff was set aside on the ground that the jury had been wrongly instructed that the defendant was answerable, whether the injury was wilful or only attributable to negligence. In the opinion it is stated that if the act was wilful the master "is no more liable than if his servant had committed any other assault and battery. All the cases agree." The court said: "If Stephen, in whipping the horses, acted with the wilful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the wilful mischief of his servant, though he be at the time, in other respects, engaged in the service of the former. . . . The dividing line is the wilfulness of the act. If the servant make a careless mistake of commission or omission, the law holds it to be the master's business negligently done. It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's business, and negligence in servants is so common that the law will hold the master to the consequences as a thing that he is bound to foresee and provide against. But it is different with a wilful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair, there is, then, no longer the

presumed relation of master and servant." The rationale of this decision, according to a statement of the court in *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, was, "in substance, that a general or special agent, when he commits or orders a wilful trespass to be committed, acts without the scope of his authority."

The doctrine thus laid down was followed in *Richmond Turnp. Co. v. Vanderbilt* (1841) 1 Hill, 480 (collision between steamers; the decision of the court of appeals in 2 N. Y. 479, see *infra*, was on appeal from the supreme court after a second trial); *Hay v. Cohoes Co.* (1848) 3 Barb. 42 (damage to property); *Vanderbilt v. Richmond Turnp. Co.* (1849) 2 N. Y. 479, 51 Am. Dec. 315 (collision between steamers); *Steele v. Smith* (1854) 3 E. D. Smith, 321 (dog set on plaintiff's cattle); *Hibbard v. New York & E. R. Co.* (1857) 15 N. Y. 455 (unnecessary force used in ejecting plaintiff from railway car); *Fraser v. Freeman* (1871) 43 N. Y. 566, 3 Am. Rep. 740 (homicide); *Baldwin v. New York & H. Nav. Co.* (1872) 4 Daly, 314 (gang plank drawn in while plaintiff was on it; recovery allowed on ground that evidence negatived wilfulness); *Whitaker v. Eighth Ave. R. Co.* (1873) 51 N. Y. 295, reversing (1867) 5 Robt. 650 (street car ran down traveler); *Priest v. Hudson River R. Co.* (1875) 65 N. Y. 589 (assault).

See also the series of cases cited in § 2433, *post*, in which the *ratio decidendi* was that a carrier was liable for the wilful acts of his servants with regard to passengers, in so far as those acts were within the scope of the servant's employment.

In *Metcalf v. Baker* (1874) 57 N. Y. 662, the referee found that the defendant's servant "violently, negligently, and carelessly" drove the baker's wagon of defendant against the plaintiff's carriage, etc., "with great force and violence," throwing plaintiff upon the pavement. Defendant's counsel claimed that the finding was to the effect that the act of the servant was wilful, and therefore defendant was not liable. Held, that the finding did not import a wilful act, but simply negligence; that the words "with great force and violence" and "violently" were used only to express the rapidity of driving and the effect of the concussion. (This case in its earlier stages is reported in *Metcalf*

v. Baker, (1871) 3 Jones & S. 10, affirmed in (1873) 52 N. Y. 649 [mem.]. Having regard to the extremely narrow ground upon which the liability of the defendant was affirmed in the above case, it seems reasonable to infer that the court must have proceeded upon the assumption that the plaintiff could not have recovered if the act in question had been specifically found to be "wilful."

Two years afterwards, however, the doctrine applied in *Wright v. Wilcox*, *supra*, was definitively repudiated, in *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597, affirming (1874) 3 Hun, 329, where, in an action for assault, it was held that the trial judge had properly refused an instruction to the effect that the defendant was not liable if the act was "wilful." In the opinion delivered by the lower court we find the following remarks: "The true criterion of his [the master's] liability, it would seem, should be whether the act of the agent was performed in the course of his employment or while he was immediately engaged in the business of his employer. The act, and not the manner in which it is performed, or the mental condition of the actor, should determine its relation to the service in which he is employed. If the act itself be in the line of his duty and result in injury to another, the principal should be responsible whether the agent was acting in good or bad faith, negligently or wilfully."

In *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170, 171, the above decision was declared to have established these principles: "To make a master liable for the wrongful act of a servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this, although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. While the master is not responsible for the wilful wrong of the servant, not done with a view to the master's service or for the purpose of executing his orders, if the servant is authorized to use force against another,

when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant use more force than is necessary, the master is liable."

In *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543 (wagon collided with another), the court observed: "The rule recognized in all the recent cases, and which does not materially conflict with any of the older decisions, although it may qualify some of the intimations and casual expressions or illustrations of the judges, is that for the acts of the servant within the general scope of his employment while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even wilfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them. There are intimations in several cases of authority that for the wilful acts of the servant the master is not responsible. *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507. But these intimations are subject to the material qualification that the acts designated 'wilful', are not done in the course of the service, and were not such as the servant intended and believed to be for the interest of the master. In such case the master would not be excused from liability by reason of the quality of the act. . . . But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible; so that the inquiry is whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist so as to hold the master for the act."

The statement of the court that "the rule recognized in the recent cases does not materially conflict with any of the older decisions" will, it is apprehended, scarcely be accepted by any impartial critic as correct. It merely furnishes another somewhat entertaining instance

of the desperate efforts that are so frequently made by the courts to preserve an apparent continuity of doctrine, when they find themselves irresistibly impelled to change their views. For the later cases in which the liability of a master in respect of wilful trespasses was affirmed, see *Ochsenbein v. Shapley* (1881) 85 N. Y. 214 (excessive pressure applied in testing of boiler); *Day v. Brooklyn City R. Co.* (1877) 12 Hun, 435, affirmed without opinion in (1879) 76 N. Y. 593 (sudden starting of horse car); *Clark v. New York, L. E. & W. R. Co.* (1886) 40 Hun, 605, affirmed in (1889) 113 N. Y. 670, 21 N. E. 1116 (mem.) (ejection of trespasser from train); *Hoffman v. New York C. & H. R. Co.* (1887) 87 N. Y. 25, 41 Am. Rep. 337 (ejection of trespasser from train); *Burns v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1896) 4 App. Div. 426, 38 N. Y. Supp. 856; *Lang v. New York, L. E. & W. R. Co.* (1889) 51 Hun, 603, 22 N. Y. S. R. 110, 4 N. Y. Supp. 565 (ejection of trespasser from train); *Girvin v. New York C. & H. R. Co.* (1900) 52 App. Div. 562, 65 N. Y. Supp. 299 (ejection of trespasser from train); *Curley v. Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N. Y. Supp. 35 (cab backed by driver against plaintiff's horse); *Hill v. Baltimore & N. Y. R. Co.* (1902) 75 App. Div. 325, 11 N. Y. Ann. Cas. 418, 78 N. Y. Supp. 134 (ejection of trespasser from train); *Dealy v. Coble* (1906) 112 App. Div. 296, 98 N. Y. Supp. 452 (driver of sleigh struck boy who had jumped on it).

But in *Clark v. Koehler* (1887) 46 Hun, 536, 12 N. Y. S. R. 573 (injury caused by mismanagement of team), where a point urged in behalf of the defendant was that, as the driver had refused to stop after he was told to do so, his conduct in going on must be regarded as wilful, and by consequence that his employers were not liable, the court observed: "It is a perfect answer to this part of the defendants' case that the judge charged the jury that if they found from the facts that the accident was caused by the wilful misconduct of the driver, there could be no recovery." Having regard to the cases just cited, it seems clear that such a charge was erroneous, unless the expression "wilful" was intended to bear the meaning, "committed for the purposes of the servant himself." If so, it should not

have been used without some explanation to this effect.

North Carolina.—The rule originally applied was that "where the act of the servant is wilful, and such that an action of trespass, and not an action on the case, must be brought, the master is not responsible, unless the act is done by his command or assent." *Campbell v. Staiert* (1818) 6 N. C. (2 Murph.) 389 (390) (trespass in respect of real property). The master is not liable for a wilful trespass. *Wesson v. Seaboard, & R. R. Co.* (1857) 49 N. C. (4 Jones, L.) 379 (trespass in respect of real property); *Harriss v. Mabry* (1840) 23 N. C. (1 Ired. L.) 240 (rule enounced *arguendo*).

But a master is now deemed to be answerable for the wilful trespasses of his servant. *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A. (N.S.) 488, 23 S. E. 237 (homicide). *Pierce v. North Carolina R. Co.* (1899) 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399 (fireman pushed boy off an engine tender); *Jackson v. American Teleph. & Teleg. Co.* (1905) 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015 (wrongful arrest); *Jones v. Seaboard Air Line R. Co.* (1909) 150 N. C. 473, 64 S. E. 205 (flagman shot boy who was trying to steal a ride on a train).

"The doctrine which once obtained, that the master is not liable for the wilful wrong of his servant, is now understood as referring to an act of positive and designed injury, not done with a view of the master's service, or for the purpose of executing his orders." *Hussey v. Norfolk Southern R. Co.* (1887) 98 N. C. 34, 41, 2 Am. St. Rep. 312, 3 S. E. 923.

Ohio.—The doctrine that "the dividing line is the wilfulness of the act" was rejected in *Nelson Business College Co. v. Lloyd* (1899) 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 54 N. E. 471.

Oregon.—Master liable for wilful trespasses. *French v. Cresswell* (1886) 13 Or. 418, 11 Pac. 62 (sheep were driven on to plaintiff's land).

Pennsylvania.—The nonliability of a master for wilful trespasses was affirmed in *Philadelphia, G. & N. R. Co. v. Wilt* (1838) 4 Whart. 143 (trespass as to real property); *Repsher v. Wattson* (1851) 17 Pa. 365 (error to instruct jury that defendants were liable if their servant was guilty of "neg-

ligence, unskilfulness, or malice"); *Snodgrass v. Bradley* (1852) 2 Grant, Cas. 43 (injuries "designedly or intentionally" inflicted); *Yerger v. Warren* (1858) 31 Pa. 319 (master not liable for servant's trespass, unless the particular wrongful act was ordered by the master).

In *McAnally v. Pennsylvania R. Co.* (1900) 194 Pa. 464, 47 L.R.A. 788, where damages were claimed in respect of the act of a railway gateman in seizing and pulling back a person who was about to cross the track, a verdict against the company was sustained on the ground that there was no evidence to show that the act was wilful, wanton, or malicious.

In one of the more recent cases, *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 891, the court used language which might seem at first sight to betoken a shifting of the position that the intentional character of the given act is not the criterion of responsibility. But from an examination of the whole opinion it is apparent that the *ratio decidendi* was really that the act complained of, although deliberately done, was one of a negligent quality. The tort alleged was that the defendant's driver had struck with his whip a boy who had climbed into a truck, and so caused him to fall. It was held to be a question for the jury whether the driver had acted within the scope of his employment. The court argued thus: "The driver's control of the wagon carried with it the employer's authority to protect it and to prevent persons from getting on it, as well as to remove persons from it. It was not only the right of the driver to remove trespassers from the wagon, but also his duty to his employer to do so. He therefore was authorized to eject the boy from the wagon, and could use the necessary force for that purpose. If his act in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer, for which the latter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him to gratify the ill will of the driver, the defendant company is not responsible for the wrongful or tortious act. It would not be an act done by the employee in the execution of his employer's business, although it was performed

while he was in the service of the employer. It would be an act of the employee directed against the boy, independently of the driver's contract of service, and in no way connected with or necessary for the accomplishment of the purpose for which the driver was employed. . . . In the case at bar, . . . the servant had the right to remove the boy, but in doing so he was compelled to observe the necessary precaution so as not to endanger the life or limbs of the child. This duty was incumbent upon the employee, and a failure to perform it would be negligence for which the defendant company would be liable."

In a more recent case, *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 624, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011, it was laid down that "where the servant in the discharge of a lawful duty wilfully and maliciously inflicts injury, he alone is responsible for the consequences. The rule *respondeat superior* applies only where the injury results from the negligent manner in which the duty is discharged. The master cannot be held responsible for the malicious acts of his servants."

In the three cases last cited, no reference was made to *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119, in which the intention of the court to adopt the theory of a master's liability for wilful trespasses seems to be indicated both by its reliance upon the English case of *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 3 C. P. 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115 (see § 2239, note 4, *ante*), and its use of the following language: "We do not say that in no case a blow may not [sic] be given by a conductor or a driver, and be within the scope of his authority. It certainly may, when by resistance to proper authority it becomes necessary to execute that authority. No company would ever confer the authority to beat even trespassers on their cars. But with the authority to remove them it is implied, if necessary." But whatever may have been the position which it was intended to take, the present doctrine of the court is placed beyond all question by the explicit statements of the court in the more recent cases.

South Carolina.—That a railroad company is not liable for the wilful act of

its engineer in running over cattle on the track was laid down by the court, *arguendo*, in *Danner v. South Carolina R. Co.* (1851) 4 Rich. L. 329, 55 Am. Dec. 678. But in *Redding v. South Carolina R. Co.* (1871) 3 S. C. 1, 16 Am. Rep. 681 (ejection of negress from passengers' saloon), the court seems to have adopted the doctrine that a master is chargeable with a wilful act, unless it was done maliciously, or to serve some purpose of the servant himself.

Tennessee.—Master not liable for wilful acts. *Puryear v. Thompson* (1844) 5 Humph. 397 (hired slave whipped by overseer so severely that he died).

In *Luttrell v. Hazen* (1855) 3 Sneed, 20, an action for a trespass committed upon plaintiff's land by a servant while engaged in felling trees by his master's orders was brought after the passage of a statute (act of 1850, chap. 141) by which it was provided that an action of trespass or case might be brought at the election of the aggrieved party, in all cases where an action of trespass would then lie. With reference to an instruction construed as embodying the doctrine that the superior was not responsible for the trespass of his subordinates acting for him, unless he had directed the acts complained of to be done, or had knowledge of the facts at the time, the court laid it down that, in the business for which he is employed, the servant "is but the instrument of the master, and while acting in the scope of the business it makes no difference whether the injury done was the effect of the negligence or wilfulness of the servant." The rationale of this decision obviously was that the abandonment of the doctrine as to the nonliability of a master for wilful acts was a logical consequence of the abrogation of the rule of pleading upon which that doctrine was based. The master's liability for wilful acts was also affirmed in *Cantrell v. Colwell* (1859) 3 Head, 471 (animal injured).

Texas.—In *Echols v. Dodd* (1857) 20 Tex. 191 (death of hired slave caused by cruel chastisement), it was assumed that the defendant would not have been liable if the tort had been wilful and malicious.

But the liability of a master in respect of a tort of this description has been taken for granted in several cases which turned on the presumptive authority of a brakeman to eject tres-

passers from a railway train. See *International & G. N. R. Co. v. Anderson* (1891) 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; *Texas & P. R. Co. v. Black* (1894) 87 Tex. 160, 27 S. W. 118, and the other cases cited in § 2353, note 2, *post*.

Vermont.—That "the master is not liable for the wilful wrong or trespass of the servant, though the act be done while employed in the business of the master," was laid down in *Andrus v. Howard* (1863) 36 Vt. 248, 84 Am. Dec. 680.

But in *Palmer v. St. Albans* (1888) 60 Vt. 427, 6 Am. St. Rep. 125, 13 Atl. 569, it was declared that "the rule of *respondeat superior* is of universal application, whether the act be one of omission or of commission, whether negligent or fraudulent." This statement was quoted in *Plouf v. Putnam* (1908) 81 Vt. 471, 20 L.R.A.(N.S.) 152, 130 Am. St. Rep. 1072, 71 Atl. 188, 15 Ann. Cas. 1151, where the court observed that the doctrine embodied in *M'Manus v. Crickett* (1800) 1 East, 106, "that a master was not answerable for the wilful or malicious act of his servant, though done in the line of the servant's duties, unless he directed or assented to it," had been "pretty generally repudiated, and it has come to be well settled that a master is liable for the act of his servant, though it be wilful and malicious, when it is done in furtherance of the master's business and within the scope of the servant's employment."

Virginia.—Master not liable for wilful trespasses. *Harris v. Nicholas* (1817) 5 Munf. 483 (cruel whipping of hired slave).

But this doctrine has been discarded. *Chesapeake & O. R. Co. v. Anderson* (1896) 93 Va. 650, 25 S. E. 947 (ejection of trespasser from train).

West Virginia.—The doctrine that a master is not liable for wilful acts was rejected in *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243, quoting remarks in *Mechem on Agency*, § 740.

Wisconsin.—The doctrine that a master is not liable for wilful acts was disapproved by the court, *arguendo*, in *Cracker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, where the actual point involved was the liability of a carrier to his passengers. For later cases in which the mas-

2240. Rational ground suggested for the doctrine.—In view of the fact that a tribunal of such high authority as the supreme court of Pennsylvania still holds that a master is not responsible for the wilful acts of his servant (see preceding section), it will not be superfluous to allude briefly to the grounds upon which an attempt has been made to justify from a rational standpoint a doctrine which, as has already been stated (see § 2238, *ante*), was in the first instance generated by the technical rules of pleading.

It has been referred to the notion that a wilful act of a servant constitutes a "departure from the master's business."¹ In other words, the servant is regarded as ceasing to be a servant when he commits such an act.² But this method of accounting for the doctrine involves an obvious *petitio principii*. The very question to be settled in any given instance is whether the servant, while committing the act complained of, remained within the scope of his employment; and there is no apparent reason why the essential quality of such a question as being one of fact, determinable upon the ordinary footing, should not be recognized in this instance as in others. The extremely unsatisfactory consequences of dealing with the matter in any other way are emphasized by the circumstance that "the act which causes the injury may be precisely the same, whether merely careless or intentional, and the authority of the master wanting as much in one case as in the other."³

ter's liability for wilful trespasses was recognized, see *Rogahn v. Moore Mfg. & Foundry Co.* (1891) 79 Wis. 573, 48 N. W. 669 (assault); *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276 (wrongful arrest).

¹ *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507. The following passage may also be quoted: "The authorities deny that when the servant wilfully drives over the man, he is in his master's business. They hold it a departure, and a going into the servant's own independent business. It is true, he is still driving his master's wagon, and so he would be though he should use it to run away from service. It will hardly be contended that, after he has completed his escape, the master would be liable for his running over a man; and why? Because he has taken up a new and distinct object of his own, and is engaged in executing that; and has he not, to every material purpose, done the same whenever he commits a wilful injury to another?"

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In *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189: "The distinction is obvious between the wilful and deliberate acts of agents amounting to offenses which they might commit, even when attending to the functions intrusted to them, and those acts of imprudence, unskilfulness, and ignorance, in the discharge of their duties, which may occasion injury to others. When an agent, *losing sight of the object for which he is employed*, commits wrongs and thereby causes damage, the principal is no more answerable for them than any stranger; as to such wrongs, the agent must be considered as *acting of his own will, and not in the course of his employment*, or under any implied authority of his principal."

² *Richmond Turnp. Co. v. Vanderbilt* (1841) 1 Hill, 480.

³ *Howe v. Newmarch* (1866) 12 Allen. 49. The passage which follows this is worth quoting: "Thus, if a servant driving his master's carriage becomes entangled in a crowd of other carriages,

Another theory is embodied in the following remarks: "A man shall be presumed to intend the ordinary consequences of his own acts; and especially so far as such consequences may be innocent of all evil intention; for these he may be safely held accountable. But for those which are remote or barely possible, he is not accountable; and if they be at the same time criminal, it would be violating one of the plainest principles of presumptive evidence to say that he intended them."⁴ But the element of natural and probable consequences is clearly quite out of place in a discussion of the extent of a master's vicarious liability. The theory of the law is that this liability is an inseparable incident of the relationship of master and servant, and it is manifestly imposed, irrespective of the intention, actual or implied, of the master. So far as regards reasons of expediency, none that carry any weight have ever been suggested for excepting wilful acts from the operation of the general principle, *Respondeat superior*.⁵ On the contrary, such considerations as are producible with reference to this aspect of the matter are distinctly adverse to admitting such an exception.⁶

and is impatient to drive on, and there is not room to pass with safety, and reasonable care and prudence would require him to wait, but he persists in driving on, and in so doing strikes another carriage, this is negligence for which the master is responsible. Is the master's responsibility at an end if it is shown that the servant saw that he should strike the other carriage, and intended to extricate himself by so doing? He is in his master's employment in the one case as in the other. If his master has directed him to drive carefully, he is in each case alike acting without his master's authority or approval. His purpose in each case may be to do his master's work which he is employed to do. In the former, he does not think of or care for the rights of the other party, and so is negligent. In the latter, he perceives and understands the rights of the other party, but determines to disregard them."

⁴ *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507.

⁵ In *The Druid* (1842) 1 W. Rob. 392, where Dr. Lushington felt himself bound to defer, under protest, to the authorities which had established the doctrine of a master's nonliability, he referred to a reason which might be suggested for that doctrine, namely, "that by holding

the principals responsible for the malicious acts of the agent when committed out of the scope of his employment, the principals would be exposed to such risks as would deter them from embarking in business transactions which they could not superintend in person, and the general commerce of the world would be injuriously fettered and restricted." Such a reason, however, is clearly futile. If the master's immunity in respect of wilful acts could warrantably be declared on such a ground, the argument would apply in his favor where negligent acts are concerned,—and even with greater force, since injuries result from negligence much more frequently than from wilful wrongdoing. The learned judge thus dealt with the contention that the case before him was one of "violence and wilful oppression," and is upon that ground distinguishable from a case of fraud: "The reason of this distinction,

. . . is not very apparent. It may perhaps be argued that fraud and perjury may occur in the ordinary transactions of business, but violence cannot possibly be contemplated in the discharge of any duty. This reasoning may be true, but to my judgment is not satisfactory."

⁶ The doctrine propounded in *M'Manus v. Crickett* (1800) 1 East, 106, 5-

2241. Liability of a master in respect of illegal acts. English and Scotch cases reviewed.—Several cases decided during the earlier part of the nineteenth century proceeded upon the doctrine that a master was not responsible for the “illegal” or “unlawful” acts of his servant.¹ In its origin this doctrine was possibly a mere offshoot of that which exempted a master from liability for the “wilful” trespasses of his servant. See preceding sections. But as an illegal act may be committed without any deliberate intention on the part of the actor,² the domains covered by the two doctrines are not coextensive. It is, moreover, apparent that their application has to some extent proceeded along different lines. That during the later period of their development they have been regarded as reflecting distinct and independent theories concerning the limits of a master’s vicarious responsibility is shown by the fact that, after wilful trespasses had been declared to be within the range of that responsibility, the nonliability of the master in respect of illegal acts was not only affirmed in several instances, but affirmed on a ground which had never been adverted to

Revised Rep. 518, is thus criticized in Thompson on Corporations, § 6298: “With respect of all intentional acts done by a servant in the supposed furtherance of his master’s business, it clothed the master with immunity if the act was right, because it was right, and if it was wrong, it clothed him with a like immunity, because it was wrong. He thus got the benefit of all his servant’s acts done for him, whether right or wrong, and escaped the burden of all intentional acts done for him which were wrong. Under the operation of such a rule, it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business, springing from the imperfection of human nature, because done by another, for which he would be responsible if done by himself. Meanwhile, the public, obliged to deal or come in contact with his agents, for intentional injuries done by them might be left wholly without redress.” Quoted in *Richberger v. American Exp. Co.* (1895) 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922.

¹In *Lyons v. Martin* (1838) 8 Ad. & El. 512, where it was held that a master who had authorized a servant to distrain cattle damage feasant was not

liable for his wrongful act in distraining them after having driven them from the highway into his master’s close. Patterson, J., laid it down that “a master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one.” The trial judge was held to have correctly ruled that, as the act of seizure under the circumstances was not within the scope of a servant’s ordinary authority, some direct authority from the master ought to be proved.

See also *Hurry v. Rickman* (1831) 1 Moody & R. 126 (illegal distress); *Lewis v. Read* (1845) 13 Mees. & W. 834, 14 L. J. Exch. N. S. 295 (illegal distress); *Freeman v. Rosher* (1849) 13 Q. B. 780, 18 L. J. Q. B. N. S. 340 (illegal distress); *Green v. Macnamara* (1859) 1 L. T. N. S. 9 (obstruction of rival omnibus).

The same doctrine was applied in Scotland. *Roxburgh v. Walddie* (1822) 1 Sc. Sess. Cas. 1st series, 367, affirmed in (1825) 1 W. & S. 1 (H. L.) (deepening of river channel in violation of interdiction); *Macdonald v. Chisholm* (1860) 22 Sc. Sess. Cas. 2nd series, 1075, 32 Scot. Jur. 494 (trespass as to real property).

²As frequently occurs in cases of nuisance or interference with property rights.

in any of the cases in which the merely wilful quality of torts had been treated as negating the right of recovery,—*viz.*, that the authority of a servant to commit an illegal act could not be implied.³ But it is clear that a doctrine which purported to exempt a master from liability for “illegal” acts could not logically subsist alongside a doctrine which treated him as being responsible for “wilful trespasses.” Accordingly, the rule which has finally prevailed is that which was enounced in a case decided soon after the one which indicated the abandonment of the latter doctrine, *viz.*, that “the act done by the servant need not be lawful in order to fix the master with responsibility.”⁴

³ *Wilson v. Rankin* (1865) 6 Best & S. 208, 34 L. J. Q. B. N. S. 62, 11 Jur. N. S. 173, 12 L. T. N. S. 20, 13 Week. Rep. 404, affirmed by Exch. Ch. (1865) 6 Best & S. 218, L. R. 1 Q. B. 162, 35 L. J. Q. B. N. S. 87, 13 L. T. N. S. 564, 14 Week. Rep. 198 (violation of statute; for an extract from the judgment of Cochran, Ch. J., see § 2496, *post*); *Bolingbroke v. Swindon New Town* (1874) L. R. 9 C. P. 575, 43 L. J. C. P. N. S. 287, 30 L. T. N. S. 723, 23 Week. Rep. 47 (trespass as to real property); *Wardrope v. Hamilton* (1876) 3 Sc. Sess. Cas. 4th series, 876, 13 Scot. L. R. 568 (shooting of a dog); *Reddiford v. Norman* (1897) 15 New Zeal. L. R. 508 (trespass as to real property); *Jones v. Barton* (1883) 4 New So. Wales L. R. 271 (impounding of cattle).

It is somewhat remarkable that, in all these cases, the court should have ignored the decision in *Limpus v. London General Omnibus Co.* cited in note 4, *infra*. The same observation is also applicable to some still more recent cases.

Thus in *Stedman v. Baker* (1896) 12 Times L. R. (C. A.) 451, where one of the grounds upon which the action was held not to be maintainable for false imprisonment was thus stated by Kay, L. J.: “If the proprietors of the restaurant had given the plaintiff into custody, it would have been an illegal act. How, then, could the manager have implied authority to do that which would have been a wrongful act on the part of the proprietors?”

See also *Barry v. Dublin United Tramways Co.* (1888) Ir. L. R. 26 C. L. 150, where Holmes, J., referring to some earlier cases, said: If those decisions

are examined, one distinct and intelligible principle will be found underlying them all: “Authority from the master can only be implied when the act is one which in a certain state of circumstances might have been legally done by the master himself. This is the first and indispensable condition.” The same view is embodied in *Kinsella v. Hamilton* (1888) Ir. L. R. 26 C. L. 671.

⁴ Crompton, J., in *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. (Exch. Ch.) 526, 17 Eng. Rul. Cas. 258, where an action was held to be maintainable against an omnibus company for the wilful act of a driver in turning an omnibus across the road for the purpose of obstructing one which belonged to a rival concern. Byles, J., said: “It is . . . said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant. If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved.” Wightman, J., in his dissenting judgment, relied on the statement of Patteson, J., in *Lyons v. Martin* (1838) 8 Ad. & El. 515, 3 Nev. & P. 509, 7 L. J. Q. B. N. S. 214 (see note 1, *supra*).

The most authoritative pronouncement on this subject is that contained in the following passages of the judgment of the privy council in *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423. “The employee in question had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority, in order to render the company liable for his

2241a. — American cases reviewed.— The doctrine that a master is not responsible for the illegal acts of his servant has been applied in several American cases.¹ In some of these the conception relied upon was that the authority of a servant to do an act could be implied only in cases where the master himself, if present, would have been warranted in doing it.² But this method of stating it is, to say

acts. The law upon this subject cannot be better expressed than it was by the acting chief justice [i. e., of New South Wales] in this case. He said: 'Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this board (in *Mackay v. Commercial Bank* [1874] L. R., 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473; *Swire v. Francis* [1877] 3 App. Cas. 106, 47 L. J. C. P. N. S. 18, 37 L. T. N. S. 554, [cases involving fraud] and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the court of exchequer chamber in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298 [fraud] which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v. Glasgow Bank* (1880) 5 App. Cas. at p. 326, and has been followed in numerous other cases."

To the cases cited in this extract may be added *Dyer v. Munday* [1895] 1 Q. B. (C. A.) 742, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week. Rep. 440, 59 J. P. 276, where the master was held liable for an assault. Others may be found in the sections (2463 *et seq.*, *post*) relating to the liability of a master in respect of the wrongful use of criminal process.

In *Hunter v. McRae* (1897) 15 New Zeal. L. R. 701, recovery was allowed in respect of an injury caused by the breach of a criminal statute. See also *Croteau v. Arthabaska Water & P. Co.* (1906) Rap. Jud. Quebec 30 C. S. 128 (recovery allowed in respect of an illegal arrest).

The following passage indicates a possible ground upon which the older and

the more recent theories may be reconciled with regard to some classes of cases: "The doctrine by which a master is held responsible for an illegal act of his servant, done without his express direction, within the scope of a legal employment, is not that an authority to do an illegal act is implied, but that the master gave the servant implied authority to determine whether a state of facts had occurred in which the act might legally have been done, and therefore became responsible for the act done by his servant to the prejudice of another, under the erroneous belief that a state of facts existed in which, if it had arisen, the servant's act would have been lawful." *Kinsella v. Hamilton* (1890) Ir. L. R. 26 C. L. 671.

¹ *Sagers v. Nuckolls* (1893) 3 Colo. App. 95, 32 Pac. 187 (third person shot and killed by a servant while attempting to maintain an unlawful possession of land); *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209 (nuisance); *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418 (ejection of passenger from moving street car); *Everson v. Syracuse* (1885) 100 N. Y. 577, 3 N. E. 784 (seizure and sale of property by city constable); *Gabrielson v. Waydell* (1892) 135 N. Y. 1, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969 (assault by captain of ship on member of crew); *Hughes v. New York & N. H. R. Co.* (1873) 4 Jones & S. 222 (ejection of trespasser from moving train); *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119 (assault); *Elmore v. Brooks* (1871) 6 Heisk. 45 (railroad agent, acting in compliance with the orders of the superintendent to deliver no goods consigned to persons who had gone within the Federal lines during the Civil War, refused to deliver goods to the order of such a consignee.)

² In *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448 (for facts see § 2469, note 5, *post*), the court used the following language: "It cannot be presumed that a master, by intrusting

the least, scarcely commendable. It was evidently suggested by the language used in a leading English case, in which the liability of a railway company for a wrongful arrest was denied for the reason that the offense in question was not one of those in respect of which the company was entitled under its charter to make arrests.³ Properly speaking, therefore, it is applicable only in those instances in which the extent of corporate powers is involved.

The weight of authority is now decidedly in favor of the theory that the illegal acts of a servant are imputable to his master, in so far as they are done within the scope of his employment.⁴ That the gen-

his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment." One of the precedents relied upon was *Poulton's Case*. See next note. That decision was also cited in *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418.

In *Cosgrove v. Ogden* (1872) 49 N. Y. 255, 10 Am. Rep. 361, the court said that the language used in *Mali v. Lord*, *supra*, "must be construed in reference to the facts of that case and of the point to which it was applied. So considered, it is obvious that a master by employing a servant to protect his property did not thereby authorize him illegally to arrest and search one that he suspected had stolen and secreted upon his person a portion of such property, for the reason that such arrest and search was not embraced in the business of guarding and protecting property." With all deference it is submitted that this is hardly a correct statement of the real purport of the earlier decision. The principle upon which it proceeded was a perfectly general one, regarded as being applicable to any case in which the act complained of was unlawful.

A failure on the part of the court to appreciate the real *rationale* of the *Mali Case* is also indicated by the ground upon which it was approved in *Collins v. Butler* (1904) 179 N. Y. 156, 71 N. E. 746, 17 Am. Neg. Rep. 106, *viz.*, that

"the only modification of the cases to be gathered from later cases is that, in all such cases, the question whether the servant was acting within the scope of his employment or otherwise was for the jury." (See § 2469, note 7, *post*.)

The statement in *Mali v. Lord*, *supra*, was quoted with approval in *Central R. Co. v. Brewer* (1894) 78 Md. 407, 27 L.R.A. 63, 68 Atl. 615; *Bernheimer Bros. v. Becker* (1906) 102 Md. 250, 3 L.R.A.(N.S.) 221, 111 Am. St. Rep. 356, 62 Atl. 526. In *Cate v. Schaum* (1878) 51 Md. 309, it was laid down that "a master is liable for the illegal acts of his servant done by force or in wantonness, while in the performance of an act within the scope or course of his employment." The court cited, among other cases, *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; § 2241, note 4 *ante*. How such a statement is to be reconciled with the approval expressed of the rule laid down in *Mali v. Lord* is a matter which concerns only the Maryland court itself.

³ *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309. See § 2243, note 1, *post*.

⁴ See *Southern R. Co. v. James* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303 (watchman shot a trespasser who was attempting to break away after having been arrested); *Chicago, B. & Q. R. Co. v. Parks* (1857) 18 Ill. 460, 68 Am. Dec. 562 (forcible ejection from train in contravention of statute); *Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 298, 95 Am. Dec. 489 (letting off steam from locomotive); *Banister v. Pennsylv-*

eral adoption of this view is only a question of time can scarcely be doubted, when it is considered that there are now very few jurisdic-

vania Co. (1884) 98 Ind. 220 (complaint not demurrable which averred that the defendant's servant "wrongfully, unlawfully, and purposely" killed plaintiff's mule); *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1 (assault); *Joyce v. Duplessis* (1860) 15 La. Ann. 242, 77 Am. Dec. 185 (seizure of property); *Mouras v. The A. C. Brewer* (1865) 17 La. Ann. 82 (transporting slave out of states); *Howe v. Newmarch* (1866) 12 Allen, 49 (assault); *George v. Gobey* (1880) 128 Mass. 289, 35 Am. Rep. 376 (violation of statute); *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 643; *Enos v. Hamilton* (1869) 24 Wis. 658 (obstruction of navigable stream by logs); *Johnston v. Chicago, St. P. M. & O. R. Co.* (1907) 130 Wis. 492, 110 N. W. 424.

See also the later New York cases referred to in the preceding note; and the cases cited *passim* in chapters ci. to cvi., *post*.

In *Staples v. Schmid* (1893) 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193, the statement of the court in *Mali v. Lord*, note 2, *supra*, was thus criticized: "It is quite true that the master would have had no right to arrest and search an innocent person; but it is equally true that he would have had the right to detain the thief, and to recapture his property from him. The case, therefore, was one where the act, aside from any excessive force, might be lawful or unlawful according to whether the supposed circumstances were real or unreal. The servant was left in a situation where he was obliged to determine the fact, and where his duty to his master depended upon his decision. The decision was his, as the substitute of the master, and the act was one intended by him to be for his master's benefit, and which his duty required if the facts were as supposed. Hence, as to third persons, it was the master's act. The criterion of the master's liability can never be whether the act would have been lawful for the master to have done in the circumstances as they actually existed."

So far as regards New York itself, the *Mali Case* has in some later cases

been treated as a valid precedent. See note 2, *supra*. But the following cases, which all recognize the right of recovery in respect of a wrongful arrest, are essentially inconsistent with it: *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep. 141; *Collins v. Butler* (1904) 179 N. Y. 156, 71 N. E. 746, 17 Am. Neg. Rep. 106; *Clark v. Starin* (1888) 47 Hun, 345; *Fortune v. Trainor* (1892; Sup. Ct. Gen. Term) 47 N. Y. S. R. 58, 19 N. Y. Supp. 598, affirmed in (1894) 141 N. Y. 605 (mem.) 36 N. E. 740; *Dupre v. Childs* (1900) 52 App. Div. 306, 65 N. Y. Supp. 179, affirmed in (1901) 169 N. Y. 585 (mem.) 62 N. E. 1095; *Lubliner v. Tiffany & Co.* (1900) 54 App. Div. 326, 66 N. Y. Supp. 659; *Stevens v. O'Neill* (1900) 51 App. Div. 364, 64 N. Y. Supp. 663, affirmed in (1902) 169 N. Y. 375, 62 N. E. 424 (only a technical point of procedure was discussed by the higher court); *Fogarty v. Wanamaker* (1901) 60 App. Div. 433, 69 N. Y. Supp. 883; *Kastner v. Long Island R. Co.* (1902) 76 App. Div. 323, 78 N. Y. Supp. 469, 12 N. Y. Anno. Cas. 77; *Sharp v. Erie R. Co.* (1906) 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250; *Staton v. Mason* (1907) 119 App. Div. 437, 104 N. Y. Supp. 155; *Holloway v. Kent* (1910) 67 Misc. 440, 122 N. Y. Supp. 684.

In *Knowles v. Bullene* (1897) 71 Mo. App. 341, the court observed: "When it is said that no authority will be implied in the agent to do an act in defense of the principal's property, which act the principal himself could not lawfully do if present, it must be understood as having relation rather to the character of the act than as to what the principal might have lawfully done under the particular circumstances of the case. To illustrate: The master would have no authority, if present, to shoot and kill one detected in stealing his goods, and so under the rule, correctly applied, no such authority could be implied in the servant. But the master may lawfully arrest and detain the thief, and thereby force him to give up the stolen goods, and authority therefor may be impliedly given to the servant or agent standing in place of the principal."

tions in which the theory as to the nonliability of a master in respect of wilful trespasses has not been discarded (see § 2239a, *ante*), and that, as was pointed out in the preceding section, the abandonment of that theory logically involves the abandonment of the position that illegal acts are not imputable to him.

2242. Liability of a corporation in respect of a tortious act of its servant. Generally.—The liability of a corporation to be sued for the torts of its servants is discussed later in a general point of view. In the present connection we have to consider merely the extent to which this liability is qualified by the circumstance that a corporation is an artificial body of limited powers.

The established rule is that a claim against a corporation for damages in respect of injuries resulting from a tort committed by its servant in the course of his employment, and in relation to a matter within the scope of the corporate charter, cannot be defeated on the ground that the corporation itself could not lawfully have done the act complained of. To such a situation the defense of *ultra vires* has no application. The author has not found any specific affirmation of this doctrine in the English cases. But its correctness is manifestly taken for granted in all those in which the liability of corporations for wilful or illegal acts has been affirmed.¹ By the Ameri-

¹ See, for example, *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. (Exch. Ch.) 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258; *Citizen's Life Assur. Co. v. Brown* (1904) A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176, both cited in § 2241, note 3, *ante*. Other cases may be found in § 2394, § 2407, and §§ 2464 *et seq.*, *post*.

"There is a great distinction between tortious and contractual liability for acts *ultra vires*. Every tort is in a manner *ultra vires*, and it is no defense to legal proceedings in tort merely to set up this argument, if the torts which have been done by the corporation, or by their direction, express or implied, are reasonably incidental to the business, the powers, or the duties of the corporation." Brice, *Ultra Vires*, p. 479.

There would seem to be some difficulty, however, in reconciling the cases referred to above with the following remarks of Bowen, L. J., in *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. (C. A.)

714: "How can a company be made liable for a fraudulent answer [as to the validity of certain transfers of stock] given by their officer for his own private ends, by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself, accordingly, into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the company be made responsible for an agent's act done beyond the scope of his employment, and from which they derived no benefit?" It would seem that the dilemma proposed is not a perfect one, for such decisions as those mentioned point to the conclusion that the defendant corporation might have been liable on the ground that the fraud in question was committed within the scope of the servant's employment. But the case in which the remarks were made has been overruled by the House of Lords

can courts it has frequently been enunciated.² The effect of adopt-

in *Lloyd v. Grace* (1912) A. C. 716. See § 2395, note 5, *post*.

In *Adams v. National Electric Tramway & Lighting Co.* (1893) 3 B. C. 199, where the plaintiff recovered for an assault committed by the conductor of a tram car in ejecting him, after his refusal to pay the fare, it appeared that the only power which the company possessed, under the act of incorporation, with regard to dealing with a passenger under such circumstances, was to have him summoned and fined. The defendant relied unsuccessfully on the theory that the act of the conductor was *ultra vires*. The reporter's headnote is as follows: A corporation is liable for a trespass committed by its servant in conducting its business, although committed in the doing of an act *ultra vires* of the corporation itself.

In *Line v. Royal Soc.* (1902) 18 Times L. R. (K. B.) 634, the defendant was held liable for a wrongful arrest by one of its inspectors; the *ratio decidendi* being that the code suggestions supplied for the guidance of such officials mentioned, among the courses to be adopted, the giving of an offender into the custody of a constable, and that, as against the society itself, these suggestions defined the authority possessed by the inspector, although the cruelty to animals act only provided that an inspector could complain to a constable, and that the constable could arrest the offender. The inspector, in short, had acted within the scope of his authority, erroneously given to him by the society.

In *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880) L. R. 5 C. P. Div. 331, 2 Eng. Rul. Cas. 366, where the defendant's secretary had appropriated to his own use a sum of money borrowed from the plaintiff in excess of the amount which, under the defendant's rule, could lawfully be borrowed, Lord Coleridge thus discussed the effect of this transgression of the rules, upon the right of recovery: "It has been argued that, in order to ascertain whether the society have put their agent in his place to do for them the acts he did, the constitution of the society itself must be borne in mind. I make no doubt at all that this is true, and if it should turn out that the society could

not authorize an agent to do the act, because it was an act they could not do themselves, they would not be liable for what he did. The argument addressed to me on this point was as follows: This is a society which exists only for certain purposes; it does not exist for the purpose of borrowing beyond the limit ascertained by the 12th rule; it could not itself borrow; it could not ratify the acts of its directors in so borrowing; any such borrowing, therefore, by an agent, as there was in this case, cannot be authorized in point of fact, because there is no power to authorize it in point of law; and the judgment of the House of Lords in *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 2 Eng. Rul. Cas. 304, was cited as establishing conclusively the proposition contended for. I think it establishes nothing of the kind. The company in that case was an incorporated company, with a memorandum and articles of association. The contract on which the action against the company was brought was a contract which, in the opinion of all the judges (they differed upon other points, but agreed on this), was inconsistent with the memorandum of association; and on this ground the House of Lords decided the case. But in the case before us there is no memorandum and no articles of association, and if it be said, as with some reason it may be, that the first rule is analogous to the memorandum, and the remaining rules to the articles, then there is the authority of *Laing v. Reed* (1869) L. R. 5 Ch. 4, 39 L. J. Ch. N. S. 1, 21 L. T. N. S. 773, 18 Week. Rep. 76, 34 J. P. 134, to show that the existence in such a society as this of such a rule as rule 12 is neither illegal in itself nor inconsistent with a rule exactly like rule 1 in the present case. In this case the society, for a purpose in itself legal, have authorized Keighley Lea to take the £100 for them from the plaintiffs. I am of opinion they are liable to repay it."

²"Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application." *Merchants' Nat.*

ing a different doctrine would clearly be the entire exemption of a corporation from responsibility with respect to torts.³

Bank v. State Nat. Bank (1870) 10 Wall. 604, p. 645, 19 L. ed. 1008, 1018.

A corporation is liable for the torts of its servants, "however foreign to its nature, or beyond its granted powers." *New York & N. H. R. Co. v. Schuyler* (1865) 34 N. Y. 49 (fraudulent issue of stock). This case was followed in *Wilkinson v. Dodd* (1886) 42 N. J. Eq. 234, 7 Atl. 327.

"A corporation is equally responsible as an individual for the wrongs it commits, and will not be heard to deny, or allowed to evade, its liability on the ground that those wrongs resulted from the exercise of powers not granted by the law of its organization." *Alexander v. Relfe* (1881) 74 Mo. 495.

"An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers." *Hussey v. Norfolk Southern R. Co.* (1887) 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923.

"While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technically *ultra vires*, it is well established that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case the doctrine of *ultra vires* has no application." *Central R. & Bkg. Co. v. Smith* (1884) 76 Ala. 572, 582, 52 Am. Rep. 353.

"No court would hear the corporation assert its wrongful act was beyond its chartered limits, and therefore ineffective to charge it with the injurious consequences of fraud." *Tome v. Parkersburg Branch R. Co.* (1873) 39 Md. 36, 17 Am. Rep. 540.

In *Salt Lake City v. Hollister* (1885) 118 U. S. 259, 30 L. ed. 177, 6 Sup. Ct. Rep. 1055, the court made the following remarks: "The argument is unsound, that whatever is done by a corporation in excess of the corporate powers as defined by its charter is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensa-

tion, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort in an action of ejectment, or in trespass, or on an implied assumpsit for the value of the land. A plea of *ultra vires*, in this case, would be no defense. The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

For other cases in which the inapplicability of the doctrine of *ultra vires* in this connection is affirmed, see *First Nat. Bank v. Graham* (1879) 100 U. S. 699, 25 L. ed. 750 (loss of special deposit by gross negligence); *First Nat. Bank v. Anderson* (1898) 172 U. S. 573, 43 L. ed. 558, 19 Sup. Ct. Rep. 284 (conversion); *First Nat. Bank v. Henry* (1906) 159 Ala. 367, 49 So. 97 (breach of trust); *Dorsey Mach. Co. v. McCaffrey* (1894) 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208 (conspiracy); *McCord v. Western U. Teleg. Co.* (1888) 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 S. W. 315 (fraud); *Gulf, C. & S. F. R. Co. v. James* (1887) 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744 (malicious prosecution); *Zinc Carbonite Co. v. First Nat. Bank* (1899) 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229 (fraud); *Thomp. Corp.* § 5435, note 32.

The doctrine is, of course, taken for granted in all those numerous cases in which railway or other corporations have been held liable for such torts as assaults, wrongful use of criminal process, etc. See chapters CI. to CVI., *post*.

³ In *Philadelphia, W. & B. R. Co. v.*

Quigley (1858) 21 How. 202, 16 L. ed. 73, the court reasoned thus: "The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it; that, although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents; and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the states of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exer-

cise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives."

In *St. Louis, A. & C. R. Co. v. Dalby* (1857) 19 Ill. 353 (assault), the court, after referring to the statutory power conferred on a railway company to eject persons from its cars, proceeded thus: "Shall it not be responsible for the abuse of the powers with which it is thus clothed? This has always been maintained by all courts, in all times, and in all places, and must be considered as not to be questioned. But the answer urged is that, as the corporation has no lawful authority to order an unlawful act to be done, or to order a lawful act to be done in an improper way, or so that it shall violate the rights of others, the act, whenever such is the case, becomes the act of the agent, and not of the corporation. However specious this reasoning may at first appear, it will not bear the test of a practical application and of sound reason. . . . If the position contended for were adopted, a corporation could never be held liable for any affirmative act; for whenever such affirmative act is a violation of the rights of another, the ready and invariable answer would be that because such act was wrongful it was therefore unlawful and not authorized by its charter, and hence not the act of the corporation, but the individual act of those who represent it and exercise its functions. . . . Take a case where the company had built its road over private property. If in the proceeding to condemn the land all the forms of the law had been substantially complied with, then the act was but the legitimate exercise of a power conferred by law, and no wrong was done; but if not, then the act was not the legitimate exercise of such a power, and a trespass was committed,—but not by the company; no, for their charter did not authorize them to commit a trespass, and the injured party must be turned over to the servants of the company who ordered the

2243. Liability of a corporation in respect of the tortious act of its servant incidental to a transaction outside the scope of its charter. English cases reviewed.—The doctrine embodied in various cases and judicial *dicta* is that a corporation cannot be held responsible for torts committed by its servant with reference to a transaction outside the scope of its charter.¹ But it seems that a different rule may be ap-

act, or to the laborers who executed it. The result in all cases must be this: If the act was right and lawful, then it is the company's; but if it was wrong and not legally justifiable, then it was not the act of the company, which, it will be said, was a stranger to it. The result of the position is that the company cannot be liable for any trespass, for a trespass is an unlawful act, and no company or corporation can be legitimately empowered to do an unlawful act."

In *Philadelphia, W. & B. R. Co. v. Quigley* (1858) 21 How. 202, 209, 16 L. ed. 73, 75, the court observed that, if it accepted the contention that the railway company was not liable on the ground of its limited powers, it would "be forced to conclude that no action *ex delicto* or indictment will lie against a corporation for misfeasance."

In *Fogg v. Griffin* (1861) 2 Allen, 1, the court remarked: "If it be true, as urged by the counsel for the plaintiffs, that he could not bind the corporation by any false and fraudulent representations, because it had no authority to appoint an agent for an unlawful purpose or to use unlawful means, it would follow that no corporation could be held liable for any acts of its authorized agents, however fraudulent or wicked their conduct might be, or however great might be the injury thereby occasioned to third persons. Such a doctrine finds no support in the law. A corporation can act only through agents. If they, while exercising the authority conferred on them, are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom."

"If they [the company] are not to be made responsible for any act of an agent, except such as they might do themselves, they can never be made responsible for any act of any agent, lawful or unlawful." Begbie, Ch. J., in *Adams v. National Electric Tramways & Lighting Co.* (1893) 3 B. C. 199.

¹ This limitation of a company's liability is implied in the following remark made by Patteson, J., in a judgment delivered for the whole court in *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314: "An action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act done, and it is done by their authority."

In *Green v. London General Omnibus Co.* (1859) 7 C. B. N. S. 290, (mismanagement of vehicle), Erle, Ch. J., said: "The ground of the demurrer is that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles, and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation."

But the first case in which the non-liability of a company was distinctly affirmed on the ground of *ultra vires* was *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, where a claim in respect of a wrongful arrest was rejected on the ground that the act in question was not specified, in the company's charter, among those for which it was authorized to make arrests. The *ratio decidendi* is indicated by the remark of Shee, J., that "an authority cannot be implied to have been given to a servant to do an act which, if his master were on the spot, the master would not be justified in doing, in the assumption of a particular state of facts." In Brice, *Ultra Vires*, p. 478, Green's Am. ed. p. 362, the effect of the decision is thus stated: "If a tort be altogether *ultra vires* of a corporation, as arising out of a matter which the corporation itself has no authority to

plicable where the effect of a specific statute affecting the liability of a carrier is in question.²

direct, then there can be no implied authority to a corporate official to commit such tort."

The nonliability of a corporation for a tortious act outside its granted powers was recognized by Lord Selborne, *arguendo* in *Houldsworth v. Glasgow Bank* (1880) L. R. 5 App. Cas. 317, p. 326.

For other cases (all involving the wrongful use of criminal process) in which the validity of the defense of *ultra vires* was affirmed see *Charleston v. London Tramways Co.* (1888) 4 Times L. R. (C. A.) 629, 32 Sol. Jo. 557, affirming (1887) 4 Times L. R. 157, 36 Week. Rep. 367; *Knight v. North Metropolitan Tramways Co.* (1898) 78 L. T. N. S. (C. A.) 227, 14 Times L. R. 286; *Barry v. Dublin United Tramways Co.* (1889) Ir. L. R. 26 C. L. 150; *Emerson v. Niagara Nav. Co.* (1883) 2 Ont. Rep. 528; *Thomas v. Canadian P. R. Co.* (1906) 14 Ont. L. Rep. 55, 8 Ann. Cas. 324.

The *Poulton Case*, *supra*, was relied on as a controlling precedent in *Bolingbroke v. Swindon New Town* (1874) L. R. 9 C. P. 575, 43 L. J. C. P. N. S. 287, 30 L. T. N. S. 723, 23 Week. Rep. 47, and in *Giblan v. National Amalgamated Laborers' Union* [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708 (where the applicability of the defense of *ultra vires* to the circumstances under review was denied. See § 2400, note 2, *post*).

In *Lindley, Companies*, p. 208, the law is thus stated: "All that is necessary to charge a company for a tort is that the act complained of should be *intra vires*, and not *ultra vires*, and should be committed by the agent or servant in the course of the business to which it is his duty to attend, or, as it is sometimes expressed, in the course and part of his employment."

In *Brice on Ultra Vires*, p. 478, it is said: "This principle [of *ultra vires*] holds with regard to torts, at least to this extent, that if a tort be altogether *ultra vires* of a corporation, as arising out of a matter which the corporation itself has no authority to direct, then there can be no implied authority to a corporate official to commit such tort." The learned author also observes that

the *Poulton Case*, *supra*, "decided only that no implied authority as to detention was possessed or could be possessed by the station master. He might have had express authority to act as he did, but the liability of the corporation under such circumstances is very doubtful." The "doubtful" point thus adverted to has not yet been cleared up by the courts. The only case apparently which bears upon it is *Mill v. Hawker* (1874) L. R. 9 Exch. 309 (1875) L. R. 10 Exch. 92. There, in an action of trespass against the surveyor and members of highway board in their private capacity, for an act done in carrying out an order of the board, admitted to be *ultra vires*, the majority of the court went no further than to affirm the liability of the surveyor. But Kelly, C. B., expressed the opinion that the liability of such a body for "an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel," is different from its liability in respect to an act creating a contractual obligation. "If such an act is to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them." It is plain, however, that the dilemma thus suggested is not warrantable under the circumstances. It ignores the distinction, which may always be taken as regards any given corporation, between acts which constitute a wrongful exercise of its charter powers, and acts which are wholly outside the scope of those powers. There is no logical reason why a corporation should not be viewed as being liable in respect of any acts of the former description which it may authorize, and as not being liable for acts of the latter description, even when it has authorized them. The courts may possibly take this position hereafter, and thus assimilate, so far as the doctrine of *ultra vires* is concerned, the rules which define the responsibility of corporations in cases of contracts and of torts. On the other hand, considerations of public policy may be deemed decisive in favor of differentiating these two classes of cases.

² In *Doolan v. Midland R. Co.* (1877)

2243a. Same subject. American cases reviewed.—The theory that a corporation is not liable for a tort of its servant which has reference to a transaction outside the scope of its charter has been adopted to some extent in the American states.¹ But the preponderance of au-

L. R. 2 App. Cas. 792, an action brought under the railway and canal act 1857, which provides (§ 7) that a railway company shall be liable, in the absence of a signed and reasonable contract for exemption, for the loss of any goods, "occasioned by the neglect or default of its servants," Lord Blackburn made the following remarks in the course of his judgment: "I may here dispose of a point on which great reliance seems to have been placed by the pleaders and by some of the judges below, though I think it was abandoned on the argument at your Lordships' bar. The Midland Railway Company is not authorized by any act of Parliament to own or work steamboats, and therefore it is said that this company, if owning and working steamboats, would be doing so illegally, and therefore would be free from the restrictions imposed, it is said, only on those railway companies legally owning and working steamers. It is impossible to suppose that the legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway could not set up its own wrong against a plaintiff who contracted with the company in innocence and ignorance. Doolan and Midland Railway Company are not *in pari delicto*. Doolan might perhaps set up against the Midland Railway Company that it was acting illegally, if it would in any way help him (which I do not think it in any way could), but it does not lie in the mouth of the railway company to set up its illegality, even if it would help it, which I do not think it would." It is not apparent on what precise grounds this expression of opinion is to be reconciled with the cases cited in the last note, which were not referred to at all. This aspect of the defendant's liability was not discussed by any member of the House of Lords except Lord Blackburn.

¹ In *Jones v. Western Vermont R. Co.* (1855) 27 Vt. 399, 65 Am. Dec. 206, where a railroad embankment which, in pursuance of a contract by the plaintiff with the company's agent, its chief engineer, had been built so as to serve as a dam for a reservoir to be maintained for the benefit of the plaintiff, gave way, owing to its faulty construction, it was held that the incidental use of the embankment was not such a deviation from its strictly appropriate purposes as gave notice to all of the agent's want of authority, and consequently that the company was liable for the damages caused by the accident. The court said: "The important question in these cases respects the authority of the corporation under their charter. It does not seem to be questioned that such a corporation is liable for torts, even when committed by their agents within the apparent scope of their authority, or in the pursuit of the general purpose of the charter. In other words, when the departure from the charter powers is not such as to be notice to all that the agent is departing from the proper work of the corporation, they are liable for such acts of their agent. To apply this reasoning to the present cases: If this transaction is fairly to be regarded as the building of a mill dam or reservoir for the convenience of the water power there in use, and the laying the track of the railroad upon the erection as something incidental merely to the general purpose of the erection, then undoubtedly the corporation is not liable. But if the erection is primarily for the purpose of making a track for the railroad, and the advantage to millowners, by means of reserving the water for future use, a mere incident, and dependent only upon slight and not expensive departures from the ordinary mode of constructing such erections for the benefit of the railroad merely, we think the defendants are liable."

In *Gillett v. Missouri Valley R. Co.* (1874) 55 Mo. 315, 17 Am. Rep. 653, the defendant company was held not liable for malicious prosecution, for the

thority is in favor of the opposite doctrine.² That doctrine, however, has been held to be subject to the qualification that it will not

reason that it had no power to engage in prosecutions.

In *Weckler v. First Nat. Bank* (1875) 42 Md. 581, 20 Am. Rep. 95, the non-liability of a banking company for false representation made by its teller with regard to certain bonds which it had sold on commission was affirmed on the ground that it was not authorized to make such sales.

In *Hern v. Iowa State Agri. Soc.* (1894) 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092, the defendant was held not liable in respect of an arrest made for a cause not among those specified in the statute defining its powers.

In *Gunn v. Central R. & Bkg. Co.* (1885) 74 Ga. 509, where a passenger was injured through the careless management of a steamboat operated by a railway company in partnership with an individual person, the liability of the company was denied on the ground that it was not authorized to enter into such a partnership.

In *Bathe v. Decatur County Agri. Soc.* (1887) 73 Iowa, 11, 5 Am. St. Rep. 653, 34 N. W. 484, it was held on demurrer that a corporation organized to further the interests of agriculture, to hold expositions, etc., and to do everything necessary and incidental thereto, was not liable for the negligence of hackmen employed by it to convey persons to and from its fair grounds.

In *Ricord v. Central P. R. Co.* (1880) 15 Nev. 167, the court was willing to concede the proposition "that a corporation cannot be bound, even by the act of its board of directors, unless done in pursuance of some object embraced by its charter, or of some power conferred upon it by law." But, for reasons there stated, the doctrine was adopted that the prosecution of criminal offenders is not always and necessarily outside of the objects and privileges of a railroad corporation. "It is the object of such corporations to acquire property, and it is their privilege to protect it by every lawful means. It is not only a lawful, but a perfectly legitimate and even a commendable means of protecting private property, to institute criminal proceedings against those who infringe the right by criminal practices. And this is even more

emphatically true of corporations than of natural persons. Their property is so vast, and their business so extended and complicated, they are so constantly and in so many directions exposed to the danger of loss by theft, robbery, and embezzlement, that they are compelled, by the same policy that induces penal legislation on the part of the state, to let it be known that they will prosecute vigorously and systematically all criminal acts by which they are directly injured. That they act in conformity with this policy is notorious. They have not only their corps of legal advisers and their local attorneys, but they keep a force of detectives continually employed in ferreting out depredators upon their rights, and assisting the public authorities in bringing them to justice. No law and no public policy restrains them in this respect, and to decide that they can never be held to a proper accountability for what they are constantly doing would simply be to endow them with an additional and most invidious privilege."

² In *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258, railway companies were held to be liable for injuries caused to a passenger by the negligence of their servants, although the act complained of was committed beyond the territorial limits within which the companies were authorized to do business. The opinion delivered in this case contains a lengthy and elaborate discussion of the principles deemed to be applicable. The decision was followed in *Buffett v. Troy & B. R. Co.* (1885) 40 N. Y. 168, where the defendant railway company was held to be answerable to a passenger for injuries caused by the negligence of the driver of a stage-coach operated between a station and a village, irrespective of whether the contract to transport the passenger was *ultra vires* or not.

In *Hutchinson v. Western & A. R. Co.* (1871) 6 Heisk. 634, an action for injury caused by a collision between plaintiff's and defendant's steamers, the court said: "If a corporation, chartered for one purpose, engage in a business different from that authorized by charter, or if its employees engage in

such different business in the name of the principal, and the principal, with a knowledge of such departure, receive the profits arising therefrom, employ agents to superintend it, or in any other distinct mode recognize it as their business, and in its prosecution by its agents an injury results therefrom to another's person or property, the party so injured is entitled to maintain his action for the damages resulting from the wrongful act."

In *Nims v. Mt. Hermon Boy's School* (1893) 160 Mass. 177, 22 L.R.A. 364, 39 Am. St. Rep. 467, 35 N. E. 776, an action against an educational corporation for personal injuries occasioned to a passenger for hire upon a boat used at a public ferry operated by the corporation, through the negligence of the ferryman in managing the boat, it was held to be no defense that the maintenance of the ferry was *ultra vires*. The court said: "If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry boat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract. . . . In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires*, but its acts in that respect were not different in

kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty."

In *Gruber v. Washington & J. R. Co.* (1885) 92 N. C. 1, where plaintiff was injured on a steamboat operated by a railway company, the court observed: "If it is conceded that the line of steamers was not within the contemplation of the charter, and was unwarranted by it, it by no means follows that, upon the wrongful assumption of the business of common carriers, it can be conducted without incurring the obligations for safe transportation which belong to the exercise of those functions. It can be no defense to the company which undertakes to receive and carry persons for hire, that they had no legal right so to do, when charged with responsibility for wrongs coming to those who commit their personal safety to the agents of the company, and who suffer from their negligence and misconduct."

In *New York, L. E. & W. R. Co. v. Haring* (1885) 47 N. J. L. 137, 54 Am. Rep. 123 (defense that a company running street cars had no franchise so to do was held not to be available in an action for injuries caused by the mismanagement of the car), the court said: "The doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be permitted to set up that, inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defense. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious

enable an aggrieved party to recover unless the transaction to which the tort complained of was incidental was authorized or ratified by the corporation itself.³

act be a defense, then corporations have a dispensation from liability for these acts, peculiar to themselves." So far as New Jersey is concerned, this exposition of principles destroys the authority of the statement made in *Brokaw v. New Jersey R. & Transp. Co.* (1867) 32 N. J. L. 328, 90 Am. Dec. 659, that "to fix the liability of a corporation for the tortious act of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated."

In order to fix a corporation's liability for a tort, it is not necessary that it "should have been committed while the corporation was in the exercise of the powers conferred by its charter. It may have been committed while the corporation, or its servants or agents acting under its authority, were exceeding corporate power, or engaged in business or transaction wholly foreign to its nature." *South & North Alabama R. Co. v. Chappell* (1878) 61 Ala. 527.

³ In *Central R. & Bkg. Co. v. Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353, where the plaintiff received personal injuries and lost his baggage, owing to the defective condition of a steamer illegally operated by a railway company, the court reasoned thus: "Were the present action founded on a contract of transportation, it is unquestionable that the defendant could successfully interpose the defense of *ultra vires*. The action is, however, *ex delicto*, founded on the common-law duty of a common carrier. The plaintiff does not require the aid of an illegal contract to establish his case; its enforcement is not necessary to entitle him to a recovery. The rules applicable are those which govern in cases of torts committed by a corporation. The question is, What is the liability of a corporation for a tort committed while transacting a business without and beyond the purview of the corporate powers and purposes? This is followed by another question: By what authority, and in what manner, can a corporation be subjected to such liability? . . . Generally, it may be

said, that corporations are liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied, or incidental. . . . An exemption from liability in such cases, because the act is *ultra vires*, would be a license to corporations to do wrongs to others. From these principles it follows that if the defendant undertook the business of transporting persons by a mode of conveyance other than that authorized and provided by the charter, its duties and responsibilities to a passenger are the same as if the business was authorized and legal. But before the duties and responsibilities attach, the corporation must undertake and engage in the business, and thereby assume its burdens. Of this there can be no implication from the isolated fact that some officer or agent has engaged, in the name of the company, in running and operating the boats; in other words, there can be no implication that a corporation has made a contract or engaged in business transcending its powers. Green's Brice, *Ultra Vires*, 364. It may be inferred from proved circumstances, as other facts, but is not the subject of implication. . . . The limitation is the scope of the employment or delegated authority. If an officer or agent cannot directly subject the corporation to liability for his tortious act beyond the range and course of his employment, though done while engaged in its performance, for what reason or on what principle is it that an officer or agent can, by making an unlawful transaction, and engaging in an unauthorized and unlawful business, in the name of the company, without the authority of the corporation, indirectly subject it to liability for the negligent or intentional wrongs of the agents or servants employed by him in the performance of such contract, or in carrying on such business? While corporations should be held to a strict responsibility for the wrongful acts of their employees, when done in the course of their employment, and connected with the execution of the business for which incorporated, they should

2244. Concluding remarks.—From the foregoing summary it is apparent that the virtual result of the evolution of doctrine has been, broadly speaking, to bring back the law, so far as regards the majority of jurisdictions, to the same position as that which it reached in England within a few years after the principle *respondet superior* was first applied in its modern form. That is to say, all classes of torts are now considered by the courts to fall within the purview of that principle, the sole test of a master's liability—wherever the effect of absolute duties is not involved—being merely the quality of the torts in suit, as having been done or not done in the course of the servant's employment. But the removal of the disturbing element temporarily introduced by the adoption of the rule which accorded to the master an immunity in respect of the wilful trespass and illegal acts of his servants has in nowise affected the operation of the cause to which, for the greater part, the conflict between the authorities is attributable, *viz.*, the fundamentally different views which have been and still are entertained with regard to the policy and equity of the doctrine of vicarious accountability. The conclusions arrived at by the courts are constantly being influenced by the diverse mental tendencies of the judges who take the position that the field of that accountability is already wide enough, or even too wide,¹ and the judges who are of opinion that it should be still further enlarged.

There can be no doubt that the ideas of the latter of these schools

be protected against the consequences of unauthorized acts of their officers or agents, committed in excess of its powers, and unconnected with the business or purposes of their incorporation and organization,—especially when dealing with persons charged with notice of their powers and the nature and extent of the employment and authority of the officer or agent. . . . As there is no implied authority of any officer or agent to make an *ultra vires* contract or transaction, and on that ground merely bind the corporation, it follows that if the boats were purchased and engaged, in connection with Whitesides, in the business of transporting persons and freight on the Chattahoochee river, by the president, superintendent, or even the directors, the corporation is not bound thereby, and is not liable for the negligent or wrongful acts of the persons employed in such business, unless the transaction was previously author-

ized, or subsequently ratified by the corporation. . . . Considering the difference between the principles which govern the liability of the company for the tortious acts of its agents committed in the course of their authorized employment, and its liability for the tortious acts of persons employed in the conduct and prosecution of a business undertaken on behalf of the corporation by its agents, beyond the range of their employment, and prohibited by the laws of its creation, the previous authority or subsequent ratification, in order to bind the corporation, must be in corporate capacity."

¹ This attitude is illustrated by such remarks as the following:

"I have a great desire in all cases to make the actual wrongdoer alone responsible, and to limit the doctrine of *respondet superior*." Bramwell, B., in *Collett v. Foster* (1837) 2 Hurlst. & N. 356. It is interesting to observe that

of thought are now distinctly in the ascendant. One striking indication of that ascendancy is the wide-spread adoption of the doctrine that certain descriptions of contracts impose upon the contractor an absolute obligation to protect the contractees against the misconduct of his servants. This doctrine is now almost universally accepted in the United States with regard to the relationship of carrier and passenger (see chapter CIII., *post*), and it has invaded to a certain extent the domains covered by other descriptions of contracts (see chapter CIV., *post*).

The trend of opinion in the direction of amplifying the range of a master's liability has also manifested itself in the attempts which have been made to bring certain types of cases within the category of those which are governed by the concept of a noncontractual duty to insure safety. Not a few decisions have already been rendered upon the theory that, in some occupations, a master is bound to see that members of the general public are not injured by a perverted use of the appliances intrusted to his servants for the purposes of his work.² In other cases certain courts, proceeding upon the analogy of the rule which declares the occupier of premises to be absolutely liable for injuries caused to persons whom he invites to enter them by dangerous conditions which might have been discovered and remedied by the exercise of reasonable care,³ have taken the position that he should also be deemed to guarantee such persons against the tortious acts of his servants.⁴ But the weight of authority is still de-

one of the ways in which this very distinguished judge attested the strength of his "desire" in this regard was by consistently refusing to accept the doctrine that the fraud of a servant may be imputed to his master in an action of tort. See § 2382, *post*.

"It is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. I agree that the court ought to be very careful how it extends the doctrine *respondeat superior*. It has been carried in our law very far indeed. I think quite far enough. If I had to enact a law upon the subject, I doubt whether I should carry it so far." *Jessel, M. R. in Smith v. Keal* (1882) L. R. 9 Q. B. Div. 340.

² See especially § 2379, *post*.

³ See *Pollock, Torts*, Wald's Am. ed. pp. 624 *et seq*.

⁴ See *Columbus & R. R. Co. v. Christian* (1894) 97 Ga. 56, 25 S. E. 411 (assault by railway employee); *Southern R. Co. v. Chambers* (1908) 126 Ga. 404, 7 L.R.A.(N.S.) 926, 55 S. E. 37 (homicide by railway servant); *Dunn v. Western U. Teleg. Co.* (1907) 2 Ga. App. 845, 59 S. E. 189 (assault by telegraph operator); *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1 (assault by servant at theater); *Indianapolis Street R. Co. v. Dawson* (1903) 31 Ind. App. 605, 68 N. E. 909 (employees at public resort failed to protect visitors); *Brooks v. Jennings County Agri. Joint-Stock Asso.* (1905) 35 Ind. App. 221, 73 N. E. 951 (assault by gatekeeper at exposition grounds); *Curran v. Olson* (1903) 88 Minn. 307, 60 L.R.A. 733, 97 Am. St. Rep. 517, 92 N. W. 1124 (assault by servant of

cidedly opposed to both of these theories.⁵ They manifestly cannot be sustained upon any narrower basis than the assumed existence of a liability on the master's part to answer for all the acts done by a servant while he is "on duty." It might plausibly be argued that this extreme degree of responsibility is, in a strictly logical point of view, an unavoidable result of ascribing a full effect to any of the broader theories to which, in the final analysis, the principle of a vicarious liability must be referred.⁶ The future will show whether the law will advance in the direction indicated by these considerations, or whether the courts will continue to regard the scope of the servant's employment as being the sole admissible test of the master's liability in all cases except those which involve the effect of absolute obligations, contractual or noncontractual. That a forward movement of a more or less pronounced character is, to say the least, not unlikely to occur, will perhaps be conceded by everyone who adverts to the circumstance that one of the most distinctly marked tendencies of social ethics in the present era is towards a stricter insistence upon the policy of imposing new duties and burdens upon members of the capitalist class.

saloon-keeper); *Richberger v. American Exp. Co.* (1895) 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922 (assault by agent of express company); *Collins v. Butler* (1903) 83 App. Div. 12, 81 N. Y. Supp. 1074 (arrest by servant of storekeeper on customer; but decision was reversed in (1904) 179 N. Y. 156, 71 N. E. 746, 17 Am. Neg. Rep. 106); *Malach v. Ridley* (1888) 24 Abb. N. C. 172, 9 N. Y. Supp. 922 (wrongful arrest by servant of storekeeper); *Swinarton v. Le Boutiller* (1894) 7 Misc. 639, 31 Abb. N. C. 281, 28 N. Y. Supp. 53 (boy in store snapped a pin, so that it struck a customer's eye); *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 N. E. 327 (homicide by railway servant); *Brittingham v. Stadtem* (1909) 151 N. C. 299, 66 S. E. 128 (servant of pawnbroker negligently discharged pistol); *Rommel v. Schambacher* (1877) 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779 (assault by servant of saloon-keeper); *Krantz v. Rio Grande Western R. Co.* (1895) 12

Utah, 104, 30 L.R.A. 297, 41 Pac. 717 (station agent failed to protect person at station from assault by other employees; a case involving peculiar circumstances; see § 2350, note 7, *post*); *Beilke v. Carroll* (1909) 51 Wash. 395, 22 L.R.A.(N.S.) 527, 130 Am. St. Rep. 1103, 98 Pac. 1119 (assault by servant of saloon-keeper).

⁵ They are essentially inconsistent with a large proportion of the cases in which the master's liability was denied, in the following chapters. The second of the two theories has been expressly disapproved in *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306; *Fairbanks v. Boston Storage Warehouse Co.* (1905) 189 Mass. 419, 13 L.R.A.(N.S.) 423, 109 Am. St. Rep. 646, 75 N. E. 737; *Houston & T. C. R. Co. v. Phillio* (1902) 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994; *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276.

⁶ See §§ 2248, 2249, *post*.

CHAPTER XCIV.

RATIONAL FOUNDATIONS OF THE PRINCIPLE, RESPONDEAT SUPERIOR.

- 2245. Agency of servant.
- 2246. Power of master to select the servant.
- 2247. Power of master to control the servant.
- 2248. Public policy.
- 2249. Same subject further discussed.
- 2250. General remarks.

2245. Agency of servant.—One view regarding the vicarious liability of a master for the torts of his servant represents it as being deducible from the general principle embodied in the maxim, *Qui facit per alium facit per se*. This theory emerges in one of the earliest cases in which that liability was asserted.¹ It was afterwards adopted by Blackstone,² and it has been approved by many judges

¹In *Turberville v. Stampe* (1698) 1 Ld. Raym. 264, where the defendant was sued for damages caused by the spread of fire from his land, Holt, Ch. J. observed: "In this case, if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit."

²As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *Nam qui facit per alium, facit per se*. (4 Inst. 109.) . . . If the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master

(1 Rolle, Abr. 95); for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command. In the same manner, whatever a servant is permitted to do in the usual course of his business is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct; for the law implies that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience." 1 Bl. Com. 429, 430. Further on (p. 432) we find the following remark: "In all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter him-

of the highest eminence, both in England and in the United States.³ Its *rationale* is either the conception of a particular command implied

self from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong." This passage has been criticised by Judge Story as follows: "It seems to me that the reason here given is artificial and unsatisfactory, and assumes, as its basis, a fact which is the reverse of the truth in many cases; for the master is liable for the wrong and negligence of his servant, just as much when it has been done contrary to his orders and against his intent, as he is when he has co-operated in or known the wrong." Storey, *Agency*, 9th ed. 523, note.

³ "According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence; and he is also answerable for acts done by the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own." Little-dale, J., in *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 553.

"Upon the principle *Qui facit per alium, facit per se*, the master is responsible for the acts of his servant." Parke, B., in *Quarman v. Burnett* (1840) 6 Mees. & W. 509, quoted by Blackburn, J., in the opinion delivered by him for the judges consulted by the House of Lords in *Mersey Docks & Harbour Board v. Gibbs* (1866) 11 H. L. Cas. 716.

"The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskillfulness of his servant is that the act of his servant is in truth his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passerby, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant

does in order to give effect to his master's will may be treated by others as the act of the master. *Qui facit per alium, facit per se*." Alderson, B., in *Hutchinson v. York, N. & B. R. Co.* (1850) 5 Exch. 343. This statement was quoted in *Smith v. South & Western R. Co.* (1909) 151 N. C. 479, 66 S. E. 435.

"The general rule of law is clear, that where the relation of master and servant exists between one directing a thing to be done and those employed to do it, the master is considered in law to do it himself, and, as a consequence, that the master is responsible, not only for the consequences of the thing which he directed to be done, but also for the consequences of any negligence of his servants in the course of the employment, though the master was no party to such negligence, and even did his best to prevent it." Blackburn, J., in *Williams v. Jones* (1865) 3 Hurlst. & C. Exch. Ch. 602, 609.

"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done, was done not from any caprice of the servant, but in the course of the employment." Willes, J., in *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 7 C. P. 415, 420. This statement is a somewhat longer and more formal version of one made by the same judge in an earlier case: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 12 Eng. Rul.

in respect of the given act from the general command which is imported by the employment of the actor to perform certain functions;⁴ or the analogous conception of an implied consent to the doing of every act which is incidental to the performance of those functions;⁵ or the identification of the master and the servant.⁶ But in spite of the high authority which may be produced in favor of this method of accounting for the master's responsibility, the conclusion seems to be unavoidable that it is "a plain begging of the question;

Cas. 298, quoted by Lord Brampton in *George Whitechurch v. Cavanagh* [1902] A. C. 117.

"The master's responsibility for his servant's acts has its origin in the maxim, '*Qui facit per alium, facit per se*,' which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment." Lord Watson in *Johnson v. Lindsay* [1891] A. C. 371, 382.

See also the judgment of Lord Crenworth in *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 769, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107.

"Why is a master chargeable for the act of his servant? Because what a man does by another he does by himself. The act is within the scope of his agency." *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507.

"One must be held to do that which he procures or directs another to do for him, as well as that which he does in his own person. *Qui facit per alium, facit per se*." *McClung v. Dearborne* (1890) 134 Pa. 396, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698.

For other cases in which the master's liability was referred to the maxim, see *Aycrigg v. New York & E. R. Co.* (1864) 30 N. J. L. 460; *Board of Trade Bldg. Corp. v. Cralle* (1909) 109 Va. 246, 22 L.R.A.(N.S.) 297, 132 Am. St. Rep. 917, 63 S. E. 995.

⁴ See the extract from Blackstone's Commentaries in note 2, *supra*.

"There is a class of cases which have been thought to bear extremely hard upon masters, who are held liable for the misfeasance of their servants in driving their carriages against those of third persons; but those cases have been determined on the ground that it must be presumed that the servants have act-

ed under the orders of their masters." Buller, J., *arguendo* in *Fenn v. Harrison* (1790) 3 T. R. 757.

"The responsibility of the master for the acts of a servant rests upon the express or implied authorization of the act by the master, who, in the employment of another to act for him, assumes all the risks of a wrongful execution of his duties." *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543, 546, 547.

"The reason why the master is rendered liable for the negligent acts of his servant resulting in injury to others is because the servant, while he is engaged in the business of the master, is supposed to be acting under and in conformity to his directions." *Scammon v. Chicago* (1861) 25 Ill. 424, 438, 79 Am. Dec. 334.

"It will be found, we think, on examination, that in every system of laws this liability of masters and principals for the acts of their servants and agents rests on the ground of express or implied authority from the master or principal." *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189.

⁵ "The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is in his consent, express or implied, thereto." *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597, quoted in *Day v. Brooklyn City R. Co.* (1877) 12 Hun, 435; *Robards v. Bannon Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A.(N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429.

⁶ This notion seems to be traceable to the following note of a commentator upon Dig. 44, 2, 4 (Elzevir ed.): *Eadem est persona domini et procuratoris, Eadem, inquam, non rei veritate, sed fictione.*

it states the effect of the rule, not any reason for it. . . . It is merely an artificial statement of the thing to be explained.”⁷

2246. Power of master to select the servant.—Another doctrine is that “the right of selection lies at the foundation of the responsibility of the master or principal for the acts of his servant.”¹ In this point of view, the existence of the right is regarded as involving the existence of a correlative duty in respect of the employment of suitable servants, and also the further consequence that personal fault is imputable to the master if servants of that character are not employed.² This conception has apparently been derived from the civil law.³

⁷ Pollock, *Essays in Jurisprudence*, p. 117.

¹ *Kelly v. New York* (1854) 11 N. Y. 436.

“The principle governing the liability of a master may be stated in the following manner: He is liable for an injury done to a stranger by his servant acting within the scope of the latter’s authority, because the stranger has had no hand in the choice of the servant.” Bramwell, L. J., in *Swainson v. North-Eastern R. Co.* (1878) L. R. 3 Exch. Div. (C. A.) 341, 348.

“The master is liable for the negligent acts of the servant, on the ground that he has the power of selecting him.” *Kansas C. R. Co. v. Fitzsimmons* (1877) 18 Kan. 34, 40.

See also *Maximilian v. New York* (1875) 62 N. Y. 160, 20 Am. Rep. 468, cited in note 2 to the following section.

² “If an innkeeper’s servant robs his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery: *Nam qui non prohibet, cum prohibere possit, jubet.*” 1 Bl. Com. *429.

“The person who was really the master of the driver was bound to select a proper person to be employed as driver.” Tindal, Ch. J., in *McLaughlin v. Pryor* (1842) 4 Mann. & G. 48, 56.

That an employer is “bound to choose a man of sound judgment and discretion,” where the employee is intrusted with a discretionary authority, was laid down in *Ewbank v. Nutting* (1849) 7 C. B. 797.

Case lies against a master “in effect for employing a careless servant.” Parke

B., *Sharrod v. London & N. W. R. Co.* (1849) 4 Exch. 580, 585.

“Their duty is not only to look to the ability, but also to the disposition, of those employed to discharge the duties with which they are intrusted; and the public, who has no power to select or control those agents, have a right to look to the employers for the competency, skill, and vigilance of those employed.” *Johnson v. Bryan* (1841) 1 B. Mon. 292.

“As a general rule of law, the party who receives an injury must seek for his damages of the party by whom it was occasioned. The exception to this is in the case of master and servant, for the reason that the master in selecting his servant should see to it that he does not make choice of an unskilful, careless, or vicious person. If he neglects his duty in this respect, it is not unreasonable that he should be held responsible for any injury resulting from the want of skill or from the want of care of his servant.” *De Forrest v. Wright* (1852) 2 Mich. 368.

“If the servant, while in his master’s business, by negligence or unskilfulness, or in the neglect of ordinary care, but not wilfully, do an injury to another, the master is liable, because he ought not to employ a negligent or unskilful servant.” *Andrus v. Howard* (1863) 36 Vt. 248, 251, 84 Am. Dec. 680.

This responsibility [of a master] “results from the duty which he owes to others, as a member of the community, to employ careful and skilful servants, to the end that his fellow men may not suffer by the negligence or ignorance with which the master’s business is done. It is but a reasonable require-

ment, easily fulfilled, and the law in this respect requires merely the performance of that which a proper care for the rights of third persons would demand." *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70, 72.

If the master "employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim, *Respondeat superior*, applies, provided only that the agent was acting at the time for the principal and within the scope of the business intrusted to him." *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 27, 7 Am. Rep. 293.

It is a duty that these carriers of passengers owe to the public, to employ reliable and gentlemanly agents to conduct and manage their trains; and if they do not employ such, they should be made responsible for torts committed by those whom they have employed, and to whom they have given the power to violate their duty, imposed by law, safely to transport the passenger, and decently to treat him on his journey, so long as he properly demeans himself." *Gasway v. Atlantic & W. P. R. Co.* (1877) 58 Ga. 216.

"He who makes choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or the want of care of the person employed." *Pioneer Fireproof Constr. Co. v. Hansen* (1898) 176 Ill. 100, 52 N. E. 17.

The master is held liable for the negligence of the servant, "to hold him to the employment of skilful and prudent servants." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

"The intrusting of such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is, itself, an act of negligence" rendering the master liable for resulting injuries. *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 14 L. ed. 502.

"This liability only attaches to the corporation while the servant is acting in the discharge of the duty thus assigned to him. While the rule is thus strictly limited, it imposes no unreasonable liability, and seems proper and necessary for the protection of travelers upon their road. . . . This court has sanctioned very fully the right

of railroad corporations to adopt and enforce all reasonable regulations to secure the full enjoyment of their rights in the use of their depots, traveling cars, etc., without molestation from intruders. It seems equally reasonable to charge them with a corresponding duty of selecting proper servants, and holding them responsible for injuries occasioned by their servants in the actual performance of the duties required of them." *Hewett v. Swift* (1862) 3 Allen, 420, 424.

The liability of the master "is to be attributed to the fact that the master has placed the servant in a position where he may do unauthorized acts. On what principle of fairness could it be contended that either the error or folly of employing an incompetent or careless servant should bring damage to a stranger, while the master who put him in a position where he might commit the wrong should be free from all obligation to respond for the injury? The appointment of such improper person by the master induced the wrong, and if it was committed in the course of his employment, that is, while the relation of master and servant actually existed in the particular service in the discharge of which the servant was engaged, the master is held to answer. He cannot be excused because he did not know of it, or disapproved of it, or even had forbidden it, for, notwithstanding his conviction of the impropriety of the act, as shown by his forbidding it, he nevertheless was so careless and negligent in the selection of his agent as to subject the public to the chance of its infliction. . . . When the community deal with a corporation of the character of this defendant, with diversified departments and various branches of business incident to the general purpose of its organization, 'public policy and convenience' require that they should be responsible for the acts of commission or omission by their agents while in the course of their employment." *Redding v. South Carolina R. Co.* (1871) 3 S. C. 1, 7, 16 Am. Rep. 681.

³ The liability of shipowners, innkeepers, and stable-keepers was rested upon the ground that they are "in fault for employing dishonest servants." Inst. IV. 5, § 3.

With reference to a shipowner, it was said to be "quite reasonable that he should be answerable for their behavior,

The obvious defect of this theory is indicated by the consideration that, unless the duty which it predicates is assumed to be absolute, it conducts us to conclusions which are essentially irreconcilable with the very rule of which it is offered as an explanation. The right of recovery under that rule does not depend upon whether care was or was not exercised in respect of the engagement or retention of the servant in question. If the servant's tort is proved to have been committed within the scope of his employment, the master cannot purge himself by showing that such care was in point of fact exercised.⁴

The duty of selecting servants, in so far as it is regarded as deducible from the notion of a guaranty on the master's part that his affairs shall be properly conducted, is adverted to in § 2248, *post*.

2247. Power of master to control the servant.—There is a good deal of authority for the theory that “the rule of *respondeat superior*

as he himself employed them at his own risk.” Dig. IV. 9, § 7.

If a servant be guilty of any improprieties in the office or employment assigned by him by his master, the master is liable for such impropriety, as he should not have employed such a servant; and the fault may therefore be imputed to him. *Roccus*, p. 23, cited in *Dias v. The Revenge* (1814) 3 Wash. C. C. 262, 270, Fed. Cas. No. 3,877.

The master “doivents” imputer d’avoir pris à leur service des gens mechants, maladroits, imprudents, ou dont ils ne connaissaient pas la moralite.” 4 Boileaux, p. 765, quoted in *Nelson v. Crescent City R. Co.* (1897) 49 La. Ann. 491, 21 So. 635.

A baker's man, while driving his master's cart to deliver hot rolls of a morning, runs another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered, from the time of Ulpian to that of Austin, that it is because he was to blame for employing an improper person.” Holmes, Common Law, p. 6.

⁴“This rule must prevail wherever, on the maxim of *respondeat superior*, the master is answerable for the servant, whether in the way of commission or omission. In no such case can the master excuse himself by showing the care he had taken in the selection of this servant, or that servant's previous good character and conduct. If a's

coachman, being in one instance careless or drunk, in driving his master's carriage in his service runs over B, and B sustains an injury. A cannot excuse himself from answering for it because he had taken all imaginable care in selecting him for his servant, or because he had had the best of characters with him from his last employer, or because such misconduct in a long course of years had never happened before. And this is so, because he is to answer for the act as if it were his own; and, if it were his own act, excuses of this kind would be unavailing.” *Dansey v. Richardson* (1854) 3 El. & Bl. 144, 161.

“It is said that a master ought to be careful in choosing fit servants; but if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in part generally well conducted and competent; which is certainly not the law.” Pollock, Torts, Webb's Am. ed. p. 89.

“In torts it is sometimes said that the liability of the master is ‘in effect for employing a careless servant,’ repeating the reason offered by the pseudo-philosophy of the Roman jurists for an exceptional rule introduced by the prætor on grounds of public policy. This reason is shown to be unsound by the single fact that no amount of care in selection will exonerate the master. Mr. Justice Holmes in 4 Harvard L. Rev. p. 348, citing *Dansey v. Richardson*, *supra*.

. . . is founded on the power which the superior has a right to exercise, and which for the prevention of injuries . . . he is bound to exercise over the acts of his subordinates." ¹ This element of the relationship of master and servant is sometimes adverted to in

¹ *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304. Other statements embodying a similar notion are the following:

"Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house; and it is my fault, if I do not so exercise my authority as to prevent injury to another." Lord Tenterden, *Ch. J.*, in *Laugher v. Pointer* (1826) 5 Barn. & C. 547.

"The owners of a vessel or coach are held liable for damages to third persons, occasioned by the negligence or unskillfulness of those who are in the management of the ship or coach: (1) Either because they are engaged or employed by them, are subject to their order, control, and direction, and so are to be deemed, either generally or for the particular occasion, their servants; (2) or, in respect to their being engaged in the business or employment of the owners, conducting and carrying on such business for the profit or pleasure of the owners, by reason of which the acts done in the prosecution of such business shall be taken *civiliter* to be done by the employers themselves." *Sproul v. Hemmingway* (1833) 14 Pick. 1, 25 Am. Dec. 350.

"The only principle upon which one man can be made liable for the wrongful acts of another is that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant." *Blackwell v. Wiswall* (1855) 24 Barb. 355.

The liability of the master "rests on the ground that the master should not do an act himself, or cause it to be done, with such negligence or want of skill as to injure third persons." *Wilson v. Peverly* (1823) 2 N. H. 548.

"This responsibility of the master grows out of and is measured by his control over his servants; and in fact it begins and ends with it, although there

are cases where the rule has been satisfied with a slight degree of actual control over the servant. Without the existence of this essential element of control and direction over the servant, it is difficult to discover any principle which can, in law, make the acts of the servant the acts of the master." *Pawlet v. Rutland & W. R. Co.* (1856) 28 Va. 297, 300.

"The principle of that rule undoubtedly is that the right of control retained by the employer must be such as devolves upon him the duty to protect third persons from injury, and hence he cannot be heard to say that he did not direct or assent to the mode and manner in which it was done, if injury results." *Hughes v. Cincinnati & S. R. Co.* (1883) 39 Ohio St. 461.

"In regard to acts that would be authorized by implication only, because within the scope of the employment, the principal may control the agent as to the object, time, means, and manner of performance, or forbid it altogether. He has this right because the act is done or proposed to be done in his business, and because the act, as performed, is in law his own. He ought so to use it, as he may, by selecting a proper agent, giving proper direction and exercising a proper control, that others be not injured, and failing, is justly liable for the consequences." *Springfield Engine & Threshing Co. v. Green* (1887) 25 Ill. App. 106, 117.

"This liability rests upon the reason that in contemplation of law the master is present and does the act voluntarily, though by the hand of the servant. Being so present, with the right to control the servant in respect to it,—that is, to forbid it, or to require it, and to direct and control as to the manner of doing it,—the master should be responsible for it as done." *Illinois C. R. Co. v. Ross* (1888) 31 Ill. App. 170.

"The rule *respondeat superior* rests on the power which the responsible party has a right to exercise over the acts of his subordinates, and which, for the prevention of injuries to third persons, he is bound to exercise, and applies only

statements of the description discussed in the preceding section.² But as the power of control and the power of selection are logically distinct, and the former may and often does exist from the latter,³ it is advisable, for the sake of precision, to deal separately with these two aspects of the question.

The obvious flaw in this explanation is that it does not suggest any reason why the master's power of control should be assumed to be operative while he is absent. This assumption needs some specific justification, and that justification can, it is apprehended, only be supplied by invoking one or other of the considerations discussed in the following section.

2248. Public policy.— Certain other reasons which have been suggested for the vicarious liability of a master are all referable, in the final analysis, to the broad conception that the imposition of that liability is demanded by the interests of the community.¹ "This rule (*respondeat superior*) is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them

to cases in which such power exists." *Barrow S. S. Co. v. Kane* (1898) 31 C. C. A. 452, 59 U. S. App. 574, 88 Fed. 197.

"The reason for liability is founded upon the idea of control which a master has over the servant." *Doran v. Thomsen* (1908; Err. & App.) 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296.

"In order to avoid liability, it is not sufficient for the master to give proper directions to his servant; he must also see that those directions are obeyed." *Johnson v. Central Vermont R. Co.* (1884) 56 Vt. 707.

"Those who have control of the working are responsible for the act of their subordinates. . . . The directors were bound to see that their orders were obeyed." Lord Chelmsford in *Betts v. De Vitre* (1868) L. R. 3 Ch. 429, 442.

"The true principle of a master's liability to the public for the acts of his servants is that the master has control over their actions in their capacity as such, and that it is his duty so to exercise his control that no injury is occasioned by his business infringing upon the rights of third persons." Roberts & W. Employers Liability, 3d ed. p. 68.

² Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions. *Blackstock v. New York & E. R. Co.* (1859) 20 N. Y. 48, 75 Am. Dec. 372.

"This rule of *respondeat superior* is based upon the right which the employer has to select his servants, to discharge them if not competent or skilful or well behaved, and to direct and control them while in his employ." *Maxmilian v. New York* (1875) 62 N. Y. 160, 20 Am. Rep. 468.

³ As in cases where a principal employer reserves the right to discharge the servants of an independent contractor, or where a master is obliged to accept such servants as may be designated by a trade union.

¹ M. Sainchelette, a French jurist, expresses the opinion that "la responsabilité d'autrui n'est pas une fiction inventée par la loi positive. C'est une exigence de l'ordre social." De la Responsabilité et de la Garantie, p. 124.

as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." ²

The considerations which in this point of view have been adverted to as justifying the adoption of the rule are these: Its efficacy as a

² *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 55, 38 Am. Dec. 339.

"The rule itself, of *respondeat superior*, does not spring directly from principles of natural justice and equity, except as those principles grow out of and are connected with principles of expediency and public policy. The negligent act is a wrong on the part of the agent, and, instead of being in accordance with the instructions of his principal, it is deemed to be directly the contrary, and the agent, in cases where the principal suffers damage by his negligence, is liable to indemnify him. The dictates of natural justice, disconnected with principles of expediency, would indicate that every individual should be responsible for his own wrong, and that no person should be punished for the wrong of another. But when the rule is examined in the light of expediency, in connection with the business interests of the community, its necessity and wisdom, as applied to strangers, are manifest as one of the most salutary rules known to the law." *Coon v. Syracuse & U. R. Co.* (1849) 6 Barb. 231, 238, 239.

"If a servant is driving his master in a carriage, and a person get up behind, and the servant, knowing it, drives carelessly and injures that person, the servant may be liable, but why the master? The law, for reasons of supposed convenience, more than on principle, makes a master liable in certain cases for the acts of his servants,—not only in cases in the nature of contract, which depend on different considerations, but cases independent of contract, such as negligent driving on the public streets when damage is thereby done. This is a responsibility the law has put on them; there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit." Bramwell, B., *arguendo*, in *Degg v. Midland R. Co.* (1857) 1 H. & N. 773 (a case in which the actual point decided was the nonliability of a

master for injuries received by a volunteer; see § 1562, note 5, *ante*).

"This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission of the principal, and for injury resulting therefrom to others the principal is justly held liable." *Higgins v. Water-vliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 293.

"The principal must necessarily be answerable within reasonable limitations for the manner in which his instructions are carried into effect. This responsibility does not originate, in a case of this character, in any special relation the principal has assumed to the other party by virtue of an agreement between them, express or implied, but is founded on that primary obligation which every person in society owes to every other, to inflict as little injury upon an aggressor as is consistent with the preservation of one's own rights." *Rounds v. Delaware, L. & W. R. Co.* (1874) 3 Hun, 329, affirmed in (1876) 64 N. Y. 129, 21 Am. Rep. 597.

For other cases in which the rule was said to be based upon public policy, see *Heinrich v. Pullman Palace Car Co.* (1884) 10 Sawy. 80, 20 Fed. 100; *Helms v. Northern P. R. Co.* (1903) 120 Fed. 389; *Philadelphia & R. Coal & I. Co. v. Barrie* (1910) 102 C. C. A. 618, 179 Fed. 50; *Singer Mfg. Co. v. Taylor* (1907) 150 Ala. 574, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210; *Barnes v. State* (1849) 19 Conn. 398; *Harding v. St. Louis Nat. Stock Yards* (1909) 242 Ill. 444, 90 N. E. 205; *Chandler v. Gloyd* (1909) 217 Mo. 394, 116 S. W. 1073; *Crispin v. Babbitt* (1880) 81 N. Y. 516, 37 Am. Rep. 521; and the following notes.

In a South Carolina case decided while slavery existed in the United States, public policy was assigned as a ground for declaring a master not to be liable for any unauthorized or casual act committed by a slave without his

means of "insuring vigilance in selecting and superintending servants;"³ "the expediency of throwing the risk upon those who can best guard against it;"⁴ the circumstance that adequate compensation would very seldom be obtainable if suits against servants were the only remedies available to persons aggrieved by their tortious acts;⁵ and the general consideration that "in no other way could

knowledge or approbation. *Snee v. Trice* (1802) 2 Bay, 345, 350, 351.

³ Lord Neaves in *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282.

"In the case of a loss by the misconduct of a servant, the party injured has no means of ascertaining whether due caution was exercised by the master in employing him, or prudence in retaining him; and in the case of a controversy between the master and the servant as to which was the real delinquent, the owner of the property must generally be without the necessary evidence to charge the liability upon the master. The rule which the law has adopted, by which the master is held responsible for the acts of his servants, is the one best calculated to secure the observance of good faith on the part of persons intrusted with the property of others. The motive of self-interest is the only one adequate to secure the highest degree of caution and vigilance by the master." *Blackstock v. New York & E. R. Co.* (1859) 20 N. Y. 48, 75 Am. Dec. 372.

Bentham in his *Principles of Penal Law* (vol. 1, p. 383 of Works) observes: "The obligation imposed upon the master acts as a punishment, and diminishes the chance of similar misfortunes. He is interested in knowing the character and watching over the conduct of those for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him answerable for their imprudence."

⁴ *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. 55, 38 Am. Dec. 339.

⁵ "It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. This was treated by my brother Martin as a case of im-

proper driving, not a case where the servant did anything inconsistent with the discharge of his duty to his master, and out of the course of his employment." Willes, J., in *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. (Exch. Ch.) 526.

"Servants and employees are often without the means to respond in damages for the injuries they may inflict on others by the ignorant, negligent, or wanton manner in which they conduct the business of their employer. The loss must be borne in such cases by the innocent sufferer, or by him whose employment of an ignorant, careless, or wanton servant has been the occasion of the injury; and under such circumstances it is just that the latter should bear the loss. *McClung v. Dearborne* (1890) 134 Pa. 396, 406, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698.

On the other hand, Parke, B., is reported to have observed in one case: "I agree with what has been said by my Lord Chief Baron, that the same rule must be applied to railway companies as to individuals, and that we ought not to stretch the law against these bodies, merely because they perhaps may be considered better able than private individuals to pay for injuries done by their servants." *Roe v. Birkenhead, L. & C. Junction R. Co.* (1851) 7 Exch. 36, 42.

In another case, Martin, B., remarked: "It is a fallacy with many that because a person employed as Davies was [*i. e.*, as a journeyman carpenter], if responsible, has no means of satisfying the damage, therefore the obligation is cast on his employer." *Williams v. Jones* (1864) 3 Hurlst. & C. 256, 263.

This ground of public policy has been clearly explained in the following passage of Pollock's *Essays on Jurisprudence*: "There is another way of looking at the matter which may be suspected to count for a good deal in the popular view. A wrong without a remedy is, in theory at least, odious to the

there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents.”⁶

The master's responsibility is regarded as “growing out of an ex-

law; but in many cases the law cannot prevent the remedy from being only nominal. . . . To the popular mind a remedy not substantial is no remedy at all, and a result of this kind is not only unsatisfying (as it must be to every honest man), but unintelligible. Hence there is a natural endeavor to fix responsibility on someone who can pay. In the case of injury suffered through a servant's negligence, the servant, generally speaking, cannot pay, and the master can; and the feeling that compensation ought to be had somewhere jumps at the master's liability.”

Reference may also be made to an article in 7 *Harvard Law Review*, 107, in which Mr. Hackett expressed the opinion that “the rule may be attributed to the influence that our feelings of sympathy have over us for a fellow-being in distress. We cannot look upon the unfortunate victim of an accident without being sensible not only of pity for him, but of more or less indignation and resentment against the person whom we take to be the party in fault. . . . Following close upon this thought, if not the parent of it, is a vague feeling that the injury must be fully repaired. He who robs a man of his sound limb and good health ought to pay roundly for it. The damage has come through human agency. Some man, or men, must make it good. . . . Reducing this sentimental process to its standard of logical value, we perceive that, as a judicial reason, it is worthless. Viewing it as an impulse or a conviction to determine how men should treat each other, we find it irresistible.”

It may be suggested, however, that both these learned authors have somewhat underrated the importance of the sentiment in question. They seem to regard it as an element which is, properly speaking, nonjuridical. But it is evident from the quotations inserted at the commencement of this note that some judges have thought otherwise. In the following passage of Pollock & Maitland's *English Law*, vol. 2, chap. 8, p. 532, greater weight seems to be ascribed to this element than in the passage

quoted above from the essay of the former of these authors: “Should we now-a-days hold masters answerable for the uncommanded torts of their servants, if normally servants were able to pay for the damage that they do? We do not answer the question; for no law, except a fanciful law of nature, has ever been able to ignore the economic stratification of society, while the existence of large classes of men ‘from whom no right can be had’ has raised difficult problems for politics and for jurisprudence ever since the days of Æthelstan.”

Mr. Holmes refers in his *Common Law*, p. 6, to the suggested reason that there ought to be a remedy against someone who can pay the damages. But he does not express any definite opinion regarding the importance to be attached to it.

⁶ Story, *Agency*, 9th ed. § 452. This phraseology was adopted in *Chicago & N. W. R. Co. v. Moranda* (1879) 93 Ill. 314, 34 Am. Rep. 168; *Fifth Ave. Bank v. 42nd Street & G. Street Ferry R. Co.* (1893) 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421, 19 Pac. 783; *Stranahan Bros. Catering Co. v. Coit* (1896) 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634.

“Without such a doctrine as this, no mutual intercourse between man and man could subsist with any tolerable convenience.” 1 Bl. Com. *430.

“Unless, therefore, the principal was responsible, mankind would have no security or protection in the ordinary transaction of their affairs. The principal would be deriving a benefit from the acts of his agent, whilst the persons who may be dealing with that agent, if injured by his misconduct, would have no remedy but by an action against the agent himself, who might be wholly unable to make a compensation. The result would be that all mutual confidence between man and man, upon which the business of life depends, would be destroyed. Upon this ground I apprehend the doctrine of the master's responsibility was founded.” Dr. Lushington in.

press or implied undertaking that the thing to be done shall be well done." ⁷ In other words he "is considered, and reasonably considered, as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders." ⁸

The Druid (1842) 1 W. Rob. 392, 400, 401.

"The rule is founded upon the public policy and convenience; for, were it otherwise, there would be no safety to third persons in dealings with him, through the medium of agents, and no protection against injuries caused by the careless and reckless selection of incompetent or worthless agents. Pothier, Obligations, §§ 121, 453; 11 *Droit civil de Toullier*, book 2, title 8, § 284." *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321, 324.

⁷ *Barnes v. State* (1849) 19 Conn. 399, 407.

⁸ Lord Cranworth in *Barton's Hill Coal Co. v. Reid* (1858) 4 Jur. N. S. 767. The passage which follows this statement runs thus: "Third persons cannot, or at all events may not know whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury by any of the modes I have suggested has a right to say, 'I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged to build a house; if you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence.' A large portion of the ordinary acts of life are attended with some risks to third parties, and no one has a right to involve others in risks without their own consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders these risks are incurred responsible to third persons for any ill consequences resulting from want of any due skill or caution."

The passage in the text was quoted in *Chesapeake & O. R. Co. v. Dixon* (1900) 179 U. S. 131, 136, 45 L. ed. 121, 124, 21 Sup. Ct. Rep. 67. There the court also referred to Pollock on Torts, Am. ed. 90; where the learned author, after having expressed his agreement with the theory propounded by Chief Justice

Shaw in the *Farwell Case*, note 2, *supra*, summed up the matter thus: "I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."

"The master at his peril ought to take care what servant he employs." Holt, Ch. J. in *Wayland's Case* (1702) 3 Salk. 234.

"The fitness of the agent is always at the risk of the master." *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 602.

"It is necessary for the safety of the lieges that masters should be bound to employ servants of such character as will conduct their carts with safety to the public." Lord Robertson in *Baird v. Hamilton* (1826) 1 Sc. Sess. Cas. 1st series, 900. In the same case Lord Boyle observed: "I conceive that a master is bound to employ persons of competent skill and carefulness. He is under a covenant to the public to do this, and if he fail, he is liable in the consequences."

Where the servant, "without the assent of the master, has done some act or omitted some duty while executing the lawful commands of the master, to the injury of a third person, . . . public policy and the safety of others require the master to warrant the fidelity and good conduct of the servant, and, although faultless himself, make him liable for the unlawful conduct of the servant." *Carman v. Steubenville & I. R. Co.* (1854) 4 Ohio St. 399. Similar phraseology is used in *Stranahan Bros. Catering Co. v. Coit* (1896) 55 Ohio St. 398, 412, 4 L.R.A. (N.S.) 506, 45 N. E. 634.

As to torts committed in the course of the employment, "the principal holds out his agent as competent and fit to be trusted; and thereby in effect he warrants his fidelity and good conduct in all matters of his agency." Story, Agency, § 452, quoted in *Stickney v. Munroe* (1857) 44 Me. 195.

The conception which is thus reached resembles, as will be observed, that which is the basis of the theory that the master is vicariously liable for the acts of his servants because he has the right to select them. (See § 2246, *ante*). Strictly speaking, the two conceptions are distinguishable in this respect,—that the duty correlative to the right of selection is viewed as one which extends merely to the exercise of reasonable care, while the duty which is predicated on the ground of public policy is regarded as one of an absolute quality. But as the right of selection cannot serve as an adequate basis for the rule *Respondeat superior* except upon the hypothesis that a negligent selection shall always be conclusively presumed, whenever a servant misconducts himself within the scope of his employment, it is clear that the authorities which deduce the rule from the right rely upon a theory which in effect involves the notion of a warranty. Owing to the ultimate identity of the two conceptions in this point of view, it is only natural that the phraseology appropriate to the expression of each of them should sometimes be closely similar. With regard to some of the statements quoted in this section and the one just referred to, it is scarcely possible to determine with certainty which of the two conceptions they really reflect.

2249. Same subject further discussed.—In another point of view the rule, *Respondeat superior*, has been referred to an assumed “general principle, that whenever one of two innocent person must suffer by the acts of a third, he who has enabled said third person to occasion the loss must sustain it.”¹

“It has ever been the rule that the master is liable in damages resulting from the negligence or want of skill of the servant, in the performance of the master’s service. This is so, not because the master has himself committed a wrong, but upon the well-recognized principle that in employing a servant to perform a particular duty, he guarantees to the public at large, excepting fellow servants engaged in the common employment, that the servant so employed possesses ordinary skill and carefulness, rendering him fit for the work he is appointed to do; and that he, the servant, will characterize the performance of his duties by bringing to bear upon it the exercise of that degree of skill and carefulness. If the servant does not possess these qualifications, or, possessing, fails to exercise them, in a given case, with resultant injury to another, the master is responsible, as a
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consequence of the servant’s wrong, for failing to make good that which he has assumed for the servant, to the general public.” *Southern Bell Teleph. Co. v. Francis* (1895) 109 Ala. 224, 235, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1.

“The master should at his peril employ servants who are skilful or careful.” *Reeve*, Dom. Rel. 357, 358, quoted in *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507.

“The principal holds out his agent as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency.” *Story*, Agency, § 452, adopted in *Fifth Ave. Bank v. 42d Street & G. Street Ferry R. Co.* (1893) 137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Cantrell v. Colwell* (1859) 3 Head, 471.

¹ Ashurst, J., in *Lickbarrow v. Mason*

The doctrine has also been propounded, that "the master is responsible for what a servant does in the ordinary course of his employment; for it is done under a general authority committed to him, which is in justice equivalent to a specific direction."² The word "justice," as here used, would seem to "import" "natural justice."³

(1787) 2 T. R. 70, 4 Eng. Rul. Cas. 756. This statement is apparently a generalization of the remarks by Holt, Ch. J., in some of the earlier cases.

"Where a trust is put in one person, and another whose interest is intrusted to him is damaged by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damaged." *Lane v. Cotton* (1701) 12 Mod. 472, 490.

"Seeing somebody must be loser by this deceit, it is more reasonable that he that employs and puts a confidence in the deceiver should be a loser, than a stranger." *Hern v. Nichols* (1701) 1 Salk. 289, quoted in *Coleman v. Riches* (1855) 16 C. B. 104, 108; *Locke v. Stearns* (1840) 1 Met. 560, 35 Am. Dec. 382; *Farmers' & M. Bank v. Butchers' & D. Bank* (1857) 16 N. Y. 125, 69 Am. Dec. 678.

"It is more reasonable that a master should suffer for the cheats of his servant than strangers and trademen." *Wayland's Case* (1702) 3 Salk. 234.

The same conception has been not infrequently adverted to in more recent cases.

"The liability of masters for the acts or omission of their servants weighs heavily on them; but the hardship would be at least equal if the master were not liable; and it would be attended with injustice, too. If the master be morally innocent, so must the injured party be also; for he cannot recover, if by his own misconduct or negligence he has contributed to the loss; and, of two innocent persons, surely he should suffer through whom it is, by the employment of another, the mischief has been occasioned." Coleridge, J., in *Dunsey v. Richardson* (1854) 3 El. & Bl. 144, 161.

"If the master commits the property of another to his servant, who, while executing his master's commands, does a wilful injury to the property, it would seem but a dictate of common justice, that the master who intrusted him should bear the loss, and not the owner,

who trusted not the servant, but the master. The servant in such cases is usually irresponsible." *Sinclair v. Pearson* (1834) 7 N. H. 219.

"Where one of two innocent parties must suffer from the fraud or misconduct of a third, he who has reposed a trust and confidence in the fraudulent agent ought to bear the loss." *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380.

"The ground of the master's responsibility for the malicious torts of his servants or agents is this, that where one of two innocent persons must suffer for the wrong of a third, the loss must fall upon him who has enabled the third person to do the wrong." *Baltimore & O. R. Co. v. Strube* (1909) 111 Md. 119, 126, 73 Atl. 697.

"He rather ought to suffer in whose service or for whose benefit the act is done, than he who is injured, but is wholly innocent." *Andrus v. Howard* (1863) 36 Vt. 248, 84 Am. Dec. 680.

See also *Rimmer v. Webster* [1902] 2 Ch. 163, 71 L. J. Ch. N. S. 561, 50 Week. Rep. 517, 86 L. T. N. S. 491, 18 Times. L. R. 548; *Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank* (1899) 38 C. C. A. 108, 97 Fed. 181; *Western Maryland R. Co. v. Franklin Bank* (1882) 60 Md. 36; *New Orleans, J. & G. N. R. Co. v. Allbritton* (1859) 38 Miss. 242, 75 Am. Dec. 98; *Chandler v. Gloyd* (1909) 217 Mo. 394, 412, 116 S. W. 1073; *Dougherty v. Wells, F. & Co.* (1872) 7 Nev. 368; *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507; *Crispin v. Babbitt* (1880) 81 N. Y. 516, 528, 37 Am. Rep. 521; *Brooke v. New York, L. E. & W. R. Co.* (1885) 108 Pa. 529, 546, 56 Am. Rep. 235, 1 Atl. 206; *McClung v. Dearborne* (1890) 134 Pa. 396, 406, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698.

² Paley, *Moral Phil.*, bk. 3, chap. 11, 1793 ed. p. 167.

³ This is the meaning ascribed to it in Pollock on Torts, 8th Eng. ed. p. 77, Webb's Am. ed. p. 89, note (y).

The statement, therefore, suggests as a basis for the rule a notion distinct from, but analogous to, that of public policy.⁴

By some authorities the rule has been regarded as a deduction from the general principle, *Qui sentit commodum sentire debet et onus*. "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it."⁵ This seems to be, on the whole, the most satisfactory of the explanations that have been offered. The maxim thus invoked not only embodies a familiar and well-established

⁴ The conception that a general command is "equivalent to a specific direction" was probably derived by Paley from the passage from Blackstone's Commentaries, which is quoted in § 2245, note 2, *ante*.

A Scotch judge has declared that it would "be contrary to common feelings of justice, if a man who was injured by the carelessness of my servant in my business should have an action only against the servant." Lord Neaves in *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282. A different opinion was expressed in *Coon v. Syracuse & U. R. Co.* (1849) 6 Barb. 231.

"It is consistent with reason and natural justice, that a master should be responsible for the skill and honesty of the agent whom he employs in the management of his business. He selects him, and holds him out to the world as a fit person to be trusted, and in so doing to a certain extent he may be said to contract with the person with whom he deals for the existence of these qualities in his agent." *The Druid* (1842) 1 W. Rob. 392, per Dr. Lushington.

Liability is not imputed because the principal actually participated in the wrongful act of the agent, "but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct." *New York C. & H. R. R. Co. v. United States* (1908) 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304.

That the "justice" of the rule, however, is not universally conceded is shown by such a remark as the following: "To visit a man with heavy dam-

ages for the negligence of a servant, when he is able to show that he exercised all possible care and precaution in the selection of him, is apt to strike the common mind as unjust." *Hays v. Millar* (1874) 77 Pa. 238, 18 Am. Rep. 445.

⁵ Best, Ch. J., in *Hall v. Smith* (1824) 2 Bing. 156, quoted almost verbatim in *Barker v. Chicago, P. & St. L. R. Co.* (1910) 243 Ill. 482, 26 L.R.A.(N.S.) 1058, 134 Am. St. Rep. 382, 90 N. E. 1057.

The doctrine that "a principal is liable for the fraud or other wrongful act of his agent, if committed within the scope of his employment, . . . does not appear to rest upon the notion of the principal's holding out the agent as having authority. The grounds upon which it seems to rest, as explained in cases such as *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, appear to be that the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal; and that, the principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him." *Hamlyn v. Houston* (1903) 1 K. B. 81.

The doctrine is "based on a rule of public policy, which declares that sub-

doctrine of jurisprudence, but is also in harmony with that fundamental law of compensation which is universally operative in the natural world. If under that law the disadvantages of a given act or condition *must* be accepted together with its advantages, a court seems to be standing upon reasonably firm ground when it takes the position that the vicarious liability shall (subject to the limitation adverted to below) be treated as the burden attached to the benefit obtained from using the services of another person.

Another theory, expressive of a notion somewhat similar to that discussed in the preceding paragraph is embodied in the *dictum*: "The rule of liability and its reason I take to be this: I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this: That by employing him I set the whole thing in motion, and what he does being done for my benefit and under my direction, I am responsible for the consequences of doing it." ⁶

stantial justice is on the whole best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him for his own benefit." *Loomis v. Hollister* (1903) 75 Conn. 718, 722, 723, 55 Atl. 561.

In *New Orleans, J. & G. N. R. Co. v. Bailey* (1866) 40 Miss. 395, the court observed: "If it be 'positively certain' that somebody must suffer from the wrongful acts or neglect of these employees, as is here urged, and that without the positive fault of their principal, upon whom should the calamity fall,—upon him who trusted the wrongdoer for his own gain, or the stranger? If idle capital in search of splendid investment must do its work by agents who, 'it is positively certain,' will prove negligent or abuse their trust, upon what principle of legal right or ethical rule can it demand of the public to bear the wrongs and injuries it originates?"

⁶ Lord Brougham in *Duncan v. Findlater* (1839) 6 Clark. & F. 894, 910, quoted by Blackburn, J., in the opinion delivered on behalf of the judges, to the House of Lords in *Mersey Docks & Harbour Board v. Gibbs* (1866) L. R. 1 H. L. 93. The statement was also referred to in *Chesapeake & O. R. Co. v. Dixon* (1900) 179 U. S. 131, 137, 45 L. ed. 121, 124, 21 Sup. Ct. Rep. 67.

"It is a general rule that a person in the management of his business, wheth-

er he does it himself or acts through agents, must so conduct that business as not to interfere with the rights of or produce injury to others. This devolves on the party care and prudence in the management of his business, and renders him civilly responsible for any injury that may result to others from the want of such care and prudence, whether the injury may be done under his own immediate supervision, or under the control of agents. This doctrine is founded in reason. What can be more reasonable than that he who put any power in motion for his own benefit, which from its nature may be destructive to the property and life of others if not carefully managed, should be accountable for such injury as may be caused by the careless management of such power? An injury has been done; it has fallen on a party who is guilty of no wrong, no carelessness; it has been done by a force put in motion by a party who has caused the injury by his careless management. On whom shall the loss fall? On the innocent person who had no control or management of the thing that produced it? Or shall it not rather fall on the person who put the power in motion, for whose benefit it moves, who is in duty bound to provide for its proper management, who selects his agents, controls their movements, and who gives them their authority to act? Indeed, the rule is not only

In an interesting dissertation by a distinguished English jurist,⁷ it is argued that the rule may be justified on the ground that the employment of a servant produces a situation essentially similar to that which results in certain other classes of cases in which "a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbors. . . . It is an intelligible principle that whoever thus exposes others to risk should abide the consequences if the risk ripens into actual harm."⁸

a reasonable one that the employer should make good the injuries thus done by the carelessness of his agents, but it is necessary, as a preventive of mischief and the protection to community, that it should be strictly adhered to. The rule is founded on the principles of justice between man and man, and, abstractly considered, is of universal application. There must be some good reason for taking any case without its application." *Little Miami R. Co. v. Stevens* (1851) 20 Ohio, 415 (*arguendo*).

Compare also the remark of Alderson, B., in *Hutchinson v. York, N. & B. R. Co.* (1850) 5 Exch. 343, to the effect that "the servant is but an instrument set in motion by the master." But this statement was made in the course of an argument which conducted the learned judge to the conclusion that the master's liability was predicated in the ground of the maxim, *Qui facit per alium, facit per se*,—a standpoint somewhat different from that which is apparently suggested by Lord Brougham's *dictum*. In 7 Harvard L. Rev. 107, 110, the theory stated in the text was criticised by Mr. Hackett on the ground that "there is really no causal connection between the order given by the master" to perform certain work, and an injury inflicted upon a third person while the work is in progress. But it is apprehended that Lord Brougham's remark does not embody any theory of legal causation. It is apparently to be understood merely as an expression of his opinion regarding the justice of imposing responsibility for ultimate consequences upon a person who originates a certain train of occurrences.

The master "has set the wrong in motion, and must abide the consequences as against innocent parties." Wood, Master & S. § 309, quoted in *Voegeli v.*

Pickel Marble & Granite Co. (1892) 49 Mo. App. 643.

"The master assumes the risk of an improper discharge of duties by the servant. Indeed, he takes the risk of all consequences of a wrongful execution of his duties, on the part of any person whom he employs in whatever capacity. By such employment he sets in motion that which produces the injury." Wood, Master & S. § 282, quoted in *Steele v. May* (1902) 135 Ala. 483, 33 So. 30.

⁷ See p. 122 of Sir Frederick Pollock's *Essays in Jurisprudence*.

⁸ The following passage may also be quoted: "A man's undertaking or business is his property in a broad sense of the word. The vehicles, plant, machinery, or other effects with which he carries it on are his property in the strict sense. And by analogy to the cases we have already considered, the use of this property, so far as it entails any risk upon the public, must carry with it a proportionate duty. . . . Analogy leads us to the rule that the employer's obligation is that reasonable care as regards the public shall be used in the conduct of his business. Now a man's business must be conducted by his servants, if not by himself; indeed, it is their duty to prevent anyone else from interfering. If a servant allows intermeddling, as, if a coachman lets an incompetent acquaintance take the reins, this is a default on the servant's part, for the further consequence of which the master may be liable. So that the limitation of an employer's liability to the negligence of himself and his servants is hardly a real limitation of a liability which might be wider, but belongs to the nature of the case. But the negligence must also be in the course of the servant's employment. This means, broadly speaking, that a

2250. General remarks.—The various explanations of the rule, *Respondet superior*, which have been discussed in the preceding sections, are, it will be observed, divisible into two main categories:

(1) Explanations which, in the final analysis, are found to rest upon some purely fictitious assumption. These are manifestly useless for the purposes of an inquiry of which the object is to discover a scientific basis for the rule.

(2) Explanations which purport to deduce the rule from certain general principles. The unsatisfactory feature of all the explanations belonging to this category is that the domain covered by each of the principles invoked is wider than the field of actions which appertains to the relationship of master and servant. It is manifest that, if for the purpose of defining the extent of an employer's responsibility they should be treated as controlling elements under all the circumstances to which, having regard to their apparent range, they might conceivably be applied, the necessary result would be that he would have to answer for torts committed by a servant outside the scope of his authority, and also for those committed by an agent and an independent contractor.¹ It does not follow, however, that these principles are for this reason entirely unsuitable to serve as a rational foundation for the rule. The position may well be taken that, as they embody certain conceptions of what is assumed to be conducive to the public welfare, the requirements of that wel-

man is liable for harm done by the use of his property without due care but for his purposes and in a generally authorized manner, but not for harm done by the use of it in an unauthorized manner and for the wrongdoer's purposes alone. The reasonableness of this distinction will hardly be questioned as a matter of principle. . . . We seem, then, to have arrived at something like a rational foundation of an employer's liability to the public for the acts of his servants. He is answerable not for his servants as agents, or because they are his agents, but for the conduct of his undertaking with due caution. And it matters not whether the undertaking be for profit or not; for the fact of the thing being done by the master's orders shows that he finds it worth while to have it done. He is using his own means for his own purposes, whatever profit, pleasure, or convenience he may have in view. All this applies equally where the employer is a corpo-

ration (as in the familiar case of a railway company); and one of the strongest practical recommendations of the rule is that without it a corporation could not be liable at all. For a corporation, being not a real but an artificial person, can be negligent only by its officers and servants, and a rule of duty confined to personal diligence would leave it scot-free."

¹ In *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507, the court, referring to the theory that the vicarious liability of a master is based upon the principle which throws the loss upon that one of two innocent persons who put it in the power of the servant to do the injury, rather than another, remarked that this argument proves too much, as "it would make the master accountable for every mischievous act of the servant which he is enabled to commit in consequence of the general relation."

fare may not unreasonably be adopted as a criterion by which to determine also their permissible sphere of application in respect of persons and acts. From this standpoint the task to be accomplished is simply to effect, with reference to that criterion, an acceptable compromise between the recognized general rule of jurisprudence that only the immediate wrongdoer is liable for a tort, *Culpa tenet auctores suos*, and the notion that a person who avails himself of the assistance of others should be held accountable for any misconduct of which they may be guilty while discharging their appointed functions. It seems difficult to contend that such a compromise might not properly be made on lines corresponding to those which are indicated by the doctrine actually adopted by the courts, *viz.*, that an employer is answerable for the torts of employees whom he is entitled to control with regard to the details of their work, and for the torts of such employees only in so far as they are acting in the course of their duties.

In view of the apparent feasibility of procuring, in the manner indicated by the foregoing remarks, a solid scientific and logical foundation for the rule, the author finds himself unable to agree with the statement of Judge Holmes, that "common sense is opposed to the fundamental theory of agency."² The precise meaning which that distinguished jurist intends to convey by so vague an expression as

²⁵ Harvard L. Rev. p. 14. The learned essayist goes on to say: "I have no doubt that the possible explanations of its various rules which I suggested at the beginning of this chapter, together with the fact that the most flagrant of them now-a-days often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations, have done much to reconcile men's minds to that theory. What remains to be said . . . will justify my assumption. I begin with the constitution of the relation of master and servant, and with the distinction that an employer is not liable for the torts of an independent contractor, or, in other words, that an independent contractor is not a servant. And here I hardly know whether to say that common sense and tradition are in conflict, or that they are for once harmonious. On the one side it may be urged that, when you have admitted that an agency may exist outside the family relations, the question arises where you are to stop, and why, if a man who is working for

another in one case is called his servant, he should not be called so in all. And it might be said that the only limit is found not in theory, but in common sense, which steps in and declares that, if the employment is well recognized as very distinct, and all the circumstances are such as to show that it would be mere folly to pretend that the employer could exercise control in any practical sense, then the fiction is at an end. And evidence of the want of any more profound or logical reason might be sought in the different circumstances that have been laid hold of as tests, the objections that might be found to each, and in the fact that doubtful cases are now left to the jury." Towards the end of the article we find the following passage: "I think I now have made good the propositions which I undertook at the beginning of this essay to establish. I fully admit that the evidence here collected has been gathered from nooks and corners, and that although in the mass it appears to me imposing, it does not lie conspicuous upon the face of the law.

"common sense" is not quite clear. For juristic purposes, it must, so far as appears, import simply what accords with the opinion held, or at least not actively opposed, at a given time, by the larger part of the citizens of the state or country in question. This is presumably that notion which is reflected in the aphorism that "the common law is the perfection of common sense." If that aphorism is correct,—and unless it is so, roughly speaking, the common law must be in a bad way,—it constitutes the most effective refutation possible of the hypothesis from which the argument of Judge Holmes starts. There seems to be no escape from the conclusion that, when the courts have determined, with the tacit assent of the people for whose benefit they are maintained, that it is expedient to recognize the principle of vicarious liability, it becomes impossible to assert thereafter—whatever may previously have been the situation—that that principle is inconsistent with "common sense."

And this is equivalent to admitting, as I do, that the views here maintained are not favorites with the courts. How can they be? A judge would blush to say nakedly to a defendant: 'I can state no rational ground on which you should be held liable, but there is a fiction of law which I must respect and by which I am bound to say that you did the act complained of, although we both know perfectly well that it was done by somebody else whom the plaintiff could have sued if he had chosen, who was selected with the utmost care by you, who was in fact an eminently proper person for the employment in which he was engaged, and whom it was not only

your right to employ, but much to the public advantage that you should employ.' That would not be a satisfactory form in which to render a decision against a master, and it is not pleasant even to admit to one's self that such are the true grounds upon which one is deciding. Naturally, therefore, judges have striven to find more intelligible reasons, and have done so in the utmost faith; for whenever a rule of law is in fact a survival of ancient traditions, its ancient meaning is gradually forgotten, and it has to be reconciled to present notions of policy and justice, or to disappear."

CHAPTER XCV.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER UNDER THE CIVIL LAW.

2251. Rome.

- a. Liability of masters for the acts of their slaves.
- b. Liability of shipowners, innkeepers, and stablekeepers.
- c. Liability of occupants of buildings.
- d. Liability of contractors.

2252. Scotland.

2253. France.

- a. Prior to the promulgation of the Code Napoleon.
- b. Under the Code Napoleon.

2254. Louisiana.

2255. Quebec.

2256. Germany

2257. Spain.

2258. Mexico.

2251. Rome.—The jurisprudence of ancient Rome never attained, even in the period of its highest elaboration, a general theory of vicarious responsibility for wrongful acts.¹ A review of the subject,

¹The hesitating language which is used in this regard by Judge Story (Agency, § 458) is difficult to understand. There can be no question as to the very restricted scope of this department of the Roman law. As was observed by Judge Holmes in 4 Harvard L. Rev. 350, that law "developed no such universal doctrines of agency as have been worked out in England." The following passages in this essay deserve attention: "It was not generally possible to acquire rights or to incur obligations through the acts of free persons. But so far as rights of property, possession, on contract could be acquired through others not slaves, the law undoubtedly started from slavery and the *patria potestas*. It will be easy to see how this tended toward a fictitious identification of agent with principal, although within the limits to which it confined agency the Roman law had little need and made little use of the fiction. . . . Justinian's Institutes tell us that the right of a slave to receive a binding promise is derived *ex persona domini*. And with regard to free agents, the commentators said that in such instances two persons were feigned to be one. Such a formula, of course, is only derivative. The fiction is merely a convenient way of expressing rules which were arrived at on other grounds. The Roman prætor did not make innkeepers answerable for their

therefore, must necessarily take the form of a statement of certain specific rules relative to the particular instances in which such responsibility was recognized.² Speaking generally, the liability imposed in those instances was absolute in its quality so far as it extended. Its true analogue, therefore, in Anglo-American law, is to be sought rather in those limited classes of cases in which the right of recovery is considered with reference to the notion that the defendant owed some positive, non-delegable duty to the aggrieved party, than in those cases in which the determinative test is the character of the given torts, as being within or beyond the scope of the servant's employment.

a. Liability of masters for the acts of their slaves.—The oldest of the rules which we have to notice are those by which the liability of a master for the delicts of slaves was defined.

Inst. IV, 8, 2. *Ex maleficiis servorum, veluti si furtum fecerunt, aut bona rapuerint, aut damnum dederint, aut injuria commiserint, noxales actiones proditæ sunt, quibus domino damnato permittitur, aut litis æstimationem sufferre, aut hominem noxæ dedere. Summa autem ratione permissum est noxæ deditione defungi; namque erat iniquum nequitiam eorum ultra ipsorum corpora dominis damnosam esse.* (Gaius, Inst. IV. 75; Dig. IX. 4, 1.) [The wrongful acts of a slave, whether he commits a theft or robbery, or does any damage or injury, give rise to noxal actions, in which the master of the slave may either pay the estimated amount of damage done or deliver up his slave as a *noxæ*. It is with great reason that the master is permitted to deliver up the offending slave; for it would be very unjust when a slave does a wrongful act to subject the master to any further damage beyond that of losing the slave himself.]

Inst. IV, 8, 3. *Dominus noxali judicio servi sui nomine conventus, servum actori noxæ dedendo liberatur.* (Gaius, Inst. IV. 76.) [A master sued in a

servants because 'the act of the servant was the act of the master,' any more than because they had been negligent in choosing them. He did so on substantive grounds of policy—because of special confidence necessarily reposed in innkeepers. . . . But when such a formula is adopted, it soon acquires an independent standing of its own. Instead of remaining only a short way of saying that when from policy the law makes a master responsible for his servant, or because of his power, gives him the benefit of his slave's possession or contract, it treats him *to that extent* as the tort-feasor, possessor, or contractee, the formula becomes a reason in itself for making the master answerable and for giving him rights. If 'the act of

the servant is the act of the master,' or master and servant are 'considered as one person,' then the master must pay for the act if it is wrongful, and has the advantage of it if it is right. And the mere habit of using these phrases, where the master is bound or benefited by his servant's act, makes it likely that other cases will be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words have brought about."

² For most of the English versions of the extracts from Justinian's Digest and Institutes the author is indebted to the editions of Mr. Monro and Mr. Sandars.

noxal action on account of his slave frees himself if he gives up his slave to the plaintiff.]

Inst. IV. 8, 7. Sed veteres quidem hæc in filiisfamilias masculis et feminis admisere. Nova autem hominum conversatio hujusmodi asperitatem recte respuendam esse existimavit. (Gaius, IV. 79; Dig. IX. 4, 35). [The ancients applied the same rule to children of both sexes in the power of ascendants; but the feeling of later times has rightly rejected such rigor, and it has therefore passed into disuse.]

Dig. IX. 4, 2. Si servus sciente domino occidit in solidum dominum obligat; ipse autem videtur dominus occidisse. Si autem insciente, noxalis est; nec enim debuit ex maleficio servi in plus teneri, quam ut noxæ eum dedat. [If a slave has killed with the knowledge of his owner, this makes the owner liable for full damages, as the owner himself must be held to have killed; but if it was done without the owner's knowledge, the action is noxal, as it was not right that the owner should incur liability from the misfeasance of his slave, except so far as this, that he should have to surrender him for *noxæ*.]

Dig. IX. 4, 3. In omnibus noxalibus actionibus, ubicunque scientia exigitur domini, sic accipienda est, si cum prohibere posset non prohibuit. Aliud est enim auctorem esse servo delinquenti; aliud pati delinquere. [In all noxal actions, where knowledge on the part of the owner is required, the word "knowledge" must be taken to imply that the owner was able to prevent (the wrong being done) and failed to do so. There is, of course, a difference between instigating a slave to the commission of a delict and simply suffering him to commit one.]

Dig. XLVII. 6, 1, §§ 1, 2. The effect of these provisions is to accord to a master whose slave committed a theft without his knowledge the option of surrendering the thief or of tendering the same amount that would have been payable if a freeman has committed the theft.

For other statements concerning the delicts of slaves, see subsecs. *b* and *c*.

The question whether any connection exists between the liability of a master for such delicts under the Roman law, and the liability of a master for the acts of his servants under the common law doctrine, *Respondeat superior*, is adverted to in § 2236, *ante*.

b. Liability of shipowners, innkeepers, and stablekeepers.—By a prætorian edict, shipowners, innkeepers, and stablekeepers were declared to be liable in respect of property intrusted to their charge. This liability, being absolute in its nature, was similar, so far as its scope extended, to that which affects common carriers under the English law. But the latter liability is in some respect more stringent. In one of the provisions under this head (Dig. IV. 9, 7), the germ of the modern theory under which a master's liability in respect of his servant's acts is confined to those which are within the scope of the servant's employment may perhaps be traced.

Dig. IV. 9, 1, 1. (Opinion of Ulpian) Ait prætor:—"nautæ, caupones, sta-

bularii, quod cujusque saluum fore receperint, ne restituant, in eos iudicium dabo." Maxima utilitas est bujus edicti; quia necesse est plerumque eorum fidem sequi et res custodiæ eorum committere. Nec quisquam putet graviter hoc adversus eos constitutum; nam est in ipsorum arbitrio ne quem recipiant; et nisi hoc esset statutum, materia daretur cum furibus adversus eos, quos recipiunt, coeundi; cum ne nunc quidem abstineant hujusmodi fraudibus. [The prætor says: "Where seamen, innkeepers, or stablekeepers have received the property of anyone on the terms of safe custody, then, unless they restore it, I will allow an action against them." This edict is highly beneficial, as it is often necessary to rely on the engagements of the persons mentioned, and to commit things to their custody. And no one need think that the above edict bears hardly on them, as it is open to them, if they like, to refuse to receive anyone, and unless this rule were laid down, they would have it in their power to conspire with thieves against the persons they took in; in fact even as it is, they are not always innocent of machinations of this kind.]

Dig. IV. 9, 1, 2. Qui sunt igitur qui teneantur videndum est. Ait prætor, nautæ. Nautam accipere debemus eum qui navem exercet: quamvis nautæ appellantur omnes qui navis navigandæ causa in nave sint, sed de exercitore solummodo prætor sentit; nec enim debet (inquit Pomponius) per remigem, aut mesonautam obligari; sed per se, vel per navis magistrum: quamquam, si ips alicui e nautis committi jussit, sine dubio debeat obligari. [Let us consider, then, first of all, who the persons are that are held liable. The prætor uses the word "seamen" (nautæ). By seamen we must understand a person who has the management of the ship, though, as a matter of fact, anybody is called a seaman who is on board ship to aid in the navigation; however, the prætor is only thinking of the "exercitor" (owner or charterer). It is clear, Pomponius says, that the exercitor ought not to be bound by the act of some oarsman or man before the mast, but only by his own act or that of the master, though no doubt, if he himself told anyone to commit something to the care of one of the sailors, he must himself be liable.]

Dig. IV. 9, 1, 3. Et sunt quidam in navibus, qui custodiæ gratia navibus præponuntur, ut *νανφύλακες* id est, navium custodes et dietarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem; quia is, qui eos hujusmodi officio præponit, committi eis permittit quamquam ipse navicularius vel magister id faciat, quod *χειρέμβολον* id est, manus immissionem appellant. Sed etsi hoc non extet, tamen de recepto navicularius tenebitur. [There are particular officers on board vessels who exercise authority on the ship with a view to the proper custody of goods, such as the "nauphylax" (ship's guard), and the "dietarius" (steward); so if one of these receives anything, I should say there ought to be an action allowed against the "exercitor," because a man who gives the above officers the conduct of any such department as described authorizes things being committed to their charge, though it is the owner (navicularius) or the master who does what is called the "cheirembolon" (taking charge). Even if he does not do this, still the owner will be liable for what is received.]

Dig. IV. 9, 1, 5. Caupones autem et stabularios aequè eos accipiemus, qui cauponam vel stabulum exercent, institutoresve eorum. Caeterum, si qui mediastini opera fungitur, non continetur, utputa atriarii, et focarii, et his similes. [Under the description of innkeepers and stablekeepers are to be understood not

only those who carry on their respective businesses, but their agents as well. But those who discharge the duties of a common drudge are not included; for instance, doorkeepers, kitchenboys, and the like.]

Dig. IV. 9, 3, 2. *Eodem modo tenentur caupones et stabularii quo exercentes negotium suum recipiunt. Caeterum, si extra negotium receperint, non tenebuntur.* [In the same manner, innkeepers and stablekeepers are liable, so far as it is in the exercise of their calling that they take goods in; but if they do so in some way which is not connected with their business, they are not liable.]

Dig. IV. 9, 3, 3. *Si filiusfamilias aut servus receperit, et voluntas patris aut domini intervenit, in solidum erit conveniendus. Item si servus exercitoris subriperit, vel damnum dedit, noxalis actio cessabit: quia ob receptum suo nomine dominus convenitur.* [If a filiusfamilias or a slave takes in the goods, and the consent of the father or owner is given, the latter may be sued on the whole liability. Again, if a slave of the exercitor stole the property or did damage, there will be no noxal action, because, the goods having been taken in, the owner of the slave can thereupon be sued in a direct action.]

Dig. IV. 9, 5, 1. *Quæcunque de furto diximus, eadem et de damno debent intelligi. Non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur.* [What has been said about theft must be understood to apply equally to damage; as there can be no doubt that a man who receives property on terms of safe custody must be held to engage to protect it not only from theft but from damage.]

Dig. IV. 9, 7. *Debet exercitor omnium nautarum snorum, sive liberi, sive servi, factum præstare. Nec immerito factum eorum præstat, cum ipse eos suo periculo adhibuerit. Sed non alias præstat, quam si in ipsa nave damnum datum sit. Caeterum, si extra navem, licet a nautis, non præstabit.* [The exercitor is bound to answer for the behavior of all his seamen, whether they are slaves or free; and it is quite reasonable that he should be answerable for their behavior, as he himself employed them, at his own risk. But he is only answerable where the damage is committed on board the ship; if it happens off the ship, even by the act of the seamen, he is not responsible.]

Dig. IV. 9, §§ 7, 4. *Hac autem actione suo nomine exercitor tenetur, culpæ scilicet suæ, qui tales adhibuit; et ideo, et si decesserint, non relevabitur.* [In this action the exercitor is liable directly, that is, in respect of his own fault for employing such men; consequently even if the men themselves should die, this will not release him.]

Dig. XIV. 1, 2. In his discussion of the exercitorian action, Ulpian, after adverting to the liability of a shipowner under a contract entered into with the master of his ship, *i. e.*, the person intrusted with the care of the whole ship, proceeds thus: *Sed si cum quolibet nautarum sit contractum, non datur actio in exercitorem; quamquam ex delicto cujusvis eorum qui navis navigandæ causa in nave sint, detur actio in exercitorem; alia enim est contrahendi causa, alia delinquendi. Si quidem qui magistrum præponit, contrahi cum eo permittit; qui nautas adhibet, non contrahi cum eis permittit; sed culpa et dolo carere eos curare debet.* [But should the agreement be made with one of the seamen, no action is allowed to be brought against the exercitor, although an action is allowed against him founded on a delict on the part of any one of those who are on board the vessel to aid in navigation. The reason for this is that the ground of action in the case of the contract is a very different thing from the ground

in the case of the delict, seeing that a man who appoints a master to a ship allows contracts to be made with him, but a man who engages seamen does not authorize contracts being made with them, though he is bound to see that they engage with no negligence, or *dolus*.]

Dig. XLVII. 5, 1. In eos, qui naves, cauponas, stabula exercebunt, si quid a quoquo eorum, quosve ibi habebunt fortum factum esse dicitur, iudicium datur; sive furtum ope, consilio exercitoris factum sit; sive eorum cujus, qui in ea navi navigandi causa esset. Navigandi autem causa accipere debemus eos, qui adhibentur, ut navis naviget, hoc est, nautas. [Against persons who carry on business as shipowners, innkeepers, or stablekeepers, if it is alleged that a theft has been committed by them, or by one of their employees, an action is allowed, whether the theft was committed with the assistance and under the inducement of the shipowner, or of one of the persons who were on the ship for the purpose of navigating it. By these words, "for the purpose of navigating it," we should understand the persons who are employed in order that the ship may be sailed, that is to say, the seamen.]

Inst. IV. 5, § 3. Item exercitor navis, aut cauponæ, aut stabuli, de dolo aut furto, quod in navi, aut caupona, aut stabulo, factum erit quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicujus eorum, quorum opera navem aut cauponam aut stabulum exercet. Cum enim neque ex maleficio, neque ex contractu, sit adversus eum constituta hæc actio, et aliquatenus culpæ reus est, quod opera malorum hominum uteretur; ideo, quasi ex maleficio, teneri videtur. [The master of a ship, of an inn, or a stable is liable *quasi ex maleficio* for any damage or loss occurring in the ship, inn, or stable, provided there is no fault on his part, but merely fault on the part of the persons by whose assistance he carries on the business of shipowner, or innkeeper, or stablekeeper. For as the action given against him does not arise *ex maleficio* or *ex contractu*, and yet he is in fault in employing dishonest persons as his servants, he seems to be bound *quasi ex maleficio*.]

Dig. XLVII. 5, 6. Caupo præstat factum eorum, qui in ea caupona, ejus cauponæ exercendæ causa, ibi sunt. Item earum, qui habitandi causa ibi sunt. Viatorum autem factum non præstat. Nam que viatorem sibi eligere caupo, vel stabularius non videtur, nec repellere potest iter agentes. Inhabitatores vero perpetuos ipse quodammodo elegit, qui non rejecit, quorum factum oportet eum præstare. In navi quoque vectorum factum non præstat. [An innkeeper is answerable for the acts of persons who are in his inn, for the purpose of performing services, and also for the acts of persons who are there as lodgers, but not for the acts of travelers, for neither an innkeeper nor a stablekeeper seems to be able to exercise any choice in respect of a traveler, and they cannot refuse to receive persons who are making a journey. But one who does not reject permanent lodgers exercises a kind of selection with regard to them; and so it is proper that he should answer for their acts. Similarly in a ship there is no liability for the acts of the passengers.]

c. Liability of occupants of buildings.—Another prætorian edict defined the liability of the occupants of buildings for injuries caused by things thrown or poured down from them. This liability, like that which was imposed upon shipowners, etc., was absolute,---

predicated, as it would seem, upon the assumed existence of a positive duty, arising out of the occupancy, to protect passersby from injury. It was apparently more stringent than the similar duty imposed by the common law; for that is fulfilled if reasonable care and skill have been exercised. See Pollock, Torts, Am. ed. p. 638.

Dig. IX. 3, 1, 1. Prætor ait de his, qui dejecerint, vel effuderint: Unde in eum locum, quo vulgo iter fiet, vel in quo consistetur, dejectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum, qui ibi habitaverit, in duplum judicium dabo. . . . Si servus, insciente domino, fecisse dicetur, in judicio adjiciam, aut noxam dedere. [The prætor lays down the following as to persons who throw out or pour out anything: If anything should be thrown out or poured out from any place on a spot where people commonly pass or where they stand, I will allow an action for two-fold the damage caused or done thereby to be brought against the person who lives in that place. . . . If it is averred that a slave did the act in question without his owner's knowledge, I will add to the terms of the prayer the words, "or surrender the slave for noxa."]

Dig. IX. 3, 1, 4. Hæc in factum actio in eum datur qui inhabitat eum quid dejiceretur vel effunderetur, non in dominum ædium, culpa enim penes eum est. [The above action *in factum* is allowed to be brought against whoever occupies the house when the matter is thrown down or poured out, and not against the owner of the house, because the negligence is on the part of the former.]

Dig. IX. 3, 1, 7. Si filius familias cænaculum conductum habuit, et inde dejectum, vel effusum quid sit, de peculio in patrem non datur; quia non ex contractu venit; in ipsum itaque filium hæc actio competit. [If a *filius familias* has a hired upper room, and something is thrown or poured out therefrom, there is no action *de peculio* allowed against his father, because there is no claim made on the ground of contract; accordingly the right of action is against the son himself.]

Dig. IX. 3, 5, 3. Si horrearius aliquid dejecerit vel effuderit, aut conductor apothecæ, vel qui in hoc dentaxat conductum locum habebat, ut ibi opus faciat, vel doceat, in factum actioni locus est; etiam si quis operantium dejecerit vel effuderit, vel si quis discentium. [If the person by whom something is thrown is a warehouseman, or a man who has hired a store room, or has hired a place for the sole purpose of carrying on work or for seeing pupils, there will be ground for an action *in factum*; and the rule is the same, even though it should be one of the workmen or one of the pupils who threw down or poured out.]

Inst. IV. 5, 1. Item is ex cuius coenaculo, vel proprio ipsius vel in quo gratis habitabat, dejectum effusumve aliquid est, ita ut alicui noceretur, quasi ex maleficio obligatus intelligitur. Ideo autem non proprie ex maleficio obligatus intelligitur, quia plerumque ob alterius culpam tenetur, aut servi aut liberi. [So, too, he who occupies, whether as proprietor or gratuitously, an apartment from which anything is thrown or poured down, which has done damage to another, is said to be bound *quasi ex maleficio*, for he is not exactly bound *ex maleficio*, as it is generally by the fault of another, a slave, for instance, or a freedman, that he is bound.]

Dig. XIX. 2, 11. (opinion of Pomponius). Videamus, an et servorum culpam, et quoscunque induxerit, præstare conductor debeat? Et quatenus præstat?

Utrum, ut servos noxæ dedat, an vero suo nomine teneatur? Et adversus eos quos induxerit, utrum præstabit tantum actiones, an quasi ob propriam culpam tenebitur? Mihi ita placet, ut culpam etiam eorum, quos induxit, præstet suo nomine, etsi nihil convenit, si tamen culpam in inducendis admittit, quod tales habuerit, vel suos, vel hospites. [Let us consider the point: Is a lessee bound to answer for negligence on the part of his slaves, or of such other persons as he allows to be on the premises? And if so, how far does his responsibility extend? Is it enough in the case of slaves to surrender for *noxæ*, or will he be liable personally? And in the case of other persons, is it enough to assign to the lessor his own rights of action against them, or must he answer for their negligence just as if it were his own? My own opinion is this: He must answer personally for the negligence even of those whom he introduced, although there should have been no agreement to that effect; that is, provided it was his own negligence that he introduced them, in short, there was negligence in having such persons in the house, whether they were members of the family or guests.]

d. Liability of contractors.—The liability of a contractor for the negligence of his servants in respect of the performance of the stipulated work was recognized with regard to one particular class of cases. The employer in this instance was viewed as being under a positive duty to see that reasonable care was used by any persons that he hired to assist him.

Dig. XIX. 2, 25, 7. Qui columnam transportandam conduxit, si ea dum tollitur, aut portatur, aut reponitur, fracta sit, ita id periculum præstat, si qua ipsius, eorumque, quorum opera uteretur, culpa acciderit. Culpam autem abest, si omnia facta sunt quæ diligentissimus quisque observaturus fuisset. [If a man has engaged for the carriage of a column, and in the course of removing, carrying, or re-erecting it the column gets broken, he is only held answerable for the risk if the mischief occurs by some negligence of his own or of those whom he employed; and there is no negligence if all precautions were taken which any perfectly careful person would have observed.]

2252. Scotland.—The doctrines of the Scotch courts with regard to the liability of a master for the torts of his servant are apparently the same as those applied in England and the United States. For the effect of the various decisions the reader is referred to the subsequent chapters in which the different descriptions of torts are discussed.¹

2253. France.—*a. Prior to the promulgation of the Code Napoleon.*—From the subjoined extracts from Pothier on Obligations (Evans's Translation) it is apparent that the older French law had attained, during the period of its maturity, a theory of vicarious re-

¹ In *Brown v. McGregor* (Ct. of Sess.) malversation, or capable negligence of F. C. 1813, p. 232 it was laid down that servants in matters intrusted to their a master is liable for the "unskilfulness, care."

sponsibility which closely resembled that which now prevails in England and the United States.

P. 64 (*121) "Not only is the person who has committed the injury, or been guilty of the negligence, obliged to repair the damage which it has occasioned; those who have any person under their authority, such as fathers, mothers, tutors, preceptors, are subject to this obligation in respect of the acts of those who are under them, when committed in their presence, and generally when they could prevent such acts, and have not done so. But if they could not prevent it, then they are not liable: *Nullum crimen patitur is, qui non prohibet quum prohibere non potest*. Even when the act is committed in their sight, and with their knowledge: *Culpa curet, qui scit, sed prohibere non potest*. Masters are also answerable for the injury occasioned by the wrongs and negligence of their servants. They are even so, when they have no power to prevent them, provided such wrongs or injuries are committed in the exercise of the functions in which the servants are employed by their masters, although in the master's absence. This has been established to render masters careful in the choice of those whom they employ. With regard to their wrongs or neglect not committed in these functions, the masters are not responsible."

P. 270 (*453). "It is not only by contracting that managers oblige their employers; whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed, . . . and if there are several who have appointed him, they are all bound *in solido* without any exception of division or discussion: for instance, if an inferior collector of the revenue, in exercising his functions in the house of a trader, abuses such trader or damages his goods, the farmers of the revenue who have appointed him are answerable for such injury, and obliged to pay the damages to which their agent is condemned, saving their recourse against him; because the agent has committed the injury in the discharge of his functions. But if the agent had ill treated, or robbed any person in a matter not connected with his functions, they would not be answerable.

This obligation of the employer is accessory to the principal obligation of the agent who committed the injury.

It is coextensive with the principal obligation, in respect of the damages due to the person who has suffered the injury; but the employer is only bound civilly, although the person committing the injury may be subject to personal correction; the employers cannot oppose against the action which arises from such injury, either the exception of division or of discussion; they can only require, upon paying the damages, a cession of the actions of the creditor."

P. 271 (*456). Masters are likewise answerable for the faults of their servants, when they have not prevented them, having it in their power to do so. They are even responsible for those which they could not prevent, if the servants committed them in the functions to which they were appointed; for instance, if your coachman in driving your carriage has, through brutality or unskilfulness, caused any damage, you are civilly responsible for it, saving your recourse against him who is the principal debtor.

b. Under the Code Napoleon.—The provisions of the French Civil Code which define the liability of a master are as follows:

Art. 1384. A person is responsible not only for the injury which is caused by his own act, but also for that which is caused by the act of persons for whom he is bound to answer, or by things which he has had under his care. The father, and the mother after the decease of her husband, are responsible for the injury caused by their children, being minors and residing with them; masters and trustees, for the injury caused by their servants and managers in the functions in which they have employed them.

Art. 1797. A contractor is answerable for the acts of the persons whom he employs. (Compare Louisiana Civil Code, art. 2768, (2739).)

2254. Louisiana.—The following provisions of the Civil Code are relevant in the present connection:

Art. 176 (170). The master is answerable for the offenses and quasi offenses committed by his servants, according to the rules which are explained under the title, *Of quasi contracts, and of offenses and quasi offenses*.

Art. 2320 (2299). Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices while under their superintendence.

In the above cases, responsibility only attaches when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

Art. 2768 (2739). The undertaker is responsible for the acts of the persons employed by him. (Compare Code Napoleon, § 1797.)

Art. 177 (171). The master is answerable for the damage caused to individuals or to the community in general by whatever is thrown out of his house into the street or public road, and inasmuch as the master has the superintendence and police of his house, and is responsible for the faults committed therein (this provision is derived from the Roman law. See § 2251, c, *ante*).

In one case the court, referring to art. 2320, remarked that the Civil Code enunciates the rules of *respondeat superior* in terms which exactly correspond to the rule of the common as well as the civil law.¹ This statement is correct in so far as it refers to the circumstance that a plaintiff cannot, in any event, maintain an action under the Code, unless he can show that the alleged tort of the defendant's servant was committed in the course of his employment.² But in other points of view it is clearly erroneous. It has

¹ *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631. was laid down in *Vara v. R. M. Quigley Constr. Co.* (1905) 114 La. 262, 38 So. 162.

² That a master cannot be held liable

never been suggested, much less held, by a common-law court, that the right to enforce the vicarious liability of a master is conditional, as it is declared to be under the Louisiana Code, upon proof that he could have prevented the servant's wrongful act. It is, moreover, clear from the passages quoted in § 2253, *ante*, from Pothier on Obligations, that under the older French law no such prerequisite to recovery was recognized. In point of fact, the theory of a master's responsibility which is embodied in this article of the Code is derived from Justinian's Digest.³ The necessary consequence of that theory is that a person whose claim is based upon this general provision⁴ cannot recover unless he establishes a certain description of personal fault on the master's part.⁵ It is not surprising that a

In *Etting v. Commercial Bank* (1844) 7 Rob. (La.) 459, the ground upon which the plaintiff sought to charge a corporation with liability for a slander propagated by one of its employees was that the case was controlled by the general principle embodied in art. 2294 of the Code, *viz.*, that every act of a man that causes damage to another obliges him by whose fault it happens to repair it. The court rejected this contention, saying: "The true rule seems to be that when the agent acting in the capacity bestowed upon him by the corporation, and in discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage to an individual, the body corporate is responsible; but where the agent does any act of his own free will, without reference to his functions as a corporate agent, then the corporation is not responsible. For example, if a person should go into a banking house or an insurance office, and there get into a difficulty or dispute in relation to business of the corporation, with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank or officer was answerable in damages, unless there was some express recognition of the act. Articles 430, 431, 433, 434, of the Code prove this position to be correct. We suppose a bank could not maintain an action for damages against an individual, if he were to say that it was insolvent, or had issued more notes than it was authorized by its charter. If this be so, it would be unjust to make it responsible for an un-

authorized accusation made by one of its officers against another person."

³ See the proposition quoted from Dig. IX, 4, 3, in § 2251, *a*, *ante*.

Compare the remark of the supreme court, that "in neither the Roman law nor in our own has vicarious liability been recognized as actionable. On the contrary, the resulting damages have always been held as remote and consequential, and not recoverable." *Mire v. East Louisiana R. Co.* (1890) 42 La. Ann. 385, 7 So. 473.

⁴ Apparently the restrictive clause in this article does not limit the effect of the special provisions in art. 2768, (2739), and art. 177, (171). But, so far as the writer knows, the point has not been discussed.

⁵ But a petition is not deemed to be defective because it does not specifically allege that the defendant was in fault. In *McCubbin v. Hastings* (1875) 27 La. Ann. 713, the court said: "The allegations are that the death of the deceased was caused by the negligence of the defendant's clerk, and that he, the defendant, might have prevented the act complained of, but did not do so. If the act which caused the damage was done by the defendant's clerk, and the defendant be responsible therefor, and the defendant could have prevented it, but did not, then clearly it was by the fault of the defendant that the damage occurred, and the use of the word 'fault' was not a necessary allegation to fix the responsibility upon him. If he could have prevented the act, and did not, he was necessarily in fault."

clause which involves this consequence should have been unfavorably criticized on the ground that "in most cases the restriction does away entirely with everything like responsibility in the master or employer, for it will seldom happen that the latter can prevent the act which causes the damage."⁶ More than three quarters of a century ago the supreme court expressed the opinion that the insertion of the clause in the Code was due to inadvertence.⁷ The decisions rendered with reference to this article of the Code are extraordinarily conflicting, and furnish an instructive, but scarcely edifying, illustration of the confusion which is apt to be produced by the desire of a court to qualify the effects of an enactment which it conceives to be erroneous in principle and mischievous in its operation. Some of those decisions have proceeded upon the simple theory that the restrictive clause must be construed in its literal sense, and that it consequently limits the remedial rights of the injured person, irrespective of whether the master was an individual or a corporation.⁸ The purport of others is that this clause is applicable to individual employers, but not to corporations.⁹ With

⁶ *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189. The court observed: "This restriction to the liability of masters and principals was an unfortunate and unadvised departure from the Napoleon Code, from which most of the enactments of our laws on this subject have been taken almost verbatim. In that work, the restriction which exists in favor of father, teachers, etc., does not extend to masters or principals. The reason given for this distinction is that servants and agents, when in the discharge of their duties, are supposed to be acting under the authority of their masters and principals, and that the latter should be attentive to employ none but good servants and agents; while the restricted liability of fathers, teachers, etc., has only for its object to secure from them a proper degree of watchfulness over the conduct of the persons intrusted to their care."

⁷ *Marlatt v. Levee Steam Cotton Press Co.* (1836) 10 La. 583, 29 Am. Dec. 468.

⁸ For cases in which the claimants were unsuccessful in actions against individuals, see *Palfrey v. Kerr* (1830) 8 Mart. N. S. 503; *Strawbridge v. Turner* (1835) 8 La. 537; *Buell v. New York Steamer* (1841) 17 La. 541; *Boulard v. Calhoun* (1858) 13 La. Ann. 445.

In *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189, the inability of the plaintiff to prove that the defendant could have prevented the injury was held to be fatal to his claim. The position was distinctly taken that the liability of a corporation was determinable on the same footing as that of a natural person. The court distinguished *Rabassa v. Orleans Nav. Co.* (1833) 5 La. 461, 25 Am. Dec. 200, as having been decided on the ground that the company had authorized the trespass complained of. The court did not refer to *Marlatt v. Levee Steam Cotton Press Co.* note 7, *supra.* and note 9, *infra.*

In *Poree v. Cannon* (1859) 14 La. Ann. 506, the right of recovery in respect of the death of a man who had been killed by the explosion of the boiler of a steamer near which he was working was held to be determinable with reference to the act of Congress (5 Stat. at L. 306), which throws upon the owners and their employees the burden of disproving negligence, where injuries result from such a cause. The court, therefore, considered it needless to inquire whether the defendant, as captain or owner, could have prevented the given injury.

⁹ In *Marlatt v. Levee Steam Cotton*

respect to such bodies, it was in effect, "read out of the text, both as to servants and third persons, on the principle that a corpora-

Press Co. (1837) 10 La. 583, 29 Am. Dec. 468, an instruction was approved which laid it down that the article was not applicable, "because no company can act, except through its president or other agents; and in acts of this kind, the president, or other appointed administrator of the company, is the company itself to all intents and purposes."

In *Hart v. New Orleans & C. R. Co.* (1841) 1 Rob. (La.) 178, 36 Am. Dec. 689, it was held that the trial judge had properly refused to charge the jury "that responsibility only attaches when the master or employer might have prevented the act which caused the damage, and have not done it." The court said: "The counsel has asked that a part of the article 2299 of the Code be declared to be law, without taking into consideration the sense and meaning of the whole of it. If the law were such as is alleged, a master or employer could never be made responsible for the acts of his agents or servants, unless he were present and did not endeavor to prevent the act which caused the damage." (A subsequent appeal of this case is reported *sub nom. Thompson v. New Orleans & C. R. Co.* [1855] 10 La. Ann. 403.) This language is, it will be observed, sufficiently comprehensive to cover individual as well as corporate masters. But in a recent case it was treated as one of the authorities for the doctrine that, under the jurisprudence of Louisiana, it is not essential, in a suit against a corporation for damages caused by its agent, to aver that the corporation had the power to prevent the act of the agent, and failed to do so. *Nelson v. Crescent City R. Co.* (1897) 49 La. Ann. 491, 21 So. 635. The character of the liability established by the Code was thus explained by the court: "In the Napoleon Code the exemption relied on by defendant is denied to masters, and confined to parents, teachers, and artisans sought to be held for acts causing damage committed by children and apprentices in their charge. Napoleon Code, art. 1384. The commentators on that Code maintain that masters must be deemed able, by selecting careful servants, to avoid all damages arising from their acts, and hence the French jurists reach the conclusion that

inability to prevent the act cannot be urged by masters when sought to be made liable for damages caused by their servants. Boilleaux thus states this view: 'Ces derniers,' referring to masters, 'ne s' affranchiraient done point de l' obligation pèse sur eux, en offrant de pouvoir qu'ils n'ont pu empêcher le dommage; la loi les assujettit à la responsabilité la plus entière, ils doivent s'imputer d' avoir pris à leur service des gens mechant, maladroit, imprudents, ou dont ils ne connaissaient parr le moralité.' 4 Boilleaux, p. 765; 2 Mourlin, p. 890. The framers of our Code, however, have extended this exemption given by the Napoleon Code so as to give masters the same defense of inability to prevent the wrongful act of their servants, given by the Napoleon Code to parents, teachers, and artisans. Civil Code, articles cited. But when a corporation is the employer, and is sued for the wrongful act of its agent, is not the failure of the corporation to exert its power of prevention manifested by the act itself of the imprudent agent, whose act is that of the principal capable of acting only through its agents? The prevention the Code exacts, and the exercise of which it makes a shield for the employer against liability for his servant's acts, is obvious in its application to natural persons. But if the corporation, acting only through agents, is to be exempted from liability for its agents' acts, on the theory that some preventive power must be shown beyond the selection of the incompetent agent, it would follow that no corporation could be made liable. The theory, in other words, would seem to exclude liability of corporations from that responsibility for the neglect and imprudence of its servants imposed by the laws on all masters. . . . Whether guided by the reason of the French commentators, or on the theory that the act of the corporate agent is to be regarded as that of the corporation, our jurisprudence, it seems to us, dispenses with the express averment, in suits of this character, that the corporation could have prevented the act of its agent, and failed to exert that prevention."

tion is always present through its agents.”¹⁰ But even in cases decided during the period that witnessed the establishment and application of this doctrine, the distinction which it involved was not always recognized. In one of them, where the defendant was an individual, the restrictive clause was deliberately treated as a negligible factor.¹¹ In others it was not even referred to.¹²

Apparently the view which now prevails is that, having regard to the authorities on a whole, this qualifying clause may be deemed to have been, in respect of individuals, as well as of corporations, “construed out of the text, for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article.”¹³ At no time has it been available as a protection to the master, where the tort complained of constituted a breach of a contractual duty owed by him to the injured person.¹⁴

¹⁰ *Weaver v. W. L. Goulden Logging Co.* (1906) 116 La. 468, 40 So. 798 (action for injury caused by fellow servant).

¹¹ In *McCubbin v. Hastings* (1875) 27 La. Ann. 715 (mistake of drug clerk in filling prescription), the contention that the defendant could not be condemned unless the plaintiff proved that he was some way in fault, and that he really might have prevented the act which caused the damage, was thus disposed of by the court: “In one sense it was impossible for him to have prevented the calamity, because he was not in the city. But if a master is only to be held responsible for the act of his servant when he might have prevented the act, and did not, there would be no responsibility in the principal, except for such acts as were done in his presence.”

¹² So stated in *Weaver v. W. L. Goulden Logging Co.* (1906) 116 La. 468, 40 So. 798, the remark of the court being made with regard to the following cases of injuries caused by drivers of vehicles. *Wichtrecht v. Fasnacht* (1865) 17 La. Ann. 166; *Perez v. New Orleans City & Lake R. Co.* (1895) 47 La. Ann. 1391, 17 So. 869; *Loyacano v. Jurgens* (1898) 50 La. Ann. 441, 23 So. 717; *Maus v. Broderick* (1899) 51 La. Ann. 1153, 25 So. 927; *Odum v. Schmidt* (1900) 52 La. Ann. 2129, 28 So. 350.

For other cases in which the restrictive clause was not referred to as an element, see *Joyce v. Duplessis* (1860) 15 La. Ann. 242, 77 Am. Dec. 185 (illegal seizure of property by servant of individual employer); *Mouras v. The A. C. Brewer* (1865) 17 La. Ann. 82 (action *in rem* against a vessel on which a slave has been illegally transported out of state); *Choppin v. New Orleans & U. R. Co.* (1865) 17 La. Ann. 19; (collision between trains operated by railway companies); *Evans v. Louisiana Lumber Co.* (1903) 111 La. 534, 35 So. 736 (action by injured servant against a corporate employer).

¹³ *Weaver v. W. L. Goulden Logging Co.* (1906) 116 La. 468, 473, 40 So. 798.

¹⁴ In *Kelly v. Benedict* (1843) 5 Rob. (La.) 138, 39 Dec. 530, the defendants, the owners of a steamer on which certain horses of the plaintiff had been snipped were held liable on the ground that “the contract was made with the captain acting within the scope of his authority, and it was violated by a failure, through his negligence, to deliver the horses.” See also *Fisher v. Geddes* (1860) 15 La. Ann. 14 (common carrier liable for baggage lost through the negligence of a servant), and the cases cited in § 2422, *post*.

2255. Quebec.—The extent of the master's vicarious liability in this Province is defined by the following provisions of the Civil Code:

Art. 1054. Every person capable of discerning right from wrong is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care.

Schoolmasters and artisans are responsible for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and workmen are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

Art. 1731. The mandator is liable for damages caused by the fault of the mandatory, according to the rules declared in art. 1054.

The theory of liability which is embodied in these provisions appears to be virtually identical with that which is applied by common-law courts.¹ It will, therefore, be unnecessary to refer more particularly in this place to the cases in which the Code has been construed. Their effect is stated under the appropriate heads in one or other of the following chapters.

It will be observed that the portion of art. 1054 which relates specifically to the responsibility of masters is expressed in language very similar to the corresponding article (2320) of the Louisiana Code. See preceding section. But there is this material difference between the two provisions,—that the Quebec does not contain any restrictive clause like that by which, under the Louisiana Code, a master is declared to be liable only in cases where he could have prevented the act complained of.

2256. Germany.—The following statements are extracted from Schuster's Principles of German Civil Law:

A person who employs another in any kind of work must compensate any third party for damage unlawfully inflicted upon him by his employee in the course of

¹ In *Croteau v. Arthabaska Water & P. Co.* (1906) Rap. Jud. Quebec, 30 C. S. 128, the court quoted the following statement of principle from "Fuzier-Herman" Repertoire Vol. 31, verbo "Responsabilite Civile:" No. 668. "Pour que la responsabilite du maitre ou commettant soit engagee par les actes de ses domestiques ou preposes, il est necessaire que ces actes aient ete accomplis dans les fonctions qui leur etaient con-

fees, at qu'ainsi ils rentrent dans la categorie de ceux soumis a la surveillance et a la direction des maitres et commettants."

No. 669. "Mais cette necessite d'un acte de la fonction no doit pas etre comprise dans un sens trop etroit; il suffit que cet acte se rattache a l'execution d'un mandat que comporte la qualite de domestique ou de prepose qu'il ait eu lieu a l'occasion de ce mandat."

his employment, unless he can prove: (a) that he applied the degree of diligence usual under the circumstances in the selection of the employee, and, if it was his duty to supply appliances or tools, or to superintend the work, that he applied the same degree of diligence as regards such supply or superintendence; or (b) that the damage would have arisen notwithstanding the application of the proper degree of diligence on his part (p. 156).

In the case of corporate bodies or associations of persons, whose acts must of necessity be done by agents, the rule has been constantly recognized that all such bodies are liable for unlawful acts done by duly constituted agents in connection with the performance of their functions as such agents (p. 157).

All carriers are liable for the default of their employees in the same manner as for their own fault (p. 158).

The owners of a railway undertaking are liable for the consequences of any bodily injury (whether resulting in death or otherwise) caused in the working of the railway to any human being, unless they can prove that such injury was caused by the default of the sufferer, or was due to *vis major* (p. 159).

2257. Spain.—That the doctrine of vicarious liability, in the sense in which it is understood in Anglo-American jurisprudence, is not recognized in this country, was proved in one case to the satisfaction of the English court of appeal.¹

2258. Mexico.—In Wheeler's Compendium of Mexican Law, art. 1017, we find this statement: "In order that masters shall be responsible for their clerks and servants, it is precisely necessary that the acts and omissions of the latter, which give rise to the responsibility, be committed in the service for which they are employed."

¹ *The M. Moxham* (1876) L. R. 1 Prob. Div. 110. See § 2232, *ante*.

It is observed by Judge Story that the principles of the Roman law seem to be followed with more exactness in Spain

than in other countries where the system of jurisprudence is based upon that law. Agency, 9th ed. § 461, citing 2 Moreau & Carlt. Partidas, 5, tit. 8, 1. 26, p. 743; Story, Bailm. §§ 465-468.

CHAPTER XCVI.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER, DISCUSSED WITH REFERENCE TO STATUTORY PROVISIONS.

A. STATUTES NOT EMBODYING THE PRINCIPLE, RESPONDEAT SUPERIOR.

2259. General enactments.

2260. Enactments relative to liability in respect of damage caused by loss of life.

B. STATUTES EMBODYING THE PRINCIPLE, RESPONDEAT SUPERIOR.

2261. Enactments applicable to all classes of employers.

2262. —to railway companies.

2263. —to owners of horse-drawn vehicles.

2264. Enactments relative to liability for damage by loss of life.

A. STATUTES NOT EMBODYING THE PRINCIPLE, RESPONDEAT SUPERIOR.

2259. General enactments.—With regard to general provisions which impose duties upon certain classes of persons, all that need be observed is that they are answerable for a breach of those duties by their servants in the same manner and to the same extent as where common-law duties are in question.¹

¹ In *Reynolds v. Hanrahan* (1868) 100 Mass. 313, it was held that the Massachusetts enactment (Rev. Stat. chap. 51, § 3) which imposes a penalty upon any person who violates the rules prescribed for the regulation of traffic on highways, and also provides that he shall be liable for all damages sustained by reason of his offense, does not operate so as to preclude the injured party from maintaining a common-law action against the master of the tort-feasor. The court distinguished the earlier case, (*Goodhue v. Dix* [1854] 2 Gray, 181), where, in an action brought under the statute itself, it was held that the plaintiff could not recover, because the defendant was in

no way implicated in the servant's misconduct, and the statute "confined alike the civil remedy and the public prosecution to the particular individual who was personally guilty of violating the rule he was required by law to observe."

In *Cousins v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 572, it was held that a railroad company is not liable under the Missouri damage act (*Wagner Stat.* p. 520) for stock killed by one of its locomotives, whole it was being used by a servant employed in a roundhouse, without authority, for his own purposes. The court said: "Wilbur's whole duty was to keep the engines in order and properly housed. He had no authority

2260. Enactments relative to liability in respect of damage caused by loss of life.—Most of the damage acts are expressed in general terms, without any specific clause regarding cases in which the tortfeasor was a servant or an agent. So far as provisions of this type are concerned, it is clear that, if the death for which damages are claimed in a suit founded on them was caused by the negligence or other misconduct of a servant of the defendant, the right of recovery depends, as in common-law actions, upon whether the negligence complained of was within the scope of the servant's employment.¹

B. STATUTES EMBODYING THE PRINCIPLE, RESPONDEAT SUPERIOR.

As to statutes which render a master liable for the crimes of his servant, see §§ 2495 to 2497, *post*.

2261. Enactments applicable to all classes of employers.—

California.—Civil Code, § 2338. "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in, and as a part of, the transaction of such business, and for his wilful omission to fulfil the obligations of the principal."

This provision, though specifically applicable to "agents," comprehends "servants" also.¹

Georgia.—The general provisions of the Civil Code by which the extent of a master's vicarious liability is defined are the following:

(a) Code 1882, § 2961; Code 1895, § 3817; Code 1910, § 4413. Every person

whatever to take them out for any purpose. He had no more right to go upon the main track with one of them than he would have had if he had been an entire stranger to the defendant; and the defendant cannot be held responsible for the injury resulting from such unauthorized use of its property."

By Mo. Rev. Stat. 1909, § 8523, it is provided that "all persons owning, operating, or controlling" an automobile on a public highway shall exercise the highest degree of care that a very careful person would use to prevent injury to persons on the highway. In *Nicholas v. Kelley* (1911) 159 Mo. App. 20, 139 S. W. 248, it was held that a person is "operating" an automobile, where it is being operated by a servant within the scope of his employment.

¹ See, for example, *Sagers v. Nuckolls*

(1893) 3 Colo. App. 95, 32 Pac. 187; *Donaldson v. Mississippi & M. R. Co.* (1865) 18 Iowa, 280, 87 Am. Dec. 391; *Hansford v. Payne* (1875) 11 Bush, 380. Many other cases in which this doctrine was taken for granted are cited in chapters XCIX. *et seq.*, *post* (see especially §§ 2368 to 2371). It is obviously illustrated by every case in which the right of recovery as against corporation has been recognized. Many such cases are cited in 1 Beven on Negligence, pp. 208, *et seq.*; Cooley, Torts, pp. * 263 *et seq.*

As to the right of a servant to recover under the damage acts, see § 1641, note 1, *ante*.

¹ See *Bank of California v. Western U. Teleg. Co.* (1877) 52 Cal. 280, involving the default of a telegraph operator.

shall be liable for the torts committed by his wife, and for torts committed by his child or servant, by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary.

(b) Code 1882, § 1916; Code 1895, § 2658; Code 1910, § 3187. Partners are liable for the torts of agents or servants.

(c) Code 1882, § 1680; Code 1895, § 1861; Code 1910, § 1910. Every corporation acts through its officers, and is responsible for the acts of such officers in the sphere of their appropriate duties.

(d) Code 1882, § 2203; Code 1895, § 3031; Code 1910, § 3603. The principal is not liable for the wilful trespass of his agent, unless done by his command or with his assent.

These provisions, with the exception of (d), obviously embody rules of precisely the same effect as those which have been established independently of statutes, in the majority of jurisdictions. It has been observed by the supreme court that "all questions about negligent conduct, or wilful, voluntary conduct of agents of corporations, and the effect of such conduct upon the liability of the companies, have been set at rest" by the Code.² The rulings made with reference to these sections are discussed in the sections relating to the various specific torts which were involved. But it will be proper to advert here to the questions which have arisen out of the circumstance that by provision (d) the vicarious liability of a principal is negated as regards "wilful trespasses." It has been laid down that this provision and the others are to be construed together so as to harmonize them, and allow both to remain in force, in the cases to which they apply.³ This result, it might be supposed, could have been readily attained by holding that the word "agent," in provision (e) was not applicable to any employees answering that description who were also "servants." The supreme court, however, has undertaken to overcome the difficulty in another way; *viz.*, by treating the expression "servants" in provision (a) as being applicable only to domestic servants.⁴ This ruling has been followed

² *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216, 219 (assault).

³ *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842.

⁴ *Lockett v. Pittman* (1884) 72 Ga. 815. The court argued thus: "It is quite evident that the association of 'servant' with 'wife' and 'child,' in this section of the Code, could have referred to no other than a domestic servant. *Noscitur a sociis*, as a rule of construction, is directly applicable. There is no other section of the Code that makes the master responsible for the volun-

tary tort of any other species of servant, although that tort be committed in the prosecution and within the scope of his business. The wrongdoer, in this instance, was not shown to be the domestic servant of the defendant, but it appeared that he was his agent or overseer." It was accordingly held that no action would lie against the defendant under § 1445 of the Code, regarding the recovery of treble damages for killing stock. The present writer ventures to express the opinion that the construction placed upon the word "serv-

in later cases.⁵ But it was inconsistent with earlier decisions which were not referred to at all in the opinion,⁶ and also with a recent case.⁷

The provisions of the Code which relate to railroad companies are reviewed in § 2262, *post*.

Louisiana.—See § 2254, *ante*.

North Dakota.—Civil Code, § 5780. Provision similar to that in Cal. Civ. Code, § 2338.

Quebec.—See § 2255, *ante*.

South Dakota.—Civil Code 1908, § 1693. Provision similar to that in Cal. Civ. Code, § 2338.

2262. — to railway companies.—

Georgia.—(a) Code 1895, § 2321; Code 1910, § 2780. "A railroad company shall be liable . . . for damage done by any person in the employment and service of such company; unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

(b) Code 1882, § 3368; Code 1895, § 2320; Code 1910, § 2779. In all cases where the person or property of an individual may be injured, or such property destroyed by the carelessness, negligence, or improper conduct of any railroad company, or officer, agent, or employee of such company, in or by the running of the cars or engines of the same, such company shall be liable to pay the damages for the same to anyone whose property or person may be so injured or destroyed, notwithstanding any by-laws, rules, or regulations, or notice which may be made, passed, or given by such company, limiting its liability.

The liability to which railroad companies are, in respect to persons other than passengers, subjected by this provision, is wider than that imposed by the common law, for an action lies under it

ant" in this case was not correct. But the matter is one which concerns only the courts of Georgia itself.

⁵ *Byne v. Hatcher* (1885) 75 Ga. 289 (right of recovery was determined on the hypothesis that a clerk in a store was not a "servant," but an "agent"); *Patterson v. Sams* (1907) 2 Ga. App. 755, 59 S. E. 18 (defendant held liable for injuries caused by the spread of fire from a heap of brush which his servant had negligently left burning).

⁶ In *Lindsay v. Central R. & Bkg. Co.* (1872) 46 Ga. 447, where a negro pushed the plaintiff from a car, in an action brought under §§ 2910, 2911 of the Revision then in force, which corresponds with provision (a), the ground on which recovery was denied was that

there was no evidence to show that the tort-feasor was in the service of the railroad company.

In *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216, it was assumed that a railway baggage master was a "servant."

The tort-feasor in *Lee v. Nelms* (1876) 57 Ga. 253, was, it seems, a domestic servant in point of fact. But the right of recovery was affirmed without any reference to the character of the work done by him.

⁷ In *Southern R. Co. v. James* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303, the court argued on the assumption that a railway watchman was a "servant" within the meaning of provision (a).

even though the "improper conduct" complained of may have been induced by personal malice and resentment.¹

(c) Code (1910) § 2780; (1895) § 2321; (1882) § 3033. A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotive, or cars, or other machinery of the company, or for damage done by any person in the employment or service of the company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

This provision also extends the range of the employer's liability beyond the boundaries recognized by the common law; so far, at all events, as the majority of jurisdictions are concerned.²

¹ *Georgia R. Co. v. Newsome* (1878) 60 Ga. 492, where the whistle of a locomotive was blown by the engineer for the express purpose of harming the plaintiff. Some courts, however, have adopted the theory that an action may be maintained at common law under such circumstances as these. See § 2379, *post*.

² In *Christian v. Columbus & R. R. Co.* (1887) 79 Ga. 460, 7 S. E. 216, where a customer who had gone to a station for the transaction of business was killed by a clerk in a fit of homicidal mania, the contention that the defendant should be absolved from liability under the rule that mental disease which exempts a wrongdoer from criminal liability usually serves to excuse him from civil liability also was rejected on the ground that the defendant had employed the clerk with knowledge that he was subject to homicidal mania at intervals. A later appeal is reported in (1895) 97 Ga. 56, 25 S. E. 411. On this appeal the court thus stated its position: "While the section of the Code in question lays down the proposition broadly, that for damage done by any person in the employment and service of such company the latter shall be liable, such language must be understood to mean such torts only as are committed by an employee while engaged about the business of his employer; for it cannot be presumed that the legislature intended that the mere circumstance of a person being in the employment of a railroad company, should render it liable for all torts committed by such employee, whether in

any manner connected with the performance of his duties to his employer or otherwise. . . . Therefore, to make it answerable, the tort must have been committed by the employee, not necessarily by the authority of the master, either express or implied, but by him while he was engaged about the business of his master. . . . The husband of the plaintiff, as we have seen, was a patron of the defendant. He was at the place where he was killed, rightfully and upon the implied invitation of the company, to transact his business with its agent, and in the transaction of such business he was at least entitled to protection against the violence and insults of such agent. If, in the course of the transaction of such business, upon provocation growing out of the negotiations between the parties, he was wrongfully slain by the agent of the company, the latter would be liable. But even though the homicide might have occurred during the time the negotiations were pending between the agent of the company and the deceased, if the deceased was slain by the agent upon some private feud growing out of other matters wholly disconnected with the transaction of the business then in hand, and upon some provocation given by the deceased, the company would not be liable. If, however, the agent of the company took advantage of the opportunity afforded by the presence of the deceased at his place of business to bring about a difficulty with the deceased upon the occasion of some previous quarrel, the company would be liable because of the obligation imposed

Iowa.—For the text of the provision in the Iowa Code, which defines the liability of a railroad corporation, both to third persons and to its employees, for damages caused by the neglect, mismanagement, or wilful wrongs of its agents and employees, the reader is referred to § 1777, *ante*. It will be observed that the earliest enactment on the subject covered only “neglect” and “mismanagement,” and that the liability for “wilful wrongs” was first imposed by Laws 1872, chap. 65, § 1,—a provision which was carried, in an expanded form, into the Code of 1873 and the later Revisions. Consequently the cases decided prior to this amendment, in so far as they treat the corporation as being exempt from responsibility in respect of wrongs of that description, are no longer valid precedents.³

The liability of a railroad company under this provision is predicated only in cases where the act complained of was done within the authorized scope of the wrongdoer’s employment.⁴

Maine.—Rev. Stat. 1903, chap. 51, § 72. Every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of the act, or of any other neglect of any of their servants, or by any mismanagement of their engines, in an action on the case by the person sustaining such damages (Rev. Stat. 1883, chap. 51, § 35).

Rev. Stat. 1903, chap. 53, § 27. All street railroad corporations shall be liable for loss or damage caused by the negligence or misconduct of their agents or servants, or by any obstructions or defects in the street of any city or town, resulting from the negligence of its agents or servants.

Mississippi.—Anno. Code 1892, § 3557. Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks.⁵

South Carolina.—Code 1902, § 2135. Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or

upon it by law to at least afford to its patrons protection against the violence of its agents, when the patron is himself without fault, and is engaged about his business with the company.”

³ This remark applies to *DeCamp v. Mississippi & M. R. Co.* (1861) 12 Iowa 348; *Cooke v. Illinois C. R. Co.* (1870) 30 Iowa, 202.

⁴ In *Marion v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 569, 21 N. W. 86, the evidence tended to show affirmatively that the brakeman who ejected the plaintiff, a trespasser, from a moving train, was authorized to eject trespassers. The earlier appeal (1882) 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415, seems to have been taken from a

judgment rendered in an action at common-law.

In a subsequent case, which also involved the ejection of a trespasser, the authority of the brakeman was assumed to be incidental to his functions. *Johnson v. Chicago, St. P. M. & O. R. Co.* (1902) 116 Iowa, 639, 88 N. W. 811, second appeal (1904) 123 Iowa, 224, 98 N. W. 642. For further information regarding this and the earlier case, see § 2353, note 7, *post*.

⁵ For a case in which this provision was held not to be applicable to employees, see *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258, § 1641, note 1 (c), *ante*.

originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent.

It has been laid down that no recovery can be had under this provision unless the act from which the injury resulted was done within the scope of the tort-feasor's employment,⁶ and that a lumber company and its servants, while they are using a railroad company's track under an agreement authorizing such use for certain hours of the day, subject to the control of the railroad company's train orders, come within the purview of the descriptive words, "authorized agents or employees."⁷

Vermont.— Rev. Laws (1880), § 3442. When an engineer, fireman, or other agent of a railroad corporation, is guilty of negligence or carelessness, whereby an injury is done to a person or corporation, he shall be punished by imprisonment not more than one year, or by a fine of not more than \$1,000. But this section shall not exempt such corporation from an action for damages by a person or corporation sustaining such injury.

In a case where a person to whom a railroad company had leased a piece of its roadbed for a site for a coal and lumber shed, at an annual rental, agreed to indemnify the company from all liability for loss or damage to himself, his property or servants, occasioned by the negligence of the company's servants, it was held that this

⁶In *Southern R. Co. v. Power Fuel Co.* (1907) 12 L.R.A.(N.S.) 472, 82 C. C. A. 65, 152 Fed. 917, where a fire was started by the negligence of the subforeman of a bridge and trestle crew, while he was using a boarding car as a place to sleep during the night, and was not on duty, it was held that the trial judge had erred in refusing to direct a verdict for the defendant. The court argued thus: "We regard the language of the statute, 'its authorized agents,' as being, so far as we are now concerned, synonymous with 'employees.' There was evidence tending to show that Ayres was drunk, and also evidence tending to show that he in some way turned the lamp over. The one question for discussion is whether or not Ayres was, at the time the fire was started, an employee within the meaning of the statute. So far as we are advised, the supreme court of South Carolina has never ascribed to this statute any purpose other than to relieve one complaining of injury from five originating on a railroad company's right of way of the necessity of proving negligence. *Thompson v. Richmond & D. R. Co.* (1885) 24 S. C. 369. . . . We cannot in reason, ascribe to the legislature, in enacting this statute, an intent to make the railroad companies liable for the acts of their employees when not on duty, and when not engaged in the performance of some business of the master's. In the case at bar Ayres was not on duty. He was not performing any business of his employers. He was simply making use of facilities allowed him by the defendant for his own purposes. We hold that his act was not, within the intent of the statute, the act of an employee."

⁷*Bellamy v. Conway, C. & W. R. Co.* (1910) 85 S. C. 450, 67 S. E. 545.

promise of indemnity was not invalid as being contrary to public policy.⁸

2263. — to owners of horse-drawn vehicles.—England.—With reference to a statute which enacts that a magistrate may, in summary proceedings, inflict a penalty upon the driver of a hackney carriage or metropolitan stage carriage, and also provides that compensation may be awarded, either against the driver's employer or the driver himself, to the party aggrieved by the misconduct, it has been held that the acceptance of compensation by that party precludes him from afterwards maintaining an action for damages, even though he may not have understood the legal effect of the acceptance, and the compensation is not adequate to the damage done.¹

Connecticut.—Gen. Stat. act 16, pt. 1, chap. 7, § 21; Rev. Stat. 1888, § 2960; Gen. Stat. 1902, § 2036. It is provided: Every driver of any vehicle who shall, by neglecting to turn to the right on meeting another vehicle in a public highway, drive against it and injure its owner or any person in it, or the property of any person, shall pay to the person injured treble damages and costs; and if the injury be done designedly, forfeit to the state not more than \$100. And the owner of such vehicle shall, if the driver be unable to do so, pay the specified damages, to be recovered by a writ of scire facias.

In one case it was held that the word "owner" in the last clause denoted the person in control of the vehicle, either mediately or immediately, and not necessarily the actual owner. The *ratio decidendi* was that any other construction would make the owner of a vehicle liable for the acts of a person in possession of it, over whom he had no control, and to whom he did not stand in the relation of master; and that an act which should thus arbitrarily and without reason make one person liable for the acts of another would

⁸ *Osgood v. Central Vermont R. Co.* (1904) 77 Vt. 334, 335, 70 L.R.A. 930, 60 Atl. 127. There the action was brought "for negligently running an engine against a shed built on the premises, pursuant to the lease." The validity of the agreement was affirmed on the ground that the injury was one purely of private concern, "and that said agreement, being severable from the rest of the contract of indemnity, is enforceable."

¹ *Wright v. London General Omnibus Co.* (1877) L. R. 2 Q. B. Div. 271 (act of 6 & 7 Vict. chap. 86, § 28). Cockburn, Ch. J., said: "The argument most relied on for the plaintiff was that he was not a complaining party, and that

the compensation was awarded to him contrary to his wishes, and consequently, the award does not bind him. It is true that the plaintiff did not originally ask for the exercise of the jurisdiction given by the section, but in the course of an inquiry upon a complaint made by other parties, the magistrate expresses his intention of awarding compensation, and asks if £10 will be sufficient. The plaintiff answers that it will not; but, nevertheless, when the magistrate proceeds to award this amount to him, he takes it. It seems to me that by taking the £10 he consented to the exercise of the jurisdiction, and was bound by it."

be void, either as being contrary to natural justice, or as violating the article of the Constitution by which the taking away of any person's property without due process of law is forbidden.²

In a subsequent case, where the driver of the vehicle in question was the servant of the owner, and acting in his employment, it was held that the effect of this provision is to impose upon the master a statutory suretyship for the payment of all damages resulting from the negligence or malicious conduct of the person employed by him to drive the vehicle, and that, in the suit of *scire facias* against him, while he is concluded as to the amount of the damages, he may show, if he is able, that he was not master, or that the judgment was obtained by fraud or collusion.³

Illinois.—In a case where the right of the plaintiff to maintain an action at common law for injuries caused by the driving of defendant's coach against his horse was denied on the ground that the tort was wilful (see § 2377, note 1, *post*), it was also held that the declaration did not show a case within the purview of a provision (Rev. Stat. 1845, chap. 93, § 6) which was of the same tenor as the New York enactment referred to below.⁴

New York.—1 Rev. Stat. 699, § 6. The owners of every carriage running upon any turnpike road or public highway, for the conveyance of passengers, shall be liable jointly and severally for all injuries and damage done by any person in the employment of such owner or owners, as a driver, while driving such carriage, to any person or to the property of any person.

It has been held that the conductor of a street railroad car is not the driver of a "carriage" within the meaning of this provision.⁵

Vermont.—It has been held that an engineer is an "agent," within the meaning of that term, as it is used in the provision which requires railroad companies to fence their tracks, and declaring them

² *Camp v. Rogers* (1877) 44 Conn. 291. The court said: "There is a reason for the passing of the statute in this view of the meaning of the word. In the absence of such a statutory provision the master would not be liable for an injury done by his servant in driving, where it was done intentionally and maliciously. The statute wipes out the distinction and makes the master liable for even the intentional and malicious act of his servant in the particulars mentioned in it, in every case where the servant is irresponsible. There may be a good reason for this, as the master employs the servant, and so in some measure is responsible for his character; besides which, he has a remedy against him, and can indemnify himself from his wages. And the subjecting of the owner to a liability for the threefold damages recovered of the driver can be justified, or indeed accounted for, only by supposing the master to be intended."

³ *Levick v. Norton* (1884) 51 Conn. 461.

⁴ *Tuller v. Voght* (1851) 13 Ill. 277.

⁵ *Isaacs v. Third Ave. R. Co.* (1871)

47 N. Y. 122, 7 Am. Rep. 418; *Whitaker v. Eighth Ave. R. Co.* (1873) 51 N. Y. 295.

and their "agents" to be liable for injuries to animals, if occasioned by want of fences. Rev. Laws, §§ 3409, 3412; Pub. Stat. 1906, §§ 4453, 4456.⁶

2264. Enactments relative to liability for damage by loss of life.—

Alabama.—Code 1907, § 2485 (26) (2588) (2899). It is provided that damages may be recovered when the death of a minor child is caused by the wrongful act or omission or negligence of any person or corporation, or their servants or agents.

Arizona.—Rev. Stat. 1887, § 2145. Similar to the Texas statute, except that there is no specific provision as to suits against receivers.

Colorado.—General Laws, p. 342, § 1. Whenever any person shall die from an injury resulting from or occasioned by the negligence, unskilfulness, or criminal intent of any officer, agent, servant, or employee, while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or public conveyance whilst in charge of the same as driver, . . . the corporation, individual, or individuals, in whose employ any such officer, etc., shall be at the time such injury is committed shall forfeit and pay a certain sum.¹

Florida.—Laws 1883, chap. 3439, (No. 27). Damages may be recovered where death is caused by the wrongful act, negligence, carelessness, or default of any individual, or by the wrongful act, etc., of any agent of any corporation, when acting in his capacity of agent of such corporation.

Kentucky.—By Gen. Stat. chap. 57, § 1, it was provided that an action might be maintained if the life of any person not in the employment of a railroad company was lost by reason of the negligence of the proprietor of any railroad, or by the unfitness or negligence of their "servants or agents."

With reference to the provision, it was held that, when a company is both a railroad and a mining company, it cannot be compelled to answer as the proprietor of a railroad for an injury caused by negligence in its mining operations.²

⁶ *St. Johnsbury & L. C. R. Co. v. Hunt* (1887) 59 Vt. 294, 7 Atl. 277, rejecting the contention that the term comprehended only those who, by lease or other contract, stood in place of the company, and controlled and operated the road.

¹ For a case in which it was held that a defendant sued under the provision for damages caused by the death of a servant was entitled to rely on the defense of common employment, see *Atchison, T. & S. F. R. Co. v. Farrow* (1883) 6 Colo. 498, § 1641, note 1 (c), *ante*.

² *Claxton v. Lexington & B. S. R. Co.* (1878) 13 Bush, 636. The court said: "The legislature has seen proper to invest this company with a twofold character. For the purpose of construc-

ting and operating a line of railway, it is a railroad company; but for the purpose of mining, and of delivering the products of its mines on the line of the railway for shipment, it is a mining company; and the tramway and cars in use at the time the alleged negligent killing was done are the usual and necessary attachments to mining operations, and were in no sense incidents to the railroad owned by the appellee. The agents and servants in charge of the tramway were engaged in mining operations, and not in managing, controlling, or operating the company's railway. It follows, therefore, that while the appellant is able to bring his case within the letter of the section in question, it is evidently a case not contemplated by its provisions. There is no more reason

By Gen. Stat. chap. 57, § 3, it was provided that an action might be maintained if the life of any person was lost by the "wilful neglect" of another person, company, or corporation, their agents or servants.

Under this provision no action could be maintained in respect of a death resulting from an assault.³

By the existing enactment, Stat. 1909, § 6, it is provided that for a death resulting from "an injury inflicted by negligence or wrongful act, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same; and when the act is wilful or the negligence is gross, punitive damages may be recovered.

Maine.—Rev. Stat. 1883, chap. 51. Any railroad corporation by whose negligence or carelessness, or by that of its servants or agents, while employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits a specified amount, to be recovered by indictment to the use of certain parties mentioned.

Massachusetts.—Pub. Stat. 1882, chap. 112, § 212; Stat. 1886, chap. 140; Rev. Laws 1902, chap. 111, § 267. If by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in the business, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger, or in the employment of such corporation, is lost, the corporation shall be punished by fine, to be recovered by indictment to the use of certain parties named.

Before the enactment of this statute, a street railway corporation was not liable to be sued in an action for a loss of life caused by its negligence, or that of its servants, whether the person killed was a passenger or not.⁴

Pub. Stat. 1882, chap. 73, § 6. If the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stagecoach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor, etc., shall be liable in damages to a specified amount, to be recovered in an action of tort, to the use of certain parties named.

why the appellee should be compelled to answer, as the proprietor of a railroad, for an injury caused by the negligent management of a tramway attached to its mines, than that it should be required to answer for the death of a party, resulting from the negligence of its agents or servants while engaged in prospecting for coal, iron, or other minerals on some of its lands wholly disconnected from and not even bordering

on its line of railway." Compare the Texas cases cited in notes 18 and 22, *infra*.

³ *Winnegar v. Central Pass. R. Co.* (1887) 85 Ky. 547, 4 S. W. 237 (decedent was killed by driver of street car). Compare the Federal decision in note 16, *infra*, rendered with reference to a South Dakota statute.

⁴ *Holland v. Lynn & B. R. Co.* (1887) 144 Mass. 225, 11 N. E. 674.

Laws 1897, chap. 416. Action maintainable for death caused by unfitness or gross negligence of servants of corporation operating gas or electric light plant.

Laws 1898, chap. 565. Action maintainable for death caused by gross negligence of any servant or agent of any person or corporation, while engaged in his or its business.

Rev. Laws 1902, chap. 171, § 2. If a person or corporation, by his or its negligence, or by the gross negligence of his or its agents or servants, while engaged in his or its business, causes the death of a person who is in the exercise of due care, and not in his or its employment or service, he shall be liable in damages of a specified amount, to be recovered in an action of tort.

"Gross negligence," as distinguished from ordinary negligence, was created by these statutes, and exists by force of their provisions.⁵ In respect of third persons to whom the defendant owes the duty of exercising ordinary care, the expression imports "a materially greater degree of negligence than the lack of ordinary care."⁶ With regard to such persons it "may also be defined to be a failure to exercise a slight degree of care."⁷ It is established by proof of a "reckless and wilful disregard of consequences" on the part of the servants of the corporation.⁸ But it "does not necessarily include the wanton, reckless, or wilful misconduct which may be the foundation of a criminal prosecution for a wrong inflicted through gross negligence, or of a suit for damages by a trespasser, or by one who was not in the exercise of ordinary care in reference to the conditions which led up to the injury."⁹ That it is not easy to formulate a satisfactory definition is admitted.¹⁰

Missouri.—Wagner Stat. 519; Rev. Stat. 1879, § 2121; Rev. Stat. 1889, § 4425; Rev. Stat. 1899, § 2864; Rev. Stat. 1909, § 5425. It is provided that a

⁵ *Dolphin v. Worcester Consol. Street R. Co.* (1905) 189 Mass. 270, 75 N. E. 635.

⁶ *Brennan v. Standard Oil Co.* (1905) 187 Mass. 376, 73 N. E. 472; *Lanci v. Boston Elev. R. Co.* (1907) 197 Mass. 32, 83 N. E. 1; *Manning v. Conway* (1906) 192 Mass. 122, 78 N. E. 401; *Caswell v. Boston Elev. R. Co.* (1906) 190 Mass. 527, 77 N. E. 380; *Hamma v. Haverhill Gaslight Co.* (1909) 203 Mass. 572, 89 N. E. 1043.

⁷ *Dimauro v. Linwood Street R. Co.* (1908) 200 Mass. 147, 85 N. E. 894 (man run over by street car).

⁸ *Spooner v. Old Colony Street R. Co.* (1906) 190 Mass. 132, 76 N. E. 660 (action for death of passenger).

⁹ *Lanci v. Boston Elev. R. Co.* (1907) 197 Mass. 32, 83 N. E. 1.

¹⁰ *Evensen v. Lexington & B. Street R. Co.* 187 Mass. 78, 72 N. E. 355. "There is perhaps no term of which it is more difficult to give a practically useful definition, or even to form a practical conception, than this term 'gross negligence,' as used in the statute under which this action is brought, especially when the dividing line between that and what is called ordinary negligence is to be drawn. In some respects it is perhaps unfortunate that a right of action may be made to depend upon this dividing line. Of course, the greater includes the less, and where there is gross negligence there is always negligence. The line between due care and negligence may be stated clearly enough for the practical administration of the law, but when one leaves the shore of due

penalty of the amount specified may be recovered when any person shall die from an injury received through negligence, unskilfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or any master, pilot, engineer, agent, or employee while managing a steamboat, or of any driver of a stagecoach.

It has been held that this statute is penal, and that only punitive damages can be recovered under it;¹¹ that it is applicable to the negligence of servants of every description, and is not limited to that of superior servants;¹² that a hand car is a "car" within the meaning of the provision;¹³ and that the word "driver" does not embrace a motorman in charge of a street car.¹⁴

New Mexico.—Comp. Laws 1884 (as amended by Laws 1891, chap. 49). Substantially the same as the Missouri statute.

North Dakota.—Comp. Laws, § 5498. It is provided that damages may be recovered if the life of any person not in the employment of a railroad corporation shall be lost by the negligence of the proprietor of any railroad, or by the unfitness or negligence of its employees or agents.

§ 5499. Damages may be recovered if the life of any person is lost by the carelessness or unskilfulness of another person or corporation, or his or its agents, servants, or employees.

Rhode Island.—By Pub. Stat. chap. 204, § 15, it was provided that an action might be maintained in respect of death caused by the negligence of a carrier's agents or servants. But this provision has apparently been repealed.

By Rev. Stat. chap. 126, § 16, it is provided: If the life of any person crossing upon a highway with reasonable care shall be lost by reason of the negligence or carelessness of common carriers, by means of railroads or steamboats, or by the unfitness or negligence or carelessness of their servants or agents, in this state, said common carriers, proprietor or proprietors, shall be liable to damages for the same.

care, and plunges into the sea of negligence, how far out can he go before he crosses the dividing line between what is called ordinary negligence and gross negligence? The most that can be said, perhaps, is that gross negligence is further from due care than ordinary negligence; but that is not entirely satisfactory."

¹¹ *Ervin v. St. Louis, I. M. & S. R. Co.* (1911) 158 Mo. App. 1, 139 S. W. 498.

¹² *Rine v. Chicago & A. R. Co.* (1889) 100 Mo. 228, 12 S. W. 640 (for former appeal, see [1885] 88 Mo. 392; but this point was not discussed).

¹³ *Boyd v. Missouri P. R. Co.* (1911) 236 Mo. 54, 139 S. W. 561.

¹⁴ *Drolshagen v. Union Depot R. Co.* (1905) 186 Mo. 258, 85 S. W. 344. The court argued thus: "The statute was en-

acted in this state in 1855, long before electricity was used as we now use it, and long before there was in common service what we now call a motorman. But in those early days a stage driver was a personage as well known as an innkeeper, and his authority was known. When the public stage driver was on the road with his coach, there was no one present over him in authority; he was *pro hac vice* the corporation or stagecoach company itself. His title was driver, but driving the horses was not his only duty; he was, as driver, in charge of the coach. This clause of the statute was aimed at him; and, to prevent a company from avoiding liability by running a vehicle that was not called a stagecoach, the words 'or other public conveyance,' were added, the

It has been held that the term "highway," as here used, is not restricted to a highway upon land, but is also applicable to any navigable waters.¹⁵

South Dakota.—Code Civ. Proc. § 745. It is provided that an action may be maintained where the life of any person not in the employ of a railroad corporation is lost by reason of the negligence of the proprietor of the railroad, or by the unfitness or negligence of their employees or agents.

§ 746. It is provided that a widow shall have a right of action against a railroad company for the killing of her husband by reason of the neglect, carelessness, or unskilfulness of the corporation, its agents, servants, or employees.

In a case where a station agent deliberately shot a person who had come to inquire about some freight consigned to him, recovery was denied on the ground that, "by the very terms of this statute, the wanton act or conduct of the agent, which does not include neglect or carelessness in the prosecution of the agency, imposed no accountability on the master therefor."¹⁶

Texas.—(Rev. Stat. 1911; art. 4694, Rev. Stat. 1889, art. 2899; Rev. Stat. 1895, art. 3017.) 1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents;¹⁷ when the death of any person is caused by the negligence or carelessness of the receiver or receivers, or other person or person in charge or control of any railroad, their servants or agents; and the liability of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for damages on account of injuries, the same as if said railroad were being operated by the railroad company.

2. When the death of any person is caused by the wrongful act, negligence, unskilfulness, or default of another.

meaning of the clause being, 'or of any driver of any stagecoach or other public conveyance [*ejusdem generis*] whilst in charge of the same as driver.' The motorman does not come under that clause, because he is not in charge of the car, and he does not occupy towards the corporation and the public the position of the driver of a stagecoach or other vehicles of that kind."

¹⁵ *Chase v. American S. B. Co.* (1871) 10 R. I. 79 (action held to be maintainable for a death which resulted from the running down of a sailing boat by a steamer).

¹⁶ *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed.

306. Compare the Kentucky case cited note 3, *supra*.

¹⁷ Under the statute as it was worded prior to the amending act of March 25, 1887, no recovery could be had in respect of a death caused by the negligence of servants, unless it was "gross." See *Sabine & E. T. R. Co. v. Hanks* (1889) 73 Tex. 323, 11 S. W. 377; *Texas & P. R. Co. v. Hill* (1888) 71 Tex. 451, 9 S. W. 351.

In *Hendrick v. Walton* (1887) 69 Tex. 192, 6 S. W. 749, it was laid down that the provision in its original form was not intended to embody the rule that the act of the agent is the act of the principal, and thus to make private

With reference to the former of these provisions, it has been held that the responsibility which it imposes upon carriers for deaths caused by the negligence of their servants has relation only to matters connected with the business of conveying goods and passengers;¹⁸ that no action can be maintained under it in respect of a death resulting from the negligence of a servant in the employment of an express company transporting goods on a railroad,¹⁹ or from the negligence of a servant engaged in managing a private vehicle which is used solely in connection with the private business of his master;²⁰ that an elevator car habitually used to transport passengers in an office building is not covered by the phrase, "other vehicle for conveyance of goods or passengers,"²¹ and that, if an employee is

persons responsible for the death of others, when not caused by their own immediate act or omission; but that its object was to impose a larger liability upon carriers, by making them responsible for the gross negligence of their agents, and to leave the liability of others for the acts of their agents as it existed at common law.

¹⁸ *Missouri, K. & T. R. Co. v. Freeman* (1904) 97 Tex. 395, 79 S. W. 9, 1 Ann. Cas. 481. For the facts, see note 26, *infra*. The difference between the terms of the Texas act and the English act, and the American acts modeled upon thereafter, was thus averted to: "Those statutes fix the liability upon all persons without discrimination when the death is caused by wrongful act, neglect, or default, such as would have given a cause of action to the person injured if he had lived, and make all masters and employers responsible for such misconduct of their servants or agents; while ours make none accountable for the misconduct of servants and agents except certain ones classified according to the business in which they are engaged."

On the ground that the owner of a railroad is not liable unless the negligence in question occurred in or was directly connected with operating the road, it was held in *Wm. Cameron & Co. v. McSweeney* (1911) — Tex. Civ. App. —, 137 S. W. 139, that the negligence of a physician employed by a lumber company to treat the families of employees on its tram railroad did not constitute a cause of action against the company.

In *Williams v. Northern Texas Trac-*

tion Co. (1908) — Tex. Civ. App. —, 107 S. W. 125, it was held that a company which operated an electric line and also supplied customers with electricity was not liable for the death of a lineman who, while he was working on a line used for the transmission of power to a mill, received a fatal shock, owing to the negligence of the defendant's electrician in turning on the current without warning the decedent.

Compare the Kentucky case cited in note 2, *supra*.

¹⁹ *Lipscomb v. Houston & T. C. R. Co.* (1901) 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 925.

In *Houston & T. C. R. Co. v. Wells, F. & Co.* (1910) — Tex. Civ. App. —, 125 S. W. 971, where the injuries causing the death of decedent resulted from coming in contact with an express truck upon a railroad platform, which was within 18 inches of the train, and which dragged him from the train and caused him to be run over, it was held that judgment had been properly entered against the railway company, but that the express company had not been guilty, through its servants, of any actionable misconduct, and consequently could not be compelled to indemnify the railroad company.

²⁰ *Pulom v. Jacob Dold Packing Co.* (1910) 182 Fed. 356 (driver). The *ratio decidendi* was that, under the rule *eiusdem generis*, the words "other vehicles for the conveyance of goods or passengers" should be construed as meaning vehicles for the conveyance of goods or passengers for hire. See, however, note 23, *infra*.

²¹ *Farmers' & M. Nat. Bank v. Hanks*

carrying on two kinds of business, of which only one is within the purview of the statute, an action founded upon it cannot be maintained in respect of negligence which is incidental to the conduct of the other business.²² The doctrine which, after some conflict of opinion, has ever prevailed, is that the word "railroad" connotes private lines operated only for the purposes of the owner's business.²³ This construction is in harmony with the decisions as to the meaning of the word in the fellow servants act (Rev. Stat. art. 4560f) and

(1911) — Tex. —, 137 S. W. 1120, reversing (1910) — Tex. Civ. App. —, 128 S. W. 147. The *ratio decidendi* in the supreme court was that the words "other vehicle" meant a vehicle performing, substantially, at least, the same office, and serving the same necessities, as a railroad, steamboat, or stagecoach. The position taken by the court of appeals was that these words imported "that the 'vehicle' intended was one partaking of the nature of a public conveyance, as distinguished from such vehicles used simply for private purposes;" and that the purpose for which the elevator in question was used brought it within the purview of the statute. It is submitted that this view was the correct one, and that the doctrine of *ejusdem generis* was improperly applied by the supreme court.

²²In *Williams v. Northern Texas Traction Co.* (1908) — Tex. Civ. App. —, 107 S. W. 125, an action for death against a corporation furnishing electric power for domestic, etc., purposes, the complaint alleged that, while decedent, an employee of one of defendant's customers, was repairing an electric wire, defendant's engineer negligently and contrary to his agreement with decedent turned on the current, thus causing decedent's death; but there was no averment that defendant failed to exercise due care in selecting a competent engineer, or that it was negligent in the selection of its machinery, or in the construction of its poles and wires. Held, that no cause of action was stated. The court said: "For the purpose of constructing and operating a line of railway the defendant in error is an electric railroad corporation; but, for the purpose of manufacturing and selling electricity, and constructing lines of poles and wires to supply its customers therewith, it is an ordinary private corporation, and the poles and wire upon

which the deceased, Williams, was at work when killed, were in no sense incidents to its railroad or necessary to its operation. The engineer or electrician, in turning on the current of electricity, to be conducted over the wire upon which Williams was at work, for the purpose of operating the dairy company's windmill, was engaged in the corporation's business of supplying the public with electricity, and not in the operation of the company's railway." Compare the Kentucky case cited in note 2, *supra*.

²³The applicability of the statute to such lines was denied in *Ott v. Johnson* (1907) — Tex. Civ. App. —, 101 S. W. 535; *Halbert v. Texas Tie & Lumber Preserving Co.* (1908) — Tex. Civ. App. —, 107 S. W. 592.

But in *Kirby Lumber Co. v. Owens* (1909) 56 Tex. Civ. App. 370, 120 S. W. 936 (writ of error refused by the supreme court), it was held that a lumber company owning a standard-gauge spur track, which led from an ordinary railroad to its plant and timber, and was used for the transportation of its products and supplies, was liable under the statute for the death of one of its servants. The position was taken that the phrase, "for the conveyance of goods or passengers," was descriptive only of the phrase "other vehicles," and did not limit the words, "railroad, steamboat, or stagecoach," and that the word "railroad," in the part of the section relating to the liability of receivers, had the same import as in the first part of the section. The two cases above cited were disapproved.

This decision was followed with regard to the same kind of railroad in *Rice & Lyon v. Lewis* (1910) — Tex. Civ. App. —, 125 S. W. 961 (in which case also a writ of error was refused); and *Wm. Cameron & Co. v. McSween*

the venue act (Laws 1901, p. 31).²⁴ But, having regard to the objects and the tenor of those statutes, the rulings with regard to them afford at best an inconclusive analogy.^{24a} It seems quite possible, therefore, that the supreme court may ultimately take the view that this subdivision of the damage act is applicable only to railroads operated by common carriers, and not to those on which persons and goods are transferred merely as an incident of a private business.²⁵ The importance of the point is very great, owing to the fact that the general clause in subdiv. 2 of the act has been held to be applicable only to cases where personal negligence on the part of the defendant is established,²⁶—a doctrine which is apparently inevitable in view of the evident intention of the legislature to confine the

(1911) — Tex. Civ. App. —, 137 S. W. 139.

²⁴ *Cunningham v. Neal* (1908) 101 Tex. 338, 15 L.R.A. (N.S.) 479, 107 S. W. 539; *Kirby Lumber Co. v. Lloyd* (1910) 103 Tex. 153, 124 S. W. 903.

^{24a} As was pointed out in *Wm. Cameron & Co. v. McSween*, note 23, *supra*, there is no qualifying clause attached in those statutes to the word "railroad," and there was accordingly no reason for ascribing to it a restricted meaning. The cases decided with reference to them therefore "only go to the extent of holding that the word 'railroad,' used without any qualifying clause, includes a private road used solely for private business purposes, as well as a railroad operated as a common carrier, engaged in the transportation of freight and passengers for the public."

²⁵ The considerations emphasized in following remarks of the court in *Wm. Cameron & Co. v. McSween*, note 23, *supra*, deserve attention: "It seems unreasonable to hold that, under this statute, a lumber company that used wagons for hauling its logs to its mill and carrying its employees to their place of work, or a farmer who used wagons for carrying his farm hands to his field and hauling his crop to market, or the owner of a milk wagon used for distributing milk to his customers, could be held liable for injuries resulting in death which were caused by the negligence of one of his servants or agents. But, if the owner of a railroad or steamboat used for private purposes only can be held liable under this statute for injuries caused by the neg-

ligence of a servant or agent, and resulting in death, it necessarily follows that the owner of a wagon or other vehicle used for the private purposes before mentioned could be held to a like liability. Such construction, it seems to the writer, is contrary to the plain and unambiguous language of the statute, and therefore wholly unauthorized. . . . A reason why the legislature may have thought it proper to fix this liability upon the owner of a railroad used as a common carrier, and not upon one used solely in the private business of the owner, is not far to seek. In the one case the number of persons exposed to danger from the negligence of the servants or agents is much greater than in the other, and it might reasonably be considered that the proper protection of the public would require that common carriers should be held responsible for deaths caused by the negligence of their servants or agents, while no sufficient necessity existed to make the farmer, merchant, or millowner responsible for such deaths merely because he happened to own a railroad, steamboat, or other vehicle which he used in his private business for transporting his products or goods and carrying his employees to and from their work."

²⁶ *Hendrick v. Walton* (1887) 69 Tex. 192, 6 S. W. 749; *Lipscomb v. Houston & T. C. R. Co.* (1901) 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; *Pulom v. Jacob Dold Packing Co.* (1910) 182 Fed. 356.

In *Missouri, K. & T. R. Co. v. Freeman* (1904) 97 Tex. 395, 79 S. W. 9, 1 Ann. Cas. 481, an employee sent for treatment to a hospital maintained by

operation of the rule *respondeat superior* to certain specified descriptions of business. The situation seems to be one of those in which passage of an interpretative statute would be expedient.

Until this enactment was amended by the addition of the clause concerning receivers, etc., the right to maintain an action under it against a receiver was denied on the ground that such an official is

a railway company for the benefit of sick or injured employees became infected with smallpox, and communicated it to others after his return to work. Thereupon he and they were placed in a pest camp under charge of a surgeon of the company. The surgeon employed an incompetent attendant, who visited a neighboring town without disinfecting himself, and so communicated the disease to a third party, who died in consequence. The decision of the court, that no action could be maintained against the railway company in respect of the death caused by the attendant's negligence, was put upon the ground that no negligence on the part of the corporation itself was shown, and that the negligence of its servant had relation to a business not pertaining to its office as a carrier. The court said: "The negligence which, according to the findings, caused the death of Freeman, was that of local surgeon, the agent or servant of the company, in intrusting the pest camp to the care of an unreliable nurse, who, by reason of his incompetency, communicated the disease. To make such negligence that of the employer requires the aid of the rule *respondeat superior*, and this, as we have seen, is eliminated by the statute from this class of actions except to the extent it is made applicable to those falling within the first provision. Without that rule the negligence is to be viewed as merely that of the servant. But it is suggested that the duty of selecting competent nurses was that of the company, and the failure to perform it was its negligence, notwithstanding its attempt to assign it to its agent or servant, and that, hence, the death was due to its 'negligence, unskillfulness or default.' There is a confusion here, resulting from an attempt to bring into consideration a principle of the law of master and servant which does not apply, the person whose death was caused not having been a servant. By the law regulating the relation of mas-

ter and servant, unless modified by statute, the master is not responsible to the servant for an injury inflicted by a fellow servant; but the master is responsible for his own negligence, resulting in injury to the servant. It is a duty of the master to the servant to use care to secure competent and reliable fellow servants, and an omission to perform that duty is, as to the servant to whom it is due, the master's omission or neglect, notwithstanding any attempt he may have made to have it performed by another; and an injury resulting to a servant from such omission is attributable to the master's negligence. It may be that the death of a servant thus caused would be one 'caused by the wrongful act, negligence, unskillfulness, or default' of the master. If so, it would be because the death resulted from a nonperformance by the master of the duty in favor of the servant growing out of their relation. This, however, is a question not now before us. These distinctions have no place in determining the liability of a master for injuries done by the negligence of his servant to a third person, not a servant. For such injuries, other than death, the master is by the common law made responsible, upon the principle, *respondeat superior*, regardless of any question as to his care in selecting the servant, or as to the competency or fitness of the servant (3 Thomp. Neg. § 3167); but the legislature, in giving the action for death, has excluded that principle except so far as it is introduced in the first provision of article 3017. To hold that a death from such neglect of a servant as that in question, in the management of his master's business, was caused by the negligence of the master, in the sense of the statute, would at once make the master responsible for all deaths caused by negligence of servants or agents." The reversed judgment of the court of civil appeals proceeded upon the ground that the fact of the hospital department

not "a proprietor, owner, charterer, or hirer" of a railroad which is operating.²⁷ Since this alteration was made, it has been held that the statute affords a remedy against the receiver of a street railway;²⁸ but that no action lies against the receivers of a private corporation not engaged in the operation of a railroad.²⁹

being operated in connection with the claim and legal department, for the benefit and profit of the railway company, and as an essential department of its service as a common carrier, brought the case within the terms of the statute.

²⁷ *Turner v. Cross* (1892) 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; *Texas & P. R. Co. v. Collins* (1892) 84 Tex. 121, 19 S. W. 365 (action for death of servant); *Yoakum v. Selph* (1892) 83 Tex. 607, 19 S. W. 145.

In *Texas & P. R. Co. v. Cox* (1891) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905 (claim in respect of death caused by negligence of fellow servant), it was held that a Federal judge sitting

in Texas was not bound to apply the doctrine embodied in these cases, if the fatal injury was sustained in another state, where a damage act of a different tenor was in force. The court said that, without questioning the correctness of the doctrine enunciated in the Texas cases, "it would be going much too far to attribute to these decisions the effect of a determination that an action could not be maintained against receivers in the enforcement of a cause of action arising in Louisiana, whose statute is not open to such a construction."

²⁸ *Bammel v. Kirby* (1898) 19 Tex. Civ. App. 198, 47 S. W. 392.

²⁹ *Parker v. Dupree* (1902) 28 Tex. Civ. App. 341, 67 S. W. 185.

CHAPTER XCVII.

VICARIOUS OR CONSTRUCTIVE LIABILITY ARISING FROM THE CONSTRUCTIVE SERVICE PREDICATED AS AN INCIDENT OF THE DOMESTIC RELATIONSHIPS.

2266. Liability of a husband for the tortious acts of his wife. Doctrine in common-law jurisdictions.
2267. Same subject. Doctrine in civil-law jurisdictions.
- a. Scotland.
 - b. France.
2268. Liability of parents in common-law jurisdictions with respect to the torts of their minor children. Generally.
2269. Same subject. Liability when imputable to the parent on the ground of his personal fault.
2270. Same subject. Liability when imputable to the parent on the ground of the child's being his servant or agent.
2271. Same subject. Liability under statutory provisions.
2272. Liability of parents in civil law jurisdictions.
- a. Scotland.
 - b. France.
 - c. Louisiana.
 - d. Quebec.

2266. Liability of a husband for the tortious acts of his wife. Doctrine in common-law jurisdictions.—Under the common law the husband is liable for all torts committed during coverture.¹ By some authorities this rule has been referred to the notion that the wife is, in the eye of the law, the servant of the husband.² But this explanation cannot be reconciled with the historical fact that the husband's liability was recognized long before the doctrine, *Respondeat superior*, was established.³ The most that can be said is that for

¹ Eversley, Dom. Rel. 3d ed. p. 275; Edwards & H. Husband & Wife, pp. 139 *et seq.*; Lush, Husband & Wife, pp. 310 *et seq.*; The Laws of England, vol. 16, p. 436; Schouler, Dom. Rel. 5th ed. § 75.

² *Cox v. Hoffman* (1839) 20 N. C. 319 (4 Dev. & B. L. 180).

³ See the general discussion in §§ 2233, 2234, *ante*.

some purposes the relationship of a wife to her husband may be regarded as being one of constructive service or agency. The theory of actual service has in fact been explicitly repudiated in a case where the precise relationship of the wife to her husband was a material question.⁴ The true ground of the husband's liability is that "marriage by the common law operated as a conveyance of the wife's property to the husband, and the only redress the injured party had by way of pecuniary compensation was to sue the husband as well as the wife."⁵

In some of the jurisdictions with which we are concerned in this treatise, the old rule has been perpetuated by legislation.⁶ But in most of them it has been largely modified. For the effect of the statutes, generally, the practitioner will consult treatises which deal with the law of husband and wife.⁷

⁴In *Lombard v. Batchelder* (1886) 58 Vt. 558, 5 Atl. 511, the court took the distinction that exemplary damages, although not recoverable from a master in respect of the torts of a servant, might be recovered in an action brought against a husband and wife for the malicious trespass of the wife, though the husband was without blame. The *ratio decidendi* was that "the husband was liable, not as master, but as husband, and because of the oneness of the twain in the eye of the law."

⁵Eversley, Dom. Rel. p. 587.

In *Chastain v. Johns* (1904) 120 Ga. 977, 66 L.R.A. 958, 48 S. E. 343, the court observed: "At common law, the husband was liable for the wife's torts, not alone because she could own no separate estate capable of being subjected, but also because in legal contemplation she had no existence apart from his, and consequently could do no act that was not also his act. In Georgia, while the wife at present is, as to her property rights, practically a *feme sole*, the fiction of merger of her legal existence into that of her husband, so pleasing to masculine vanity, is still maintained, at least in part; for while she may own and control property, barter and trade, and sue and be sued, in entire independence of her lord and master, she may yet do no wrong that is not chargeable to his account."

⁶For example, it is enacted by § 2105 of the North Carolina Revisal 1905, that every husband living with his wife is jointly liable with her for all damage

resulting from any tort committed by her.

The Code of Georgia, § 4413 (3817) (2961), also makes a person liable for torts committed by his wife.

⁷In *Radke v. Schlundt* (1902) 30 Ind. App. 213, 65 N. E. 770, the grounds upon which the nonliability of the husband for an injury caused by the negligent driving of his team by his wife were thus stated: "Our statutes, framed with reference to the pre-existing rules of the common law [Burns's Rev. Stat. Ind. §§ 6965, 6966], and expressed in terms corresponding with those employed in those rules, make the husband and wife jointly liable for torts committed by the wife by direction of her husband,—whether the tort be committed in his presence or not,—and for torts committed by her in his presence with his consent. He remains liable for his own torts. . . . For a tort committed by the wife, as was the trespass here involved, not in the presence of the husband or by his direction, she is liable, and the action is to be prosecuted against her as if unmarried; and the husband is not liable, unless it can be said that he may be liable as a master. Confining our decision to the facts here involved, we are of the opinion that, where the wife is engaged in the use of her husband's personal property in the performance of her duty as a wife, in domestic service for herself and her family, including her husband, not in his presence, he is not liable for a personal injury inflict-

2267. Same subject. Doctrine in civil-law jurisdictions.—a. Scotland.—In Scotland a husband is not liable for his wife's delicts or quasi delicts, unless they are committed by his authority, or with his consent, and when he might have prevented them.¹

b. France.—The rule which prevailed under the older French law is thus stated by Pothier (*Obligations*, * 454, Evans's Translation, p. 271):

"Another kind of accessory obligations is that of heads of families, who are responsible for the injuries committed by their minor children and their wives, if they did not prevent them, having it in their power to do so. They are supposed to have had it in their power to prevent the injury, when it was committed in their presence; if it were committed in their absence, we must judge by circumstances whether the father could have prevented it."

The existing doctrine, as stated by the jurists, is that the effect of this doctrine is that, since the presumption of fault does not, as a general rule, arise against the husband, the injured party cannot hold him liable unless the evidence shows either that he did not prevent his wife's act, or that he employed her for the functions to which her act was incidental.²

The same doctrine has been adopted in the Province of Quebec.³

2268. Liability of parents in common-law jurisdictions with respect to the torts of their minor children. Generally.—The general rule of the common law is that the father of a minor child cannot, on the mere ground of the parental relationship, be held liable for an injury caused by the tortious act of the child.¹ "The law holds

ed by her, not by his direction, but by her trespass through her negligent use of such property. Through statutory modifications of the common law, our system of law concerning husband and wife has advanced, as did the law of Rome, toward the conferring of independence upon the *feme covert*. The relation has not come to be one of partnership or of master and servant. In her conduct in the management of the affairs within her proper domestic sphere, while she is performing her duties as wife, much the same as at common law, she acts with a discretion which does not belong to one standing in the relation of a servant, and is liable for her torts therein as if *sole*, and her husband is not liable."

¹ Fraser *I. Husb. & W.*, 558; *Barr v. Neilson* (1868) 6 Sc. Sess. Cas. 3d series, 758; *Meline v. Smiths* (1892) 20 Sc. Sess. Cas. 4th series, 95.

² Toullier, *Droit Francais* Title IV. § 279, p. 379; Dalloz, *Dictionnaire de Jurisprudence*, "Responsabilite," 495, 505. Both these writers state that a husband is responsible for his wife's "rural delicts."

³ *Rocheleau v. Rocheleau* (1869) 20 Rap. Jud. Quebec, 117, 500, 14 Lower Can. Jur. 194, 18 Rev. Leg. 294; *Fortier v. Demers* (1902) *Rap. Jud. Quebec*, 21 C. S. 543; *Bourassa v. Drolet* (1892) *Rap. Jud. Quebec*, 1 C. S. 107.

In *Lavinguer v. Liscomb* (1891) 20 Rev. Leg. 619, the husband was held liable on the ground that the delict of the wife was committed in his presence, without any opposition on his part and apparently with his consent.

¹ In § 2233, par. (b), *ante*, a decision is cited from *Y. B. 30 Edw. 1*, 202

(1863, ed.), which, so far as regards the facts involved, might be regarded as an authority for the general doctrine stated in the text; but the grounds upon which it was based render it inapplicable as a precedent. The only English case of some recent date which bears upon the question is *Moon v. Towers* (1860) 8 C. B. N. S. 611, where the defendant was held not to be liable for the wrongful arrest of the plaintiff by his minor son, who was acting as treasurer of his theater. The question with reference to which the case was argued and decided was merely whether a previous authorization or a subsequent ratification could be inferred from the evidence. See § 2269, *post*. It must therefore have been taken for granted by the counsel and by the judges that the parental relationship alone would not justify importing liability to the defendant. This point of view is reflected in the following remarks of Willes, J.: "I am not aware of any such relation between a father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of anybody else. I apprehend that, when it is established that a father is not liable upon contracts made by his son within age, except they be for necessities, it would be going against the whole tenor of the law to hold him to be liable for his son's trespasses. The tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the courts. No man ought, as a general rule, to be responsible for acts not his own." The case is deemed by Mr. Eversley (Dom. Rel. 3d ed. 587) to warrant him in formulating the English doctrine thus: "A father is not liable in damage for the torts of his child committed without his knowledge, consent, or sanction, and not in the course of the employment of the child." The learned author cites Schouler, Dom. Rel. § 263. The case has been followed in Canada, *File v. Unger* (1900) 27 Ont. App. Rep. 468 (see § 2270, note 1, *post*); *Thibodeau v. Cheff* (1911) 24 Ont. L. Rep. 214, Ann. Cas. 1912A, 582. In the latter case it was laid down that "the rule of common law is that a parent is not, because of his family relationship,

legally responsible to answer in damage for the torts of his infant child."

The American cases which support the statement in the text are quite numerous, the doctrine which it embodies being affirmed or taken for granted in all the decisions reviewed in this section. It will suffice to refer to the following: *Wilson v. Garrard* (1871) 59 Ill. 51 (children entered upon plaintiff's land and worried and maltreated his cattle); *Paulin v. Houser* (1872) 63 Ill. 312 (defendant's minor son, in driving the plaintiff's hogs from the defendant's inclosure, set a dog upon and worried one of the hogs until it died; liability denied on the ground that instructions concerning the effect of previous directions by the father were erroneous for the reason that they had no relation to any of the evidence given); *Malmberg v. Bartos* (1898) 83 Ill. App. 481; *Teagardner v. McLaughlin* (1882) 86 Ind. 476, 44 Am. Rep. 332; *Smith v. Davenport* (1891) 45 Kan. 423, 11 L.R.A. 429, 23 Am. St. Rep. 737, 25 Pac. 851 (defendant's son, who had gone to a neighboring farm, carelessly and negligently rode a pony belonging to defendant, taken without the latter's knowledge or consent, and in so doing, struck and injured the plaintiff); *Edwards v. Crume* (1874) 13 Kan. 348 (the complaint, which merely alleged that the defendant's son, while living with and under the control of the defendant, negligently set out a prairie fire which destroyed plaintiff's property, held to be demurrable); *Baker v. Morris* (1885) 33 Kan. 580, 7 Pac. 267 (defendant's son negligently shot and killed plaintiff's horse); *Mirick v. Suchy* (1906) 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366; *Pauley v. Draine* (1888) 9 Ky. L. Rep. 693, 6 S. W. 329 (defendant not liable for a slander uttered in his absence, and without his knowledge, procurement, instigation, or indorsement, by a daughter twelve years old); *Scott v. Watson* (1859) 46 Me. 362, 74 Am. Dec. 457 (*arguendo*); *Brohl v. Lingeman* (1879) 41 Mich. 711, 3 N. W. 199 (injury negligently inflicted by defendant's son while driving his horse and wagon); *Baker v. Haldeman* (1857) 24 Mo. 219, 69 Am. Dec. 430 (*arguendo*); *Needles v. Burk* (1884) 81 Mo. 569, 51 Am. Rep. 251 (action to recover money paid by the plaintiff in settlement of damages for the tort of his minor child

the parent liable only on the same grounds that he would be responsible for the wrong of any other person.”²

2269. Same subject. Liability when imputable to the parent on the ground of his personal fault.—One of the exceptions to the general rule stated in the preceding section is that a father may be held responsible for a wrongful act committed by his minor child, if his own conduct in the premises was such as to render him a principal tort-feasor, or, in other words, if his personal fault was a proximate cause of the injury complained of. Liability in this point of view is predicable whenever one of the following situations is established:

(1) That the plaintiff was injured by reason of something done by the child in pursuance of his father's command, and that the injury inflicted was a necessary or natural consequence either of the thing itself so prescribed, or of the manner in which the father appointed it to be done.¹

(2) That the child was not competent for the work in which he was engaged when the injury was inflicted by him, and that his father had knowledge, actual or constructive, of his incompetency, before he was ordered to perform it.²

in setting fire to a building owned by the defendant held not to be maintainable, because the plaintiff was not liable for the damage caused by the fire); *Bassett v. Riley* (1908) 131 Mo. App. 676, 111 S. W. 596; *Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351; *McCauley v. Wood* (1806) 2 N. J. L. 86; *Brittingham v. Stadiem* (1909) 151 N. C. 299, 66 S. E. 128; *Tift v. Tift* (1847) 4 Denio, 175 (plaintiff's pig, which had got into defendant's inclosure, was worried to death by defendant's dog, which his daughter had, in his absence, set upon the animal); *Schlossberg v. Lahr* (1881) 60 How. Pr. 450 (demurrer to complaint was sustained); *Maher v. Benedict* (1908) 123 App. Div. 579, 108 N. Y. Supp. 228; *Hower v. Ulrich* (1893) 156 Pa. 410, 27 Atl. 37; *Johnson v. Glidden* (1898) 11 S. D. 237, 74 Am. St. Rep. 795, 76 N. W. 933; *Chandler v. Deaton* (1872) 37 Tex. 406 (plaintiff's mule was shot by defendant's sons); *Ritter v. Thibodeaux* (1897) — Tex. Civ. App. —, 41 S. W. 492 (defendant's minor son had, without defendant's knowledge or consent, borrowed a gun from a neighbor and negligently shot another boy in the

eye); *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922.

² *Broadstreet v. Hall* (1907) 168 Ind. 192, 10 L.R.A.(N.S.) 933, 120 Am. St. Rep. 356, 80 N. E. 145.

¹ See cases cited in note 4, *infra*.

² In *Adams v. Swift* (1898) 172 Mass. 521, 52 N. E. 1068, 5 Am. Neg. Rep. 607, the liability of a mother for an accident caused by her minor daughter's mismanagement of a team was held to be a question for the jury, where the evidence tended to prove that the daughter was so weak physically, and so inexperienced in handling horses, that it might be negligence to allow her to drive at all; that she was driving under her mother's control and direction, and that her driving was careless.

In *Broadstreet v. Hall* (1907) 168 Ind. 192, 10 L.R.A.(N.S.) 933, 120 Am. St. Rep. 356, 80 N. E. 145, an averment of which the gist was that the defendant was negligent in that he had, with knowledge of his son's reckless habits and inability to control a certain horse, directed the son to ride that horse to a customer's house for the purpose of carrying a message, was sufficiently sup-

(3) That the parent sanctioned the commission of the actual tort which caused the given injury.³ Such sanction may be proved by evidence which tends to show that the actual tort complained of was committed in pursuance of his directions,⁴ or with his assistance and

ported by evidence that the son was only eight or nine years old, and weak for his age; that he had a reputation in the neighborhood for riding horses in a reckless and dangerous manner; and that he had frequently ridden at a dangerous speed up and down the street in front of his father's house and store. Under the evidence in this case, however, a charge of personal negligence against the father was clearly superfluous; for the tort-feasor was, *quoad* the errand on which he was sent, the servant of his father, and also, as regards the management of the horse, acting within the scope of his employment. See § 2270, note 1, *post*.

In *Daily v. Maxwell* (1910) 152 Mo. App. 415, 133 S. W. 351, the grounds upon which the trial court was held to have properly overruled a demurrer to the evidence in a case where the plaintiff was injured by reason of the negligence of the defendant's son in driving his automobile were thus stated: "No one can deny that an automobile in the hands of a careless and incompetent driver would be a dangerous machine to turn loose on busy streets, and would constitute a menace to travelers. The owner of a car must exercise reasonable care in the selection of a chauffeur, and, failing in this, will be held liable for the consequences of his own negligence in sending out his car in charge of an incompetent operator. Boys are very apt at learning how to run vehicles of all sorts,—more apt than men,—and the evidence before us is all to the effect that Ernest was a bright boy, and careful too, for one of his years. But he was only a boy, and the jury were entitled to say, from the mere fact that he was only sixteen years old, that he lacked the judgment, discretion, and care to be expected of a mature person, and which was essential to the proper and careful operation of a vehicle so powerful as an automobile. In § 8510, Revised Statute 1909, the legislature has said, in so many words, that a person under eighteen years of age is incompetent to act as an auto driver. 'Where a statute forbids the employ-

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ment of a child under a certain age, it is in effect a determination that a child of that age does not possess the judgment and discretion necessary for the pursuit of a dangerous work.' [26 Cyc. 1221.] We do not go to the length of holding that the statutory prohibition against giving a license to run an automobile to a person under eighteen years of age makes the employment of a chauffeur under that age negligence as a matter of law, but we do say that it gives the jury the issue, as one of fact, of classifying the conduct of one who turns his car over to an operator who is under the statutory age, with permission to run it over the streets of a populous city."

³ For cases in which the absence of the element of consent on the parent's part was adverted to as a reason for applying the general rule as to his non-liability, see *Wilson v. Garrard* (1871) 59 Ill. 51; *Baker v. Morris* (1885) 33 Kan. 580, 7 Pac. 267; *Edwards v. Crume* (1874) 13 Kan. 348; *Smith v. Davenport* (1891) 45 Kan. 423, 11 L.R.A. 429, 23 Am. St. Rep. 737, 25 Pac. 85; *Pauley v. Draine* (1888) 9 Ky. L. Rep. 693, 6 S. W. 329; *Brohl v. Lingemen* (1879) 41 Mich. 711, 3 N. W. 199; *M'Cauley v. Wood* (1806) 2 N. J. L. 86.

⁴ In *Paulin v. Howser* (1872) 63 Ill. 312, the court made the following remarks: "If the son acted without authority from his father, then the father was not liable. A father is not, nor can he be held, responsible for the unauthorized trespasses of his minor children. In that respect the child occupies the same relation to the father as does a servant. He is liable for the acts of either when performed under his directions or in the course of their general employment; but not for their trespasses committed independent of their employment or not under directions. It was a question for the jury whether the son was acting under the general or special orders of appellant." The defendant in this case was, upon the facts, held not to be liable. See § 2268, note 1, *ante*.

encouragement;⁵ or that he did not prevent it, after he had notice, actual or constructive, that it was about to be committed, or was in process of being committed;⁶ or that he ratified it after it had been committed.⁷

In *Harrington v. Hall* (1906; Super. Ct.) — Del. —, 63 Atl. 875, the court charged the jury that, "if you find that the [plaintiff's] dog was killed by the son of the defendant, either under the general or special direction of his father, then the act of killing was, in contemplation of law, the act of the defendant."

⁵ In *Sharpe v. Williams* (1889) 41 Kan. 56, 20 Pac. 497, defendant, having been informed by his sons that they intended to "duck" their school teacher, told them they had better not do so, but that, if they were determined to carry out their project, he would pay half of any costs that might arise if they got into trouble over it, if their grandfather would agree to pay the other half. The latter refused to countenance the scheme, which was, however, carried out by the boys. Held, that the defendant was liable for the injuries sustained by the teacher at the hands of his minor sons and others, as a result of the "ducking."

⁶ In *Beedy v. Reding* (1839) 16 Me. 362, the action was held to be maintainable on grounds thus stated: "The minor sons of the defendant, being at the time members of his family, with the defendant's team, at three several times, hauled away the plaintiff's wood. This could hardly have been done without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property. *Qui non prohibet, cum prohibere possit, jubet*. And this maxim may be applied with great propriety to minor children residing with and under the control of their father. If he had caused them to carry the wood back when the fact came to his knowledge, if he did not know it at the time, he would have done his duty to his children and to his neighbor. Considering the relation in which he stood, and the repeated use of his team in getting the wood, it would not be easy, otherwise, for him to escape legal liability upon a just view of the facts."

In *Strohl v. Levan* (1861) 39 Pa. 177, the liability of the defendant for an in-

jury caused by the negligent management of his team by his minor son was affirmed on grounds thus stated: "Here the son was driving and the father, the defendant, was riding. The latter made no objection or endeavor to control his son, and if he did not, it was a presumption which a jury might well make, and which I think they were bound to make, that he assented to what was done in the management of the instrument (the team) which did the injury, and therefore, per consequence, was answerable, provided the result was not an unavoidable accident."

In *Bassett v. Riley* (1908) 131 Mo. App. 676, 111 S. W. 596, an action against a father for the tort of his son in killing plaintiff's dog, it appeared that, when the boy stepped out of the house with the gun in his hand, defendant, who was behind the house, asked the boy what he intended to do with the gun, that the latter replied he intended to scare a dog, and then went around the house and fired the shot. Held, that these facts were not sufficient to show that the father knew that his son's intention was tortious, or that he consented to the killing of the dog.

In *Hower v. Ulrich* (1893) 156 Pa. 410, 27 Atl. 37, defendant was employed to gather corn and store it in plaintiff's barn. The corn was gathered by defendant or his family, and there was evidence that some of his children had carried off part of it and put it in his own or his wife's bin. The trial judge instructed the jury that "if somebody else carried it [the corn] away, if the children or family . . . of the defendant, and he was not present and did not aid, abet, or counsel them, then, of course, he would not be guilty. This is an action of trespass, and the defendant must be guilty of the wrongful or tortious acts himself, or have advised or assisted in some way, before he can be found guilty." Held, that this instruction placed the defendant's liability upon too narrow a basis, and that the jury should have been told that, if the corn was taken by any of the defendant's family under the

(4) That the father was negligent in respect of having omitted to take such precautions as the circumstances indicated to be proper for the purpose of preventing commission of the tort. Some of the cases under this head apparently embody the broad theory that no special obligation as regards the supervision, control, or restraint of a child is imposed upon a father by the mere circumstance of his having been chargeable with notice, actual or constructive, of the probability that the child would at some time or other commit a tort of that description.⁸ But the more reasonable view with respect to this situation seems to be that, after the actual commission of such

circumstances charged, then it was not necessary that he should have been present, or ordered or aided the taking in any way; if he knew of it at the time, or afterwards, he was liable for its value in this action. Adverting to the fact that the instruction had been qualified somewhat by the additional direction that, "if these children were in his employ and he knew of it, and he countenanced it and directed it, he would be responsible, even though he was not on the ground himself," the court said: "Even this was much too narrow a basis for liability. A man cannot keep and use another's stolen corn, and avoid liability for its value by saying that he did not know of or countenance or direct the stealing of it. If he knew at any time, he became immediately responsible, and the presumption in the present case is that he did know. His children, several of them under age, were doing his work, by his orders, and, to some extent at least, in his personal presence. It is highly improbable that they would have hauled the corn to his bin without his knowledge and sanction, at least. The circumstances give rise to a strong presumption that what they did was by his orders."

The circumstances presented in this class of cases may sometimes be such as to constitute, in the alternative, a cause of action on the ground of the father's negligence in the failure to prevent the child's tort. See notes 8 *et seq.*, *infra*.

⁷ *Paulin v. Howser* (1872) 63 Ill. 312 (offer made by the father to compromise the claim did not operate as a ratification); *Baker v. Morris* (1885) 33 Kan. 580, 7 Pac. 267 (ratification by the father could not be inferred from

evidence that he had promised, without consideration, to pay for the damages inflicted by the wrongful act of his child); *Newson v. Hart* (1866) 14 Mich. 233 (defendant, by retaining and selling a horse which his son had wrongfully taken up as an estray, was held to have ratified the trespass); *Lamb v. Davidson* (1897) 69 Mo. App. 107 (ratification inferable, when defendant, upon being informed that his children had wrongfully impounded plaintiff's cattle, despatched a messenger to them with instructions not to deliver the cattle to plaintiff until the latter paid certain charges therefor); *Howser v. Ulrich* (1893) 156 Pa. 410, 27 Atl. 37 (defendant continued to enjoy the benefit of property converted by his children; see note 6, *supra*); *Kumba v. Gilham* (1899) 103 Wis. 312, 79 N. W. 325, 6 Am. Neg. Rep. 412 (mere fact of the father's having asked the liveryman whether he or the liveryman should go after a hired buggy which the minor had damaged did not show a ratification of the minor's act).

In *Sartin v. Saling* (1855) 21 Mo. 387, where the defendant's son had purchased a horse from a person having no title thereto, and refused to deliver it up upon the demand of the plaintiff, who claimed to be its owner, it was held that a ratification by the defendant of this wrongful act could not be inferred from the fact that he advised the son not to give up the horse until he could inquire into and satisfy himself as to the plaintiff's title.

⁸ In *Baker v. Haldeman* (1857) 24 Mo. 219, 69 Am. Dec. 430, an action to recover for an assault committed by the defendant's son upon one of the plaintiff's children, the trial court, at the request of the defendant, instruct-

a tort, the question whether the failure of the father to prevent its commission imports culpability should be regarded as being primarily one of fact for the jury.⁹ Such is the footing upon which the right of recovery has been considered in some instances, where the antecedent notice to the father was predicated upon evidence which showed that, before the plaintiff was injured, the child had already been guilty of several acts of misconduct similar to the one complained of.¹⁰ As is apparent from the note below, the cases in

ed the jury that they were to find for the defendant, "unless the plaintiff has established that the boy was of vicious disposition and habits, and that the father knew it at the time." A verdict for the defendant was sustained by the supreme court, which was of the opinion that the instruction, although erroneous, was not prejudicial to the plaintiff. That the doctrine embodied in the instruction was incorrect was again affirmed in *Paul v. Hummel* (1868) 43 Mo. 119, 97 Am. Dec. 381, where a complaint was held demurrable which alleged that the defendant's minor son, by reason of his vicious and destructive temper, and sudden and causeless fits of anger, was dangerous to the plaintiff, and that the latter informed the defendant thereof and requested him to restrain and control his son, which he failed to do; and the defendant's son inflicted an injury upon plaintiff's minor son. This conclusion was based merely upon the general doctrine that a parent is not liable for the wilful torts of his minor child. It seems doubtful, however, whether a court is justified in laying it down, as a matter of law, that plaintiff is not entitled to recover under the circumstances set forth. The more correct view apparently is that, in any given instance, it is a question of fact whether the failure of the parent to exercise such control of a child of the character alleged constituted a want of due care in respect of the person injured. Such would seem to be the general doctrine indicated in the Wisconsin case cited in note, 10, *infra*.

In *O'Brien v. Loomis* (1890) 43 Mo. App. 29 (an action against a father and son jointly), a complaint was held to be demurrable which alleged, in respect of the father, that he carelessly and negligently gave a "cat" rifle to his ten-year-old son, a child of reckless habits with little or no discretion in the

use of firearms, and that the child, to the knowledge of defendant, was in the habit of recklessly using the gun, and, in so doing, shot the plaintiff. The correctness of this ruling was not questioned in the appellate court, the opinion being taken up with a discussion of the liability of the son.

⁹ In *Meers v. McDowell* (1901) 110 Ky. 926, 53 L.R.A. 789, 96 Am. St. Rep. 475, 62 S. W. 1013, it was held that a cause of action was stated by a complaint which alleged that the defendant plied his minor son, a boy of weak and undeveloped mind, with intoxicating liquors, and that, while the son was under the influence of those liquors, the defendant permitted him to have a loaded rifle, with which the son subsequently shot the plaintiff.

¹⁰ In *Hoverson v. Noker* (1884) 60 Wis. 511, 50 Am. Rep. 381, 19 N. W. 382, where defendant's minor sons had frightened the plaintiff's team while he was driving past the defendant's home, by running into the highway and shouting and firing a pistol, the result being that the plaintiff's wife was injured, it was held that evidence should have been admitted which tended to connect defendant with the wrongful acts of his sons by showing that the latter had frequently, before the day of the accident, called abusive names, shouted, and discharged firearms when other persons were passing the defendant's home, and that this had been frequently done in the presence of the defendant,—the court saying: "If the father permitted his young sons to shout, use abusive language, and discharge firearms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which in its nature was likely to result in damage to those passing; and when an injury did happen from that cause, he was not only morally, but

which it has been sought to impute responsibility to the father on the ground that the instrumentality which caused the injury was

legally, responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not, in words, order the erection to be made. If he made it himself with the intention to frighten passing teams, he would be responsible for the injury caused by it, and when he permits his irresponsible children to do it, he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing is certainly equally, if not more, reprehensible than permitting an inanimate structure to be placed where it would cause such fright."

In *Johnson v. Glidden* (1898) 11 S. D. 237, 74 Am. St. Rep. 795, 76 N. W. 933, it was shown that defendant permitted his thirteen-year-old son to have and use a gun when he pleased, and that, although he had been informed of his son's reckless and careless use thereof, he did nothing to prevent a continuance of such conduct. The boy, disregarding plaintiff's requests not to do so, fired the gun near a colt the plaintiff was watering, and so frightened it that it ran away and dragged the plaintiff, who became entangled in a picket rope attached to the colt. Held, that the defendant might properly be found liable, notwithstanding the general provision of the South Dakota Code that a parent shall not be held answerable for the acts of his child. The court was of opinion that it would not be deemed negligence *per se* for a father to furnish a gun to a son of the age in question, and that, in the absence of knowledge to the contrary, he would be justified in presuming that his son would be justified in presuming that his son would use it with ordinary care and caution; but the position was taken that "if, as alleged, defendant's son

was in the habit of using the gun given him by his father in a dangerous manner, and defendant knew of such use, it was his moral and legal duty to prevent a continuation of such conduct; and it is immaterial whether his knowledge was derived from seeing his son's acts of negligence, or from being informed of them by other persons. His culpability consisted in permitting his son to continue in a course of conduct which, in its nature, was likely to result in damage to those with whom his son came in contact." Evidence tending to prove that the minor had negligently used the gun on other occasions was held to be admissible against the father, when knowledge thereof was brought home to him.

In *Thibodeau v. Cheff* (1911) 24 Ont. L. Rep. 214, Ann. Cas. 1912 A. 582 an action against the father of a boy of sixteen, to recover damages for destruction of the plaintiff's property by reason of fire set out by the boy, the jury found that the fire which destroyed the plaintiff's property was caused by the infant son of the defendant; that this boy, by reason of the weakness of his intellect, his want of intelligence, and his not understanding the difference between right and wrong, and by reason of his being addicted to the habit of smoking and the frequent use of matches, was a dangerous person to be at large without being under surveillance, or being watched by some person of ordinary discretion, to prevent his setting out fires; that the father (in whose house the boy lived and under whose custody he was) knew of the character and habits of the boy and of the danger of fire from his being at large alone; that the father was guilty of negligence in the premises, by reason of his not taking any steps to control or restrain the boy in carrying and lighting matches and in setting out fire, after the father had been told of these actions by his neighbors; and that the probable result of the lack of necessary precaution in the custody of the son was to enable the son to destroy property. Held, that upon these findings, which were warranted by the evidence, judgment was properly given for the plaintiff. The

given by him to the child, or left by him in such a place that the child might obtain access to it, are by no means harmonious.¹¹ It

American authorities were cited with approval. The court relied upon two grounds: (1) That the facts brought the case within the exception to which the general rule regarding the nonliability of a father is subject in a case. Where he "has knowledge of the wrongdoing and consents to it, where he directs it, where he sanctions it, where he ratifies it, or participates in the fruits of it, he becomes in effect a party to it, and as such is liable to the injured persons;" and (2) that "the usual rule as to dangerous articles appears to be pertinent to this situation. Anyone possessed of a dangerous instrument owes a duty to the public, or to such members of the public as are reasonably likely to be injured by its misuse, to keep it with reasonable care, so that it shall not be misused to the injury of others." The conclusions of the court were summed up as follows: "It may safely be laid down that the father is liable for the conduct of his young child, if he knows of the child's frequent wrongdoing in a particular direction, and by his attitude or his inaction (when he is able to restrain or confine the child), he indicates his willingness that the misconduct should be repeated. This appears to be so *a fortiori*, when the child is of imbecile or demented mind. Incapable of distinguishing right from wrong, and, one whose manner and habit of playing or intermeddling with dangerous things easily obtained, or to which there is easy access, is likely to, or even may probably, bring about destructive results to the property of others."

In *Broadstreet v. Hall* (1907) 168 Ind. 192, 10 L.R.A.(N.S.) 933, 120 Am. St. Rep. 356, 80 N. E. 145, evidence that a boy was reckless in the management of horses, and that he had frequently ridden recklessly in front of his father's house and store, was held to be admissible, in an action against the father by a person injured to charge the father with notice of his son's incompetency to be sent upon the highway on horseback.

¹¹ The liability of a father for an injury caused by a toy air gun which he had given to his child has been denied on the ground that such a weapon is

not an intrinsically dangerous article, and that a father is not bound to anticipate that the child will fire it at other persons. *Harris v. Cameron* (1892) 81 Wis. 239, 29 Am. St. Rep. 891, 51 N. W. 437 (son eleven years old); *Chaddock v. Plummer* (1891) 88 Mich. 225, 14 L.R.A. 675, 26 Am. St. Rep. 283, 50 N. W. 136 (son nine years old). In the Michigan case the court thus adverted, *arguendo*, to what it regarded as an analogous case: "An ax is considered a dangerous weapon, but, if one leave an ax by his wood pile and a child comes into the yard, picks it up, and injures another with it, is the owner of the ax liable for damage, because he has not put this deadly weapon under lock and key?"

In *Malmberg v. Bartos* (1898) 83 Ill. App. 481, the plaintiff, a girl four years old, while she was playing with the defendant's son, a boy four years old, picked up a piece of ice that was lying on the sidewalk opposite the defendant's place of business. The boy took offense at what she did, and, upon her refusal to go away, seized an ax which had been used by the defendant to cut the ice, and, while another child held her cut off her fingers. A verdict for the defendant was held to have been properly directed, because the wilful act of the child was the proximate cause of the injury, and consequently the defendant could not be charged with liability on the theory of his having been negligent in leaving the ax on the sidewalk within the child's reach.

In *Swanson v. Crandall* (1896) 2 Pa. Super. Ct. 85, the defendant's daughter, a girl five years old, abstracted a loaded revolver from the drawer of a chiffonier where he kept it, and shot the plaintiff with it. The decision of the court that no action could be maintained against him for the resulting injury was put upon the ground that the revolver had been deposited in a reasonably safe place, and that he was not bound to anticipate such an event as its discovery and abstraction by his child.

In *Hagerty v. Powers* (1885) 66 Cal. 368, 56 Am. Rep. 101, 5 Pac. 622, a complaint was held to be demurrable which alleged that the defendant "wil-

seems questionable whether some of the courts concerned have not gone to an unwarrantable extreme in affirming the nonliability of the defendants as a matter of law.

Having regard to the several grounds of liability above specified, it is obviously improper to instruct the jury in language which gives them to understand that the plaintiff cannot recover unless they infer from the evidence that the child was the servant of his parent.¹¹

fully, carelessly, and negligently suffered, permitted, countenanced, and allowed" his son, a child of eleven years, to have in his possession a loaded pistol, which the latter so carelessly handled as to shoot the infant child of the plaintiff. The *ratio decidendi* was that, at common law, a father was not liable in damages for the torts of his child committed without his knowledge, consent, or sanction, and not in the course of his employment of the child. Myrick, J., dissented on the ground that the defendant's conduct disclosed sufficient negligence to give rise to a cause of action, and both upon principle, as well as under the authorities cited in this note, it is submitted that this is the correct view. The complaint being clearly framed on the theory that the defendant was a principal tort-feasor, the plaintiff was at least entitled to present such evidence as he could produce in support of it.

In *Brittingham v. Stadium* (1909) 151 N. C. 299, 66 S. E. 128, the evidence was held to be sufficient to support a complaint of which the gravamen was that the defendant, as part of her business, conducted a pawnbroker's shop and received in pawn various articles, among them pistols, which she also carried in stock for sale; that these dangerous weapons were carelessly and negligently permitted to lie on the counters and in the windows of the store, within reach of her son, a boy twelve years old; and that "he fooled with them." The court took the position that a pawnbroker who permitted a boy of that age employed in the business, to handle pistols brought by customers to be pawned, was bound to take the precaution of seeing that they were rendered safe by unloading, and that, if an injury to a customer resulted from a neglect of this duty, the pawnbroker would be liable therefor.

In *Turner v. Snider* (1906) 16 Manitoba L. Rep. 79, where defendant's fourteen-year-old son, while hunting, negligently fired his gun so as to kindle a prairie fire which destroyed plaintiff's buildings, negligence on the part of the father in permitting his son to hunt alone with a gun was held to be negatived by the fact that the son had been carefully trained in the use thereof, and ordinarily used great care in handling it. Under such circumstances, the father was justified in assuming that the son would observe reasonable care when using the weapon.

In *Palm v. Iverson* (1905) 117 Ill. App. 535, where defendant's twelve-year-old son, who was thoroughly experienced in and accustomed to the use of firearms, accidentally shot the plaintiff, it was held, as matter of law, that the father could not be held either on the ground of negligence in permitting his son to use the gun; or on the theory that he was negligent in not anticipating danger to others from the use of the firearm in the hands of the son.

In *Taylor v. Seil* (1903) 120 Wis. 32, 97 N. W. 498, 15 Am. Neg. Rep. 465, the defendant furnished his crippled son, a lad of seventeen years, with a gun for the purpose of hunting. On his expeditions he was frequently accompanied by a brother, seven years of age, who would often carry the gun, in contravention of the father's positive instructions that he should not carry it or have it in his hands when it was loaded; but the father had no notice that his instructions were habitually disobeyed. The plaintiff's son having been accidentally shot while the younger brother was handling the gun, it was held that the father had not been guilty of any such negligence as would render him liable for the injury.

¹² *Lamb v. Davidson* (1896) 69 Mo. App. 107.

2270. Same subject. Liability when imputable to the parent on the ground of the child's being his servant or agent.—The operation of the general rule as to the nonliability of a parent for the torts of his child may also be avoided by proof that, at the time when the injury was inflicted, the latter was employed by the former in the capacity of a servant or agent, either generally or with respect to the particular piece of work then in progress, and that the act from which the injury resulted was done in the course of that employment.¹ The inference that the act was one of that description may sometimes be warrantable under circumstances which, if the rela-

¹ In *Broadstreet v. Hall* (1907) 168 Ind. 192, 10 L.R.A. (N.S.) 933, 120 Am. St. Rep. 356, 10 L.R.A. (N.S.) 933, 80 N. E. 145, an action for injuries received by a foot passenger who was run over by the defendant's horse, which his minor son was using to carry a message from the father, it was held that, by employing the boy in this manner, the defendant must, on demurrer, be taken to have created, *quoad* the errand at least, the relation of master and servant between him and his son, and was therefore, under the third paragraph of the complaint, responsible for injuries resulting from the inability of the son properly to control or manage his horse, or, under the first paragraph, on account of the son's negligence in riding the horse along the public highway while engaged in the performance of the business of his father.

In *Sacker v. Waddell* (1903) 98 Md. 43, 103 Am. St. Rep. 374, 56 Atl. 399, 15 Am. Neg. Rep. 324, where defendant's minor son, who had been sent by the former, with a team, to assist a neighbor in threshing, negligently drove over and injured the plaintiff, it was held to be for the jury to say whether the child was, at the time of the accident, the servant of the parent or of the person whom he was assisting.

In *Lashbrook v. Patten* (1864) 1 Duv. 316, the defendant's minor son, when taking his two sisters in the defendant's carriage to a picnic, negligently drove it against the plaintiff's vehicle. The horses, as well as the carriage, belonged to the defendant, and the son was driving with his approbation. Held, that the son must be regarded as being, at the time of the accident, the servant of the father, so as to affect him with liability for the injuries complained of.

In *Lamb v. Davidson* (1897) 69 Mo. App. 107, the acts of children temporarily left in charge of a farm of their parent, in detaining cattle of another which had entered upon the farm through a partition fence, and demanding the payment of an impounding charge, were held to be within the scope of their duty to protect the premises, and therefore imputable to their parent. As to the case, see further § 2269, note 7, *ante*.

In *Andrus v. Howard* (1863) 36 Vt. 248, 84 Am. Dec. 680, where the defendant sent his minor sons to obtain certain cattle from a pasture, and the children, not finding them, trespassed upon plaintiff's premises and drove off the latter's cattle, which the plaintiff never recovered, it was held that the defendant was liable for their acts.

In *Schmidt v. Adams* (1885) 18 Mo. App. 432, defendant instructed his minor sons to drive the plaintiff's trespassing cattle out of his fields. In doing so, they set dogs upon and worried the cattle, so as to injure some of them. A verdict for the plaintiff was held to be proper, although the defendant testified that he cautioned his sons not to chase the cattle with dogs.

In *Dunks v. Grey* (1880) 5 Bann. & Ard. 634, 3 Fed. 862, the manager of a mercantile business, who had permitted his minor son to assume the general management thereof, was held liable for the violation by the son of an injunction restraining the defendant from vending a patented article.

In *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922, it appeared that the defendant's son had trained the defendant's horses to run furiously when passing other vehicles on the highway; and that, dur-

ing the defendant's absence from the country, while he was using these horses as he had been accustomed to do with his father's knowledge and acquiescence, for the purpose of conveying the family to church, he negligently drove against the plaintiff's rig in attempting to pass it. Held, that the defendant was liable for the resulting injury.

See also *Jennings v. Schwab* (1895) 64 Mo. App. 13 (defendant held liable for injuries caused to a child who was run over by his son while engaged in driving his team); *Shockley v. Shepherd* (1891) 9 Houst. (Del.) 270, 32 Atl. 173 (jury instructed that a father is liable for all the wrongful acts of his son which are committed while the son is in the father's service and acting in that capacity as his agent).

In *Brittingham v. Stadiem* (1909) 151 N. C. 299, 66 S. E. 128, evidence going to show that the wrongdoer had been seen selling goods and handling them behind the counter of her mother's shop was held to be sufficient to submit to the jury on the question whether the defendant's son was his servant and acting in the course of his employment in handling the pistols pawned at her shop.

In *Maddox v. Brown* (1880) 71 Me. 432, 36 Am. Rep. 336, the defendant's son, in the absence of, and without the knowledge of, his father, took the latter's horse and carriage, which the son had been allowed to use without restriction, and, for his own convenience and pleasure, drove to a neighboring town. The horse, being negligently left unhitched and unattended in the street, ran away and caused an injury. Held, that the action could not be maintained.

In *Kumba v. Gilham* (1899) 103 Wis. 312, 79 N. W. 325, 6 Am. Neg. Rep. 412, the defendant ordered a rig from a livery stable in order to convey his daughter to another town. He intended to drive it himself, but another person, desiring to go to the same destination as the daughter, obtained the rig without defendant's knowledge or consent, and drove away with defendant's daughter and minor son, the latter being taken for the purpose of bringing back the rig. The defendant, as soon as he learned of what had been done, made an unsuccessful attempt to prevent his son from going with them. On the re-

turn journey, the carriage having broken down, the defendant's minor son left it at the side of the road, where the plaintiff's horse took fright at it and ran away. Held, that, assuming the son to have been guilty of negligence in leaving the carriage by the side of the roadway, the father was not liable therefor. It could not be said that the son, at the time of the accident, was acting as the defendant's servant, because the latter had not consented to his son's driving the rig, and had done all in his power to prevent his doing so.

In *Winkler v. Fisher* (1897) 95 Wis. 355, 70 N. W. 477, where a father arranged with his son to go to a cornfield and shoot crows at so much a head, when he had spare time, but the son, instead of doing this, went off to hunt other game at a place some miles away from his father's premises, and, while so engaged, negligently shot the plaintiff, it was held that the parent was not liable therefor.

In *Evers v. Krouse* (1904) 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, 16 Am. Neg. Rep. 515, where defendant's minor son, who had been directed by his mother to sprinkle the lawn in front of defendant's home, turned the hose upon plaintiff's horse and so frightened it that it ran away, a judgment in favor of the plaintiff was reversed. The court said: "If the act of the defendant's son in throwing water upon the plaintiff's horse was not the result of his careless handling of the garden hose while sprinkling his father's lawn, but was deliberately done by him purely out of a spirit of mischief, for the purpose of frightening the animal, the fact that he used the tool supplied to him for the doing of his father's work, for the accomplishment of his own mischievous purpose, did not make it an act within the scope of his employment, and did not render the defendant liable for the injury resulting therefrom."

In *File v. Unger* (1900) 27 Ont. App. Rep. 468, the plaintiff was injured through the negligence of a youth about twenty years old living at home, while he was using, with his father's permission, his father's horse and buggy. The accident occurred while he was returning from a shop to which he had gone to purchase clothes with money earned by himself, and it was held that no action would lie against his father. This

tionship of parent and child had not existed between the defendant and the tort-feasor, would be treated as precluding recovery.²

A complainant who seeks to recover on the ground of a parent's vicarious liability must allege facts sufficient to show that a contract of employment existed between the defendant and the child in question at the time when the injury was sustained;³ and also that the

result was not affected by the circumstance that his mother had accompanied him, the evidence being that she had done so at his request, merely for the purpose of helping him to select the clothes. Lister, J. A., said: "No presumption arises that the son, a minor, was, at the time of the accident, acting in the employment of his father as his servant, merely because he was in possession of and driving his father's horse and buggy, even with his father's consent, and accompanied by his mother. If such a presumption could, upon the facts here, arise, it has been fully rebutted by the evidence on the part of the defendant, which, in my opinion, clearly establishes that the son at the time of the accident was engaged solely upon his own business, and not in any sense upon his master's business." Upon the facts this decision is essentially inconsistent with the case cited in the next note.

In *Ferguson v. Terry* (1840) 1 B. Mon. 96, an action of trespass, an instruction to the jury that, if the son committed the trespass "whilst engaged in the ordinary business of" the father, the latter would be liable, was held to be erroneous. The court said: "The trespass may have been committed whilst the son was engaged in the business of the father, and yet have been committed without the knowledge, against the will, and contrary to the wishes of the father, and which he never afterwards sanctioned or even countenanced. For such an act, the father cannot be made responsible in trespass."

² In *Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351, which has already been discussed under one of the aspects in § 2269, note 2, *ante*, the court thus dealt with the contention that defendant should not be held liable for the negligence of his son in driving his automobile, because the evidence shows beyond question that the latter was using the machine merely for his own pleasure; "Ernest was more than

a mere chauffeur. He was the minor son of the owner, and was using the car for his own pleasure, it is true, but with the permission of his father and for one of the very uses for which his father kept the vehicle. The evidence discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle, and when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner? It is the practice of parents to provide their children healthful and innocent amusements and recreations, and, certainly, it is as much the business of parentage to supervise and control the pleasures of their children as it is to give them nurture and education. Had Ernest been taking his mother for a pleasure ride instead of taking some of his young friends, no one would contend that he was not on his father's business; or, had he been using the car on an errand of his own, such as shopping for himself, or going to school, he would have been on his father's business, since it was the duty of his father to support and educate him."

³ In *McCarthy v. Heiselman* (1910) 140 App. Div. 240, 125 N. Y. Supp. 13, where the employers of the minor sought to hold his father liable for his conversion of their money, an order denying the father's motion for judgment on the pleadings was reversed. The court said: "In the pleading before us there is no fact alleged to indicate any agency of the boy for the parents in the conversion or the disposition of the proceeds of the conversion. Was the boy in this case, while employed by the plaintiffs, the agent of his parents in any aspect? It is true he went into the plaintiffs' service with the consent of his parents, and turned over his wages to them. This fact alone does not make him the servant of his parents while engaged in the service of another. To hold otherwise would enlarge the

act which caused the injury was done in the course of the child's employment.⁴ The general rule as to the nonliability of a parent for the torts of a minor child necessarily imports, under one of its aspects, that the parental relationship itself does not create any presumption as to the existence of a contract of employment.⁵ It has also been held that no presumption that, at the time when the injury was inflicted, the child was acting in the employment of his father as his servant, arises from the fact that he was using an

scope of a parent's liability for the torts of a child beyond reasonable limits, and lead to a result not only most inconvenient, but contrary to the common understanding."

In *Mirick v. Suchy* (1906) 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366, an action against a father for damages resulting from fire set out by his minor sons while erecting a fence, a complaint was held demurrable which alleged that the sons, "while engaged in the father's business and for his benefit, purposely, carelessly, and negligently set out the fire." The court said: "An essential ingredient of liability is lacking, viz., that the setting out of the fire was within the scope of their employment; that the setting out of the fire was the act of the father, by his sons as his agents, in the same sense as was the building of the fence by them his act. No connection is shown between the father's work of building the fence and the act of setting out the fire. . . . It is urged that the setting of the fire may have been necessary to enable them to build the fence. The argument is good; not so the petition. Had the petition alleged that it became necessary to remove rubbish or brush by burning it before the fence could be built, and for that purpose the sons built the fire and negligently allowed it to escape and spread upon the plaintiff's premises, etc., the missing link would probably have been supplied. . . . If the act complained of is the setting out of a fire, it is not a sufficient pleading of liability that the servant or child was engaged in the business of the master or parent; but it must appear that the setting of the fire was a part of that business, or resulted from some act done in the performance of such business. The act must be the result of doing the business of the master or parent,

and not an independent act done in a cessation, even momentary, of such business while engaged therein."

⁴ In *Fanton v. Burum* (1910) 26 S. D. 366, 34 L.R.A. (N.S.) 501, 128 N. W. 325, an action for the value of the services of the plaintiff's son, the defendant made a counterclaim, alleging that a fire set by the son on lands not belonging to his employer had spread to the employer's land and caused the damage complained of. A demurrer to the counterclaim was sustained on grounds thus stated: "It is not alleged that this act was done under the direction or with knowledge of the parent, nor that it was negligently done in the course of work the minor was performing for his employer. Under the facts as alleged in the counterclaim, the act of the minor was a mere wilful tort, committed during the time he was in the employment of defendant, and which happened to injure his employer. The wilful act bears no relation whatever to the employment, or the contract to pay for the minor's services, and creates no other or different liability on the part of the father than would have existed had the contract of employment never existed. If the defendant in this action could not maintain an action against the parent for this same act, then defendant cannot plead it by way of counterclaim. Upon this question there is no room for discussion."

⁵ *Kumba v. Gilham* (1899) 103 Wis. 312, 79 N. W. 325, 6 Am. Neg. Rep. 412. The court observed that "it is not sufficient that the child [at the time of committing a tort] was engaged in some undertaking beneficial to the father, or which he desired to have accomplished, unless such engagement be in accordance with directions or authority from the father."

instrumentality belonging to his father, even though such use may have been sanctioned by his father.⁶ But possibly this view would not be accepted in all jurisdictions.⁷ There is authority for the doctrine that where the evidence goes to show that the child was living as a member of his father's family, and using an instrumentality owned by his father in and about his father's business, he is presumed *prima facie* to have been acting in behalf of, and under the directions of, his father.⁸ That he was using the instrumentality for such a purpose may warrantably be inferred by a jury from the fact that it had been habitually used in the same manner with his father's expressed approval or without his objection.⁹

The effect of one decision is that any tortious acts which a minor, while performing services under a contract made with his father, may commit in the course of his employment, are imputable to the father, although the terms of the contract may be such that, if the parties concerned were strangers, it would be regarded as constituting the employee an independent contractor, for whose defaults the employer would not be liable.¹⁰ But the reasoning of the court is not altogether convincing, and the point may be regarded as still open to further discussion.

⁶ *File v. Unger* (1900) 27 Ont. App. Rep. 468 (son drove father's horse and buggy).

⁷ The general question of the evidential import of the fact that the tortfeasor was using an instrumentality of the defendant is discussed in § 2281, *post*.

⁸ Instructions to this effect were approved in *Gerhardt v. Swaty* (1883) 57 Wis. 37, 14 N. W. 851, and *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922.

⁹ *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922, a case in which the accident happened while the minor was driving his father's team to church, as he had frequently done before.

¹⁰ *Teagarden v. McLaughlin* (1882) 86 Ind. 476, 44 Am. Rep. 332. The grounds upon which the defendant was held liable for the negligence of his son, who had, while engaged in clearing a parcel of land, set fire to and burned property belonging to a tenant, were thus stated: "A son not of full age, who undertakes to do work for his father, cannot be regarded as an independent contractor in such a sense as

to shield the father, who employs him to do work, from injuries resulting from his negligence. It would be pushing the rule absolving an employer from liability for the negligence of an independent contractor to an unwarrantable extent, to extend it to the case of a father who contracts with his minor son. The reason upon which rests the rule holding employers not liable for the negligence of independent contractors fails where the contractor is the infant child of the employer. The reason supporting the rule is that the employer has no control over the acts of the contractor in the performance of the work, and ought not to be held responsible for that over which he has no authority or power. The right to control is the test by which to determine whether the relation of employer and contractor exists. 2 Thomp. Neg. 906. In legal contemplation, the minor child is within the control of the parent, and there can be no doubt that, as a general rule, the theory of the law corresponds with the actual fact. Not only does the principle we have referred to require that it should be held that a father cannot evade responsibility for

2271. Same subject. Liability under statutory provisions.—By § 3817 of the Georgia Code (1895) it is provided that “every person shall be liable for torts committed by . . . his child, . . . by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary.” This provision embodies the rule which prevails under the common law.¹

the negligent manner in which his minor son does an act which he commanded to be done, but there are other strong reasons leading to the same conclusion. If a man were permitted to escape liability upon the ground here relied on, it would be easy to perpetrate great wrongs, and leave the injured person to proceed against irresponsible persons under legal disabilities; and it would also open a way for unscrupulous persons to evade liability for torts committed in their behalf, by wrongfully shifting the responsibility to those subject to their commands.” An obvious criticism which may be made upon that part of the argument of the court which is based upon the circumstances of parental control is that the father's right to exercise that kind of control has never been viewed as a ground for affecting him with liability for the torts of his child. Indeed, the general rule as to his nonliability for such torts clearly implies that his right in this regard is, for the purposes of the rule, treated as an entirely negligible factor. It is submitted, therefore, that the court was not warranted in relying upon the parental control as an element which operated so as to change the nature of a contract the very essence of which was that it did not invest the employer with that control which is the fundamental characteristic of a contract of service. In this point of view, it would seem that, since that description of control was, *ex hypothesi*, abstracted from the case, the situation should have been assimilated to the ordinary one of the commission of a tort by a minor child who is not a servant of his father. Another objection which may be made to the reasoning of the court is that it ignores altogether the consideration that such a contract as the one in question should, under the authorities reviewed in § 647, *ante*, presumably be deemed to have produced, so far at least at its performance was concerned, an

emancipation of the minor. It might well be contended therefore, that, quite apart from its other incidents the contract operated so as to suspend the parental control in respect of any acts which the minor might do in pursuance of it. With regard to the other ground assigned for the decision, *viz.*, expediency, it may be suggested that the mischief which would result from a doctrine under which fathers would have the right to employ their minor children as independent contractors is probably much less serious than the court apprehended. It may be surmised that, as a general rule, considerations of self-interest would ordinarily suffice to deter fathers from seeking to evade a purely contingent liability for sporadic torts by arranging for the performance of work under conditions which, by depriving them of the right to exercise an effective supervising over details, would be apt to create a situation in which the youth and inexperience of the persons employed would constitute an ever-present source of potential damage to their employers.

¹ In *Chastain v. Johns* (1904) 120 Ga. 977, 66 L.R.A. 958, 48 S. E. 343, a complaint was held to be demurrable which alleged that defendant's minor son maliciously and negligently shot and killed plaintiff's live stock, but did not state that the defendant participated in, connived at, had any knowledge of the tort, or received any benefit from the commission thereof, or was negligent in any manner whatsoever. The court said: “It is apparent that, if the words, ‘by his command, or in the prosecution and within the scope of his business,’ in the section quoted, are to be applied only to the word ‘servant,’ the parent is liable for all torts of his minor child as claimed in the plaintiff's petition; otherwise if they extend to both ‘child’ and ‘servant.’ The punctuation of the section renders its meaning in this respect somewhat ambiguous; but when it is remembered

The same remark is applicable to the briefer enactment adopted in two other American states: "Neither parent nor child is answerable as such for the act of the other." N. D. Civ. Code, § 4107; S. D. Civ. Code, § 126.

By § 1125 of the Hawaiian Civ. Code, it is provided that a parent shall be personally responsible in damages for trespass or injury to the person or property of others committed by his child under majority, or by his commands; and by § 1288, that a parent "shall be liable for tortious acts committed by his child." The construction placed upon this section is that a parent can be held liable only in cases where legal responsibility is imputed to the child himself. In this point of view the parent's vicarious liability cannot be enforced if the child was so young when he committed the given tort that no action lies against him personally.²

2272. Liability of parents in civil-law jurisdictions.—a. Scotland.—Under the Scottish law, a father is not liable for the delict or quasi delict of his child.¹

b. France.—The old French law, as it stood prior to the enact-

that the section is not based on any special statutory enactment, but is merely a codification of the common law on the subject, this ambiguity is at once removed. . . . Between parent and child . . . the law has never recognized a merger of existence. At common law, as in Georgia to-day, the father was entitled to the services and earnings of his minor child, and as its natural guardian might control and manage property of which the child had become possessed; but he was liable for the child's torts only upon the idea that the child was his servant, and to the extent that he would be liable for the torts of any other servant that he might have. As is said in 1 Jaggard on Torts, 160, 'liability of a parent for the tort of a child is governed by the ordinary principles of liability of a principal for the acts of his agent, or a master for his servant. It does not arise out of a mere relation of parent and child.' Having in view these principles, we are clear that the meaning of the Civil Code, § 3817, is that the liability of a parent for the torts of his child, like his liability for those of his servant, arises only when the commission of the tort was 'by his com-

mand, or in the prosecution and within the scope of his business.'"

In *Vaughan v. McDaniel* (1884) 73 Ga. 97, an action against the defendant for the maiming and crippling of plaintiff's cow by a stone thrown by the defendant's minor son, who was, at the defendant's command, driving it from the latter's inclosure, it was assumed by the court that the father was liable for the act of his son as being done by him in the capacity of his servant. The judgment of the lower court, however, was reversed on the ground that the admissions of the son after the services were finished were not admissible.

² *Day v. Day* (1891) 8 Haw. 715 (defendant not liable where his child of two years old set out a fire which destroyed the plaintiff's property): *Victoria v. Palama* (1903) 15 Haw. 127 (defendant held not liable, where his son, a child of seven years, shot another child with a gun which had been carelessly left by defendant's servant on a porch, and which the child had found without the defendant's knowledge).

¹ Fraser, *Parent & Child*, p. 99; Green, *Enc. of Scots Law*, title "Parent & Child."

ment of the Code Napoleon, is thus stated in Pothier on Obligations (Evans's ed. vol. 1, p. 64):

"Not only is the person who has committed the injury, or been guilty of the negligence, obliged to repair the damage which it has occasioned; those who have any person under their authority, such as fathers, mothers, tutors, preceptors, are subject to this obligation in respect of the acts of those who are under them, when committed in their presence, and generally when they could prevent such acts, and have not done so; but if they could not prevent it, then they are not liable, . . . even when the act is committed in their sight and with their knowledge."

See also the quotation from the same work in § 2267, *b*, *ante*. In the passage following the one which is there inserted, Pothier remarks (p. 454):

"If a child has had a quarrel with his companion and wounded him with a sword, although not in the presence of his father, the father may be answerable for the injury, as having had it in his power to prevent by not allowing his son to wear a sword, especially if he was naturally quarrelsome."²

"What we have said of fathers is equally applicable to mothers, when, after the death of their husbands, they have their children under their power; and also to masters, tutors, and to all those who have children under their care."

By art. 1384, of the Code Napoleon it is provided: "The father, and the mother after the decease of her husband, are responsible for the injury caused by their children, being minors and residing with them."

Tutors and artisans for the injury caused by their pupils and apprentices during the period in which they are under their superintendence.

The responsibility above mentioned is incurred, unless the father and mother, tutors, and artisans can prove that they were not able to prevent the act which gives rise to such responsibility.

c. Louisiana.—By the Civil Code, art. 2318 (2297), it is declared that "the father, or, after his decease, the mother, is responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons."

In the earlier cases decided with reference to this provision, the liability of the parent was treated as being predicable irrespective of whether he was or was not personally present at the time when the given injury was inflicted.³ The doctrine thus adopted was

² Compare the common-law cases cited in § 2269, notes 8, 10, *ante*.

³ In *Mullins v. Blaise* (1885) 37 La. Ann. 92, while the defendant's family were discharging fireworks from the balcony of his house, one of his children,

six years of age, discharged one of the pieces so carelessly as to strike and destroy the eye of a child who, with several others, was standing in the street below the house to watch the display. The defendant was held liable for the

apparently based upon the consideration that the provision does not, like the corresponding enactments in the Codes of France and Quebec, restrict the parent's liability to cases in which he was in a position to prevent his child from committing the tort complained of.⁴ But the effect of a recent decision is that a qualifying clause of this tenor is to be read into the provision.⁵

It has been held that the liability which is imposed in respect of the torts of a child "placed under the care of other persons" is imputable only in cases where the transfer of the child is with the consent of the parent, and, by consequence, that where the child is removed from his control by the act of the law, his liability is suspended as long as his parental authority remains in abeyance.⁶

d. Quebec.—Prior to the promulgation of the Civil Code in 1866, the law doctrine regarding the liability of a parent for the torts of

injury, although he was absent from the house when the accident occurred, and the fault might not be imputable to the child itself on account of its tender years and lack of discernment.

See also *Carmouche v. Bouis* (1851) 6 La. Ann. 95, 54 Am. Dec. 558 (defendant held liable where son, who had been directed by the former to guard his plantation against trespassing negroes, with instructions to shoot only to frighten them, carelessly shot and killed a negro); *Marionneaux v. Brugier* (1883) 35 La. Ann. 13 (defendant held liable for the negligent use of a gun on a city street, by his child thirteen years old).

⁴ The omission of such a clause was referred to in *Mullins v. Blaise*, note 3 *supra*.

⁵ In *Miller v. Meche* (1903) 111 La. 143, 35 So. 491, where the defendant's minor son had shot the plaintiff, the evidence showed that bad blood had existed between the minor and the plaintiff for some time, that the latter was the aggressor in the affray in the course of which the injury in question was inflicted, and that the defendant was not present during the affray. The nonliability of the defendant was affirmed on grounds thus stated by the court: "It must be shown, when the father or tutor was absent, and when he had naught to do with the trouble, either directly or indirectly, that, owing to a want of discipline in the family, or to the negligence in not exercis-

ing needful parental influence and authority, he is liable." The statement of a commentator, Fuzier-Herman, that, under this provision of the Code, "the father is not liable if he proves that, owing to his absence, he could not prevent the deed," was declared to be correct.

⁶ *Coats v. Roberts* (1883) 35 La. Ann. 891 (the defendant not liable where his minor son, who had been summoned and was serving as a member of a *posse comitatus*, negligently shot another member of it).

But the theory adopted in this case seems to be essentially inconsistent with the doctrine applied in *Cleveland v. Mayo* (1841) 19 La. 414, an action against husband and wife to recover damages for injuries received at the hands of the wife's minor brother, who was staying with her during her husband's absence. It was argued in behalf of the defendants that, under the Code, the action should have been against the father, he having his recourse against the defendants. This contention was rejected on the general ground that a parent was not liable for the torts of his child, where the latter was not under the parent's control at the time of committing the tort, and the parent did not assent to or encourage his child in its wrongdoing. The phrase referred to in the text was not discussed by the court, though it seems to be decisive in favor of the defendant's position.

his minor children was the same as that which prevailed under the old French law before the Code Napoleon came into force. See subsec. *b*, *supra*.⁷

By art. 1054 of the Civil Code, it is provided: "The father, or after his decease, the mother, is responsible for the damage caused by their minor children, but only where they fail to establish that they were unable to prevent the act which has caused the damage."⁸

By referring to subsec. *b*, *supra*, it will be seen that this provision differs from the statement of Pothier there quoted, in that it contains no clause which restricts the liability of a parent to torts committed in his presence; and from the Code Napoleon, in that it contains no clause which restricts that liability to the torts of children living with him.

If the evidence shows that the parent participated in the act complained of, he is, of course, liable, not merely by virtue of this provision, but also under the general principle, *culpa tenet auctores suos*.⁹

⁷In *Hislop v. Emerick* (1857) 9 Lower Can. Rep. (Dec. Des Tribunaux) 203, 7 Rap. Jud. Quebec, 192, it was held that an action was not maintainable against a father for a seduction of a woman by his minor son.

⁸In *Lussier v. Chayeth* (1886) 30 Lower Can. Jur. 166, the defendant was held to be liable for the act of his son in carelessly frightening a horse which the plaintiff was riding, so that it ran away and injured him.

In *Thibault v. Blouin* (1899) Rap. Jud. Quebec 16 C. S. 98, an action for an assault committed by the defendant's minor son, the evidence showed that the defendant, in the presence of his minor son, related the details of an altercation which had occurred between the plaintiff and the defendant; that, upon the son's saying he wished he had been present, as he would have thrown the plaintiff from the wagon in which it had occurred, the defendant replied he had never had a fight, and, as no

harm had come to him, he wished the matter to rest; but that the son, a few days later, lay in wait for the plaintiff and provoked him into a fight, in which the son inflicted a serious injury upon the plaintiff. Held, that the defendant could not be held liable, since it appeared that he had reared his son with care and Christian training, and had done his best to foresee and prevent the act. The court was of opinion that, under these circumstances, the exception clause of the Code relating to the inability of the parent to prevent the damage protected the defendant.

⁹In *Lortie v. Claude* (1892) Rap. Jud. Quebec 2 C. S. 369, 16 L. N. 160, a defendant who knew that his children were planning and abetting other persons in the hanging and burning of the plaintiff in effigy, and who had not only not interfered to restrain them, but actually encouraged them, was held to be responsible for their acts.

CHAPTER XCVIII.

GENERAL DISCUSSION OF THE CIRCUMSTANCES UNDER WHICH A MASTER IS DEEMED TO BE LIABLE FOR THE TORTS OF HIS SERVANTS.

2273. Introductory statement.

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2276. Generally.

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2280. Wrongful act wilfully done.

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2286. Wrongful act done for the benefit of the master.

2287. Wrongful act not done for the benefit of the master.

2288. Wrongful act done with a personal object, or from a personal motive.

2289. Wrongful act done for the benefit of a third person.

2289a. Wrongful act done for the purpose of vindicating public justice.

2273. Introductory statement.—In § 2226, *ante*, mention has been made of the various phrases used by the courts for the purpose of describing the classes of torts which are imputable to the master under

the rule, *Respondeat superior*. Among the elements which have a bearing upon the question whether a given act is assignable to any of the categories designated by those phrases, the most important is the nature of the functions which the servant was hired to perform. It is this consideration which has determined the arrangement of the material in the following chapters. But, before entering upon an examination of the authorities from this standpoint, it will be proper to advert to the general elements which operate independently of the character of the servant's work. As the index of cases will enable the reader to turn at once to the sections which contain a statement of the facts involved in the illustrative decisions to be cited in the course of this discussion, those facts will be mentioned only to such an extent as is deemed necessary or advisable for the purpose of elucidating the principles considered.

A. FUNDAMENTAL QUESTIONS UPON WHICH THE MASTER'S LIABILITY DEPENDS.

2274. Generally.—The fundamental questions to be determined in every case which involves the vicarious or constructive liability of a master for the tort of a servant are these:

(1) Was the function which the servant was discharging at the time when the given tort was committed a function which was within the range of the contract of hiring, or which had been allotted to him after he commenced the performance of the contract? If this question is answered in the negative, the master's nonliability is obviously a necessary inference,¹ even though the act from which the plaintiff's injury resulted was done with a view to benefiting the mas-

¹In *M'Kenzie v. M'Leod* (1834) 10 Bing. 385, Alderson, J., made the following remarks: "The question is whether the finding of the jury was correct, under the direction of the chief justice that the defendant was not liable unless the injury was occasioned by something done within the scope of the servant's duty. Now the words, 'the servant's duty' may convey several meanings. They may mean cases where the duty is defined by precise orders; or where something is directed to be done, and the manner of doing it is left wholly in the discretion of the servant; or where the manner of doing it is only partly left in his discretion. In the first the act of the servant is the act of the mas-

ter; in the second, the judgment exercised may be considered the judgment of the master, and the master must be responsible. But where he has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice or common sense, the master can be held responsible."

"I apprehend there is no difficulty in a general limitation of the extent of the employment of a servant, by agreement or command, so as to prevent him from doing acts of a particular character. It is true that the prohibition of specific acts within the scope of a general employment on a particular occasion only, or of a particular mode of doing them,

ter.² The test with reference to which the right of action in this point of view is determined is, What was the servant employed to do?³

may not exempt the employer from liability. But prohibiting their being ever done must certainly curtail the extent of the employment." *Haack v. Fearing* (1867) 4 Abb. Pr. N. S. 297.

"It is essential that the damage should arise from the way and manner of doing the master's work." Lord Glenlee in *Baird v. Hamilton* (1826) 4 Sc. Sess. Cas. 1st series, 797, 1 Fac. 742.

See also the cases cited in § 2276, note 1, *post*, and *Higgins v. Chesapeake & D. Canal Co.* (1842) 3 Harr. (Del.) 411 (question for jury to determine whether a servant of a canal company had any duties to perform in connection with a sluice, the closing of which by him had aggravated the damages caused to the plaintiff's land by the water which had escaped through a breach in the towpath); *Fraser v. Hollenberg* (1888) 30 Ill. App. 163 (party contracting to furnish a competent millwright to set up silver mill and machinery not liable for damages caused by the deficient size of a flume built by him, that structure not being included in the contract); *Biederman v. Brown* (1893) 49 Ill. App. 483 (master not liable where engineers engaged to run a steamer attempted at the request of a passenger to run an aerial railway at a pleasure resort which was at the time closed); *Reaume v. Newcomb* (1900) 124 Mich. 137, 82 N. W. 806 (master not liable where a servant employed to drive a delivery wagon was guilty of negligence, while riding one of the horses, for the purpose of exercising it, at the request of the livery-stable keeper to whose charge they were in the ordinary course returned after the wagon had made one of its rounds).

For cases in which the liability of employers to servants for injuries caused by the acts of co-servants who under the circumstance represented the employers was denied on the ground that the acts in question had no relation to the work for which the wrongdoers were employed, see *Smith v. Peach* (1909) 200 Mass. 504, 86 N. E. 908 (§ 1466, *ante*); *Malsky v. Schumacher & Ettlinger* (1894) 7 Misc. 8, 27 N. Y. Supp. 331 (§ 1466, *ante*).

² See § 2286, note 2, *post*.

³ Lord Justice Lindley in *Gillson v.*

London & India Docks Joint Committee (1892) 8 Times L. R. (C. A.) 702 (dock company not liable, where a servant hired to keep the rails clear on which a crane was moved to and fro unlashed a gangway ladder without warning a stevedore's laborer).

It will be useful to refer in this connection to some criminal cases involving the liability of servants to be convicted for embezzlement.

In *Rex v. Beechey* (1817) Russ. & R. C. C. 319, a clerk intrusted to receive money at home from out-door collectors received it abroad from out-door customers. Held, that such a receipt of money might be considered "by virtue of his employment," though it was beyond the limits to which he was authorized to receive money for his employers.

In *Rex v. Smith* (1823) Russ. & R. C. C. 519, it was laid down that, if a servant generally employed by his master to receive sums of one description and at one place only is employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum is to be considered as received by him "by virtue of his employment." He fills the character of servant; and it is by being employed as servant that he receives the money. The transaction is out of the course of his ordinary employment, but not out of the course of his employment.

In *Rex v. Hawtin* (1836) 7 Car. & P. 281, A. owed £5 to B., and A. paid it to C., a servant of B., who was not authorized by B. to receive money for him, though A. supposed that he was so. C. never accounted to B. for the money. Held, that this was neither embezzlement nor larceny. Alderson, B., cited an unreported case, *Rex v. Crawley*. There a servant not authorized to receive money was standing near a desk in his master's counting house, and a person who owed money to the master paid his servant, supposing that he was authorized to receive money, and the servant never accounted for the money to his master. Held, that this was not an embezzlement.

In *Reg. v. Hastie* (1863) 9 Cox, C. C. 264, there was evidence that the mortgages of the members of a benefit society were always made to the trus-

The special difficulty incident to the application of this test is that of distinguishing between torts which are to be regarded as being entirely outside the domain of the servant's appointed functions, and torts which are to be regarded as merely involving an irregular exercise of those functions.⁴

(2) If the function which the servant was discharging at the time when the wrongful act complained of was done was a function of the description specified in the preceding paragraph, was the act of such a character as to fall within the category designated by the various phrases tabulated in § 2226, *ante*; or was it done solely with a view to attaining some personal object or to subserving the interests of some third party?

With reference to the former branch of this alternative, it is sufficient for the purposes of this general discussion to state that, in order to affect a master with liability, something more must be proved than that the wrongful act was in some way connected with the servant's

tees, but that the redemption money was always paid, in the first instance, to the secretary, the prisoner. Held, that the jury were warranted in finding that the money was received "by virtue of his employment," and for the trustees, his masters.

In *People v. Sherman* (1833) 10 Wend. 299, 25 Am. Dec. 563, it was held that a stage driver intrusted by his employers to carry money from one place to another was a servant who had obtained possession of property "by virtue of his employment." The court said: "The care and custody of packages of every description are a part of the ordinary duty of servants of this description, although it is not their principal business; and it appears to me that it would defeat one very important object of the act to restrict its application to clerks or servants whose principal or ordinary employment was the receiving and taking care of the money, goods, etc., of their employers."

In *State v. Costin* (1883) 89 N. C. 511, 4 Am. Crim. Rep. 169, one employed by a merchant "to sweep out the store, and wait about the store, but not as 'clerk,'" was authorized by the merchant to take a lot of shoes, and sell them during his visit to a neighboring town. This he did, and converted the money to his own use. Held, that he was a "servant" who had received the goods "by virtue of his employment."

In *Reg. v. Stewart* (1861; Victoria) 1 W. & W. (L.) 313, an embezzlement case, the question was raised whether the prisoner, having been appointed for the purpose of discharging one set of duties, not including the receipt or collection of moneys, could be said, in consequence of a practice having sprung up by which he used to receive and collect moneys, to have received them by virtue of his employment. Held, that, as the prisoner had submitted to the practice, he could not now be allowed to gainsay it, and that the question should therefore be answered in favor of the Crown.

In *Reg. v. O'Ferrall* (1875) 1 Vict. L. R. (L.) 81, it was held that, although a person appointed to the position of licensing clerk in the government service had originally no authority to receive the money for the licenses, yet if, while he was acting as such clerk, he got instructions to take money for the licenses, and during several years did take money and account for it, that course of proceeding was sufficient to make him responsible for the receipt of the money as received "by virtue of his employment."

⁴Many cases illustrating this statement are reviewed in the following chapters. Reference may be made especially to those cited in chapter (Cvi.) which relates to Wrongful Arrest, etc.

authorized functions,⁵ or that he committed it at a time when he was occupied with the discharge of those functions.⁶ A master, as it is

⁵ "I do not think that it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all." Lord Loreburn, L. C., in *Glasgow v. Lorimer* [1911] A. C. 209, 215, 21 Ann. Cas. 341 (defamation).

⁶ Of course we do not say that a master is responsible for everything which a servant does "in the course of his employment." Martin, B., in *Seymour v. Greenwood* (1861) 6 Hurlst. & N. 359. It will be observed that the meaning of the words, "in the course of his employment" as they are here used, is, "while the servant was engaged in the performance of his appointed work." This manifestly is not the ordinary notation of the phrase.

"Was this act done for the purpose, or as a means of doing what . . . [the servant] was employed to do? If not, then in respect to that act he was not in the course of the . . . [master's] business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master." *Bowler v. O'Connell* (1894) 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498.

"It seems to be clear enough, from the cases in this state, that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction." *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 136, 21 Am. Rep. 597.

"For a wilful . . . trespass by an employee outside the line of his duty under his employment, it is settled that the employer is not responsible, even though it be committed while the servant is in the exercise of his employment." *McFarlan v. Pennsylvania R.*

Co. (1901) 199 Pa. 408, 49 Atl. 270, quoted in *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 30 L.R.A. (N. S.) 1049, 77 Atl. 1011.

"The test is not whether the act was done while . . . [the servant] was on duty or engaged in his duties; but was it done within the scope of his employment, and in the prosecution and furtherance of the business which was given him to do?" *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A. (N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375, approving the refusal of certain requested instructions which all embodied the notion that if the given tort was committed by the servant while he was engaged in the performance of his duties, the defendant was, in any event, responsible.

"The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts which he was put in the master's place to do, and was committed for the master's purposes." Pollock, Torts, Webb's Am. ed. p. 388, quoted in *Bradford v. Hanover F. Ins. Co.* (1900) 49 L.R.A. 530, 43 C. C. A. 310, 102 Fed. 48.

"A negligent act of a servant for which the master will be responsible must not only be an act done while the servant is engaged in the performance of his service, but also must be an act which pertains to the duties of the servant's employment." *Pittsburgh, C. C. & St. L. R. Co. v. Adams* (1900) 25 Ind. App. 164, 171, 56 N. E. 101.

"In all the affairs of life, men are constantly obliged to act by others; but no one could venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such persons might possibly commit during the period of such employment." *Stephenson v. Southern P. Co.* (1892) 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234, quoting 2 Thomp. Neg. 885.

"A master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business.

sometimes expressed, "does not warrant a servant's good conduct in matters outside the scope of his agency."⁷ But it is not an easy matter to ascertain from a collation of the cases as they stand, where the boundary line is to be drawn between the domain appropriate for the operation of these principles, and for the operation of the doc-

It does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment." *Morier v. St. Paul, M. & M. R. Co.* (1884) 31 Minn. 351, 352, 47 Am. Rep. 793, 17 N. W. 952.

Special reference may also be made to the cases which relate to the expulsion of trespassers from railway trains in an improper manner. In such cases the right of recovery is determined not with reference to the circumstance almost invariably present, *viz.*, that the object of the expulsion was the protection of the railway company's interests, but with reference to the question whether the expulsion was an act within the scope of the given servant's employment. See §§ 2352-2356, *post*.

In *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133, the court made the following remarks: "Stress is laid by counsel for plaintiff upon the construction of the phrase 'in the course of his employment,' and it is contended that the acts of the agents on the occasion in question bring the case within the proper understanding and definition of that expression. This phrase or expression is found in many of the books; but it has no particular magic, and does not enlarge the rule of liability in such cases. In contemplation of law, it means simply 'while engaged in the service of the master,' and nothing more. It is not used as synonymous with 'during the period covered by the employment,' but rather as expressive of 'within the scope of his employment,' or

during the time when the servant is engaged in the performance of the master's work. . . . The phrase must be limited in sense and meaning to acts committed by the servant while engaged generally in the master's work."

In *Electric Power Co. v. Metropolitan Teleph. & Teleg. Co.* (1894) 75 Hun, 68, 27 N. Y. Supp. 93 (conversion), the connotation of the phrase, "done within the scope of the business with which the servant is intrusted," seems to have been regarded as being wider than that of the phrase, "done in the scope of the servant's employment." If this was actually the position of the court, it is not, so far as the present writer is aware, countenanced by any other authority.

In *Palos Coal & Coke Co. v. Benson* (1905) 145 Ala. 664, 39 So. 727, it was declared that the "act must be not only within the scope of his employment," but also "committed in the accomplishment of objects within the line of his duties, or in and about the business in duties assigned to him by his employer." The theory propounded in this passage, that it is not sufficient to show that the servant's tort was "within the scope of his employment," is plainly inconsistent with the view generally accepted, unless the court intended to employ the phrase in a sense which, having regard to ordinary usage, is inaccurate, *viz.*, "engaged in performing services." Compare the expression "course of employment," as used by Martin, B., in the case cited at the beginning of this note. The language of the Alabama court is an expansion of the phraseology in an earlier case—"within the scope of their employment, and in the accomplishment of objects within the line of their duties." *Mobile & O. R. Co. v. Seales* (1893) 100 Ala. 368, 13 So. 917. But this statement seems to be merely an instance of a not uncommon type of tautology.

⁷*Everingham v. Chicago B. & Q. R. Co.* (1910) 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912 C, 848.

trine under which liability has been imputed to a master in respect of certain torts which had no immediate relation to the servant's contractual functions, and were merely in a broad, not to say loose, sense incidental to them.⁸ But the real scope of this doctrine cannot be understood until it has been subjected to further discussion. Its latent possibilities in regard to the enlargement of a master's responsibility would seem to be very considerable.

The latter branch of the alternative propounded above manifestly points to circumstances in which, having regard to the general principle just stated, the inference of a vicarious liability is necessarily excluded by the consideration that *quoad* the supposed act, the relationship of master and servant must be deemed to have been suspended.⁹ The cases involving this situation are again referred to in a subsequent part of this chapter. See §§ 2288-2289a, *post*.

It has been laid down that one test by which to determine whether a given tort was within the scope of the servant's employment is furnished by the answer to the question, Could the master hold him responsible for his failure to perform the duty in respect of which he was in default?¹⁰ that the master's liability extends to any act which the servant could have justified to him;¹¹ and that an act which the

⁸ This doctrine was the *ratio decidendi* in two cases where damage resulted from the negligence of servants with regard to the use of water in lavatories. *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, 50 L. J. Q. B. N. S. 231, 44 L. T. N. S. 153, 29 Week. Rep. 506, 45 J. P. 603; *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518. See § 2316, notes 1 and 2, *post*.

In *McCann v. Consolidated Traction Co.* (1896) 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 388, where a horse took fright at a coat which a servant hung at the side of a street railway sprinkler, the company was held liable on the ground that his act was one incidental to his employment.

Apparently it was cases of this class that Lopes, L. J., had in mind when he remarked in *Gillson v. London & India Docks Joint Committee* (1892) 8 Times L. R. (C. A.) 702, that he could imagine a case where, although the servant was not strictly employed to do a particular act, yet that act was reasonably necessary for and incidental to the purpose for which he was employed, so as to

make it an act within the scope of his employment.

⁹ "If the servant in doing any act breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master." Collins, M. R., in *Sanderson v. Collins* [1904] 1 K. B. 628, 632.

"If the servant steps aside from his master's business, for how short a time soever, to commit wrong not connected with such business, the relation of master and servant will be for the time suspended." *Stephenson v. Southern P. Co.* (1892) 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234, quoting 2 Thomp. Neg. 886. Almost identical phraseology is used in *Morier v. St. Paul, M. & M. R. Co.* (1884) 31 Minn. 351, 353, 47 Am. Rep. 793, 17 N. W. 952.

¹⁰ *Aldrich v. Boston & W. R. Co.* (1868) 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74.

¹¹ In *Harlow v. Humiston* (1826) 6 Cow. 189, where the injury was caused by the trunk of a tree laid across a highway by a servant, the court said: "The servant in this case placed the

evidence shows to have been done by the tort-feasor within the scope of his employment is imputable to his master, irrespective of whether the act was or was not of such a description as entitles the master to claim damages from the servant.¹²

2275. Functions of court and jury.—As the answer to the questions specified in the preceding section depends, in any given instance, upon the probative significance of the evidence offered in each particular instance, the master's liability is an issue to be decided by the jury or other trier of facts whenever there is a conflict of testimony regarding those facts, or more than one inference may reasonably be drawn from them. All the cases reviewed in this and the following chapters proceed upon this doctrine. Some of those in which it has been expressly affirmed are cited in the subjoined note.¹ On the other hand, where the case is a clear one, that is to say, where only a single con-

wood where the defendant below, himself, had been accustomed to place his wood for near forty years. This was sufficient to justify the servant to the defendant below; and in my judgment sufficient to render the latter responsible if the act itself was reprehensible." This statement was approved in *Baker v. Kinsey* (1869) 38 Cal. 631, 99 Am. Dec. 438.

¹² In *Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392, it was conceded that the master's "liability exists notwithstanding the fact that the servant's negligent act is contrary to the master's direction, and, as between the two, a violation of the duty which the latter owes to the former."

In *Star Brewery Co. v. Hauck* (1906) 222 Ill. 348, 113 Am. St. Rep. 420, 78 N. E. 827, affirming (1906) 126 Ill. App. 608, the court, in commenting upon an instruction held to have been properly refused, said: "Whether the servant could be held liable to the master would depend upon whether he was acting in accordance with his master's instructions. If in driving at a rate of speed in excess of that allowed by the ordinance, or in utter disregard of the safety of persons on the street, he was obeying the master's directions, he could not be held liable to the master. If the rule is as stated in the proposed instruction, it would have required determining the question whether the driver was liable to appellant, and this would involve the determination of an issue between different parties from those to

the suit on trial. The law makes the master liable to third persons for the negligent conduct of the servant while acting within the line of his duty and in obedience to the master's authority, and this is independent of whether there is any liability of the servant to the master."

"Reasonable care and fidelity in his employment is a part of the servant's engagement; and every act of negligence on his part is in some sense a violation of his duty to the master and a deviation from his authority. . . . Nevertheless while so deviating and disregarding their instructions, they are still doing their employer's work, though not according to their instructions." *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

¹ *Croft v. Alison* (1821) 4 Barn. & Ald. 590, 23 Revised Rep. 407; *M'Kenzie v. M'Leod* (1834) 10 Bing. 385, 4 Moore & S. 249, 3 L. J. C. P. N. S. 79; *Goff v. Great Northern R. Co.* (1861) 3 El. & El. 672, 30 L. J. Q. B. N. S. 148, 7 Jur. N. S. 286, 3 L. T. N. S. 850; *Seymour v. Greenwood* (1861) 7 Hurlst. & N. (Exch. Ch.) 358, 30 L. J. Exch. N. S. 189, 9 Week. Rep. 518; *Limnux v. London General Omnibus Co.* (1862) 1 Hurlst. & C. (Exch. Ch.) 526, 9 Jur. N. S. 333, 11 Week. Rep. 149, 32 L. J. Exch. N. S. 34, 7 L. T. N. S. 641, 17 Eng. Rul. Cas. 258; *Whatman v. Pearson* (1868) L. C. 3 C. P. 422, 37 L. J. C. P. N. S. 156, 18 L. T. N. S. 290, 16 Week. Rep. 649; *Bayley v. Manchester,*

- S. & L. R. Co.* (1873) L. R. 8 C. P. (Exch. Ch.) 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115; *Ward v. London General Omnibus Co.* (1873) 42 L. J. C. P. N. S. (Exch. Ch.) 265, 28 L. T. N. S. 850, affirming (1873) 27 L. T. N. S. 761, 21 Week. Rep. 358; *Burns v. Poulson* (1873) L. R. 8 C. P. 563, 42 L. J. C. P. N. S. 302, 29 L. T. N. S. 329, 22 Week. Rep. 20; *Baker v. Snell* [1908] 2 K. B. (C. A.) 825, 2 B. R. C. 1, 24 Times L. R. 811, 77 L. J. K. B. N. S. 1090, 52 Sol. Jo. 681, affirming [1908] 2 K. B. 352, 24 Times L. R. 599, 52 Sol. Jo. 483; *Washington Gaslight Co. v. Lansden* (1898) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296; *Scipio v. Pioneer Min. & Mfg. Co.* (1910) 166 Ala. 666, 52 So. 43; *St. Louis, I. M. & S. R. Co. v. Pell* (1908) 89 Ark. 87, 115 S. W. 957; *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 400, 52 Am. Rep. 675, 1 N. E. 849; *Deck v. Baltimore & O. R. Co.* (1905) 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650; *Baltimore, C. & A. R. Co. v. Twilley* (1907) 106 Md. 445, 67 Atl. 265; *Philadelphia, B. & W. R. Co. v. Stumpo* (1910) 112 Md. 571, 77 Atl. 266; *Schulte v. Holliday* (1884) 54 Mich. 73, 19 N. W. 752; *Barmore v. Vicksburg, S. & P. R. Co.* (1904) 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594; *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597; *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep. 141; *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170; *Peck v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 587; *Hoffman v. New York C. & H. R. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 337; *Collins v. Butler* (1904) 179 N. Y. 160, 71 N. E. 746; *Magar v. Hammond* (1902) 171 N. Y. 377, 59 L.R.A. 315, 64 N. E. 150; second appeal (1906) 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474; *Hussey v. Norfolk Southern R. Co.* (1887) 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327; *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375; *Nelson Business College Co. v. Lloyd* (1899) 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 54 N. E. 471; *Lima R. Co. v. Little* (1902) 67 Ohio St. 91, 65 N. E. 861; *Guinney v. Hand* (1893) 153 Pa. 404, 26 Atl. 20; (syllabus) *Madara v. Shamokin & M. C. Electric R. Co.* (1899) 192 Pa. 542, 43 Atl. 995; *Simmons v. Pennsylvania R. Co.* (1901) 199 Pa. 232, 48 Atl. 1070; *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 891; *Moon v. Matthews* (1910) 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; *Marcus v. Gimbel Bros.* (1911) 231 Pa. 200, 80 Atl. 75; *Moore v. Columbia & G. R. Co.* (1892) 38 S. C. 1, 16 S. E. 781; *Polatty v. Charleston & W. C. R. Co.* (1903) 67 S. C. 391, 100 Am. St. Rep. 750, 45 S. E. 932; *Lovejoy v. Campbell* (1902) 16 S. D. 231, 92 N. W. 24; *Forsythe v. Canadian P. R. Co.* (1905) 10 Ont. L. Rep. (C. A.) 73.
- "Whether, then, the act of a servant for which it is sought in a particular case to hold the master responsible was done in the execution of the master's business, within the scope of the employment, or not, must, from the nature of things in most cases, be a question of fact, to be determined as such by the jury or other trier, because no general rule of law has been or probably can be laid down, the application of which will determine the matter in all cases." *Ritchie v. Waller* (1893) 63 Conn. 155, 161, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29.
- "It is obviously a question of fact for the determination of a jury whether, at the time of the particular act or omission by the servant which caused the injury, the plaintiff's servant was acting within the scope of his employment, or acting outside of it to effect some purpose of his own." 1 Thomp. Neg. §§ 615, 616, quoted in *Sharp v. Erie R. Co.* (1906) 184 N. Y. 100, 105, 76 N. E. 923, 6 Ann. Cas. 250.
- The case is not to be withdrawn from the jury merely because plaintiff testifies that he thought the servant's act was wilful and malicious. The case is to be determined upon the facts, and not according to the opinions of witnesses. *Baltimore Consol. R. Co. v. Pierce* (—) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940.
- The following statement, made in a case where a brakeman kicked a trespasser from a moving freight train, would presumably not be approved in the majority of jurisdictions: "Whether or not what the brakeman did was in the scope of his authority or in the line of his employment was a question

clusion can warrantably be deduced from the testimony, the right of recovery may and should be determined by the court.²

of law, or of mixed law and fact, to be determined by the court alone from the proof, if indeed that were required, and from common observation and experience, and from knowledge of the nature of the business and the daily practice which is obtained in its exercise." *Smith v. Louisville & N. R. Co.* (1893) 95 Ky. 11, 22 L.R.A. 72, 23 S. W. 652.

² *Hatch v. London & N. W. R. Co.* (1898) 15 Times L. R. (C. A.) 246; *Beard v. London General Omnibus Co.* [1900] 2 Q. B. (C. A.) 530, 83 L. T. N. S. 362, 69 L. J. Q. B. N. S. 895, 48 Week. Rep. 658, 16 Times L. R. 499; *Wilson v. Owens* (1885) Ir. L. R. 16 C. L. (Exch. Div.) 225; *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940; *Smith v. Spitz* (1892) 156 Mass. 319, 31 N. E. 5; *Simons v. Monier* (1859) 29 Barb. 419; *Miller v. Wanamaker* (1908; App. Term) 111 N. Y. Supp. 786; *Staples v. Schmid* (1893) 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193, and the cases cited *passim* in the ensuing chapters.

"If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide." *Washington Gaslight Co. v. Lansden* (1898) 172 U. S. 534, 544, 545, 43 L. ed. 543, 547, 548, 19 Sup. Ct. Rep. 296.

"Where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized. And again, the absence of authority may be so clear that it becomes the duty of the judge to determine the matter." *Sawyer v. Norfolk & S. R. Co.* (1906) 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440.

"Of course, if the facts and the inferences to be drawn from them are not in dispute, the court may determine the question as a matter of law." In order to justify the submission of the case to the jury, "the evidence must show at least circumstances from which a jury

can reasonably infer such facts before the employer can be held answerable for the consequences. When it discloses circumstances which admit of no other inference than that the act complained of was both wilful and separate from duty, the individual committing the trespass alone is responsible." *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 624, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011.

"For a wilful act done by a servant, not within the line of his employment, and about which there is not a doubtful question of fact as to whether the act of the servant was or was not within the line of his duty, the court should control the case, and nonsuit, or direct a verdict for the defendant. Whether there be evidence which raises a question to go to the jury, as to whether the act of the servant was within the line of his duty and employment, is for the court. If the court so determines, then it is a question for the jury whether, under the proof, the act was or was not within the line of the servant's duty or employment. Where it appears, when the plaintiff rests his case, that the act of the servant was a wilful one, and was not, expressly or impliedly, within the line of the servant's duty or employment, there should be a nonsuit." *Holler v. Ross* (1902) 68 N. J. L. 324, 59 L.R.A. 943, 946, 96 Am. St. Rep. 546, 53 Atl. 472.

In order to sustain a nonsuit "the evidence must have been so conclusive that the jury could not have found a verdict for the plaintiff. . . . When the defense is that the wrongful act was not within the general scope of the servant's employment, and so not within the express or implied authorization of the master, it is for the court to pass upon the competency of evidence, and for the jury to give effect to it." *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543.

In *Robards v. P. Bannan Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, it was laid down that "the law . . . will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be

One of the consequences of the doctrine that the quality of the tort complained of is ordinarily a matter for the jury to determine is that a witness cannot be asked whether the tort-feasor had ever previously done acts of a character similar to the one alleged, while performing duties within the scope of his employment.³

It may in some instances be justifiable to nonsuit the plaintiff, or direct a verdict against him, upon facts admitted by his pleadings, or conceded by his counsel in the opening statement.⁴ But this is a power which is very seldom exercised.

resolved against the master, upon the ground that he set in motion the servant who committed the wrong." The precise import of this statement is not quite clear. If it means simply that a court should not interfere with a verdict, where the facts themselves, or the inferences to be drawn from them, are doubtful, it is consistent with the language used in other jurisdictions. If it is intended as an assertion of the doctrine that where this is the evidential situation, a court may hold the balance and decide disputable points, it is manifestly not sustained by the authorities.

In *Barmore v. Vicksburg, S. & P. R. Co.* (1905) 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594, it is laid down that the master's liability is a question for the court, where there is "no conflict in the facts." But this statement is clearly inexact, as taking no account of the cases in which more than one inference may be drawn from the facts.

A special finding as to the existence of a rule of the company relating to the duties of brakemen is the statement of a fact upon which the court could determine, as a question of law, whether authority had been given the brakeman to eject a trespasser on the train, and such determination would not infringe any prerogative of the jury. In such case, if the finding had been that the brakeman had or had not authority to eject the trespasser, such finding would have stated the limit of the issue, both as a question of fact and one of law, and would be objectionable. *Lake Shore & M. S. R. Co. v. Peterson* (1895) 144 Ind. 214, 42 N. E. 480.

³ *Philadelphia, B. & W. R. Co. v. Crawford* (1910) 112 Md. 508, 515, 516, 77 Atl. 278. The court said that the error in the admission of such evidence

was not cured by the circumstance that the trial judge admitted it only for the purpose of showing that the defendant had knowledge of the fact that the tort complained of was within the scope of the agent's duty.

⁴ In *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543, the plaintiff offered in evidence an answer to the original complaint, which contained this admission: "That one P. T., who was then in the employment of these defendants as a driver of an ice cart of these defendants, . . . wilfully, and not negligently nor carelessly, drove said ice cart against the carriage of the said plaintiff, and caused some injury thereto, and to the said plaintiff, one or both, and they say that said driving against, and said injury, are the same as the driving against and injury complained of in the complaint in this action, and not otherwise." The court thus discussed the contention that the plaintiff was estopped by this admission from asserting that the defendant was liable: "It is not made to appear by the answer that the servant committed the act wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by the wrongful act to execute it. It is consistent with the answer that the act was done in the execution of the authority given him, and for the purpose of performing the directions of the defendant. There was clearly no estoppel, and there was evidence, taken in connection with the answer, upon which the jury might have found that the act was a negligent or even a reckless act, in the course of the employment of the servant, and one for which the defendant was responsible. The answer did not conclude the plaintiff, and the case was one for the jury."

B. MASTER'S LIABILITY TESTED WITH REFERENCE TO THE SCOPE OF THE SERVANT'S AUTHORITY.

2276. Generally.—As we have seen in an earlier section (2226), one of the forms in which the rule, *Respondeat superior*, is enunciated is that a master is answerable for the tortious acts of a servant according as they are or are not committed “within the scope of his authority.”¹ Not infrequently, language expressive of this notion is

In *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047, the court thus dealt with the argument that defendant was entitled to a judgment notwithstanding the verdict, for the reason that the statements of counsel, taken in connection with the evidence, conclusively showed that the brakeman, in ejecting the plaintiff from a railway car in which he was stealing a ride, was not acting in the performance of any duty, but for the sole reason that he was irritated at the plaintiff for not having paid him 25 cents for the privilege of being allowed to remain on the car: “A trial court has the right to act upon facts deliberately conceded by counsel in his opening statement, and to direct a verdict against the plaintiff upon such concession, if such facts, if proven, would not entitle the plaintiff to a verdict. Such power, however, must be exercised sparingly, and never without full consideration and opportunity for counsel to explain and qualify his statement, so far as the truth will permit. *Oscanyan v. Winchester Repeating Arms Co.* (1880) 103 U. S. 261, 26 L. ed. 539; *Spicer v. Bonker* (1881) 45 Mich. 630, 8 N. W. 518. It is clear on the face of the statements of counsel here urged, that they are not within the rule stated, and that they afford, taken in connection with the evidence, no support for the defendant's claim.”

¹ “Whatever a servant does in the course of the employment with which he is intrusted, and as a part of it, is the master's act. The legal presumption is so, unless the contrary be shown. It is the presumption that the master authorized it.” Alexander, L. C. B., in *Atty. Gen. v. Siddon* (1830) 1 Crompt. & J. 220, 225.

“It appears to me perfectly clear that, in order to charge any person with a

fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it, while acting within the scope of his authority, while doing something, and purporting to do something, on behalf of the principal.” Lord Herschell in *Thorne v. Heard* [1895] A. C. 495, quoted by Lord Shaw in *Lloyd v. Grace* (1912) 81 L. J. K. B. N. S. 1140.

For cases in which liability was denied on the specific ground of a want of authority as regards the act from which the given injury resulted, see *Wilson v. Owens* (1885) Ir. L. R. 16 C. L. 225 (injury resulted from the negligent driving of a vehicle by a servant hired for another kind of work); *Engelhart v. Farrant* [1897] 1 Q. B. 240, 66 L. J. Q. B. N. S. 122, 75 L. T. N. S. 617, 45 Week. Rep. 179 (similar ruling); *Washington Gaslight Co. v. Lansden* (1899) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296 (libel by manager of business corporation); *Healy v. Patterson* (1904) 123 Iowa, 73, 98 N. W. 576 (accident caused by handling of machinery); *Flinn v. World's Dispensary Medical Asso.* (1901) 64 App. Div. 490, 72 N. Y. Supp. 243 (servant sent to repair rheostat in newspaper office undertook to discharge the electricity with which one of the presses had become charged); *Waalder v. Great Northern R. Co.* (1904) 18 S. D. 420, 70 L.R.A. 731, 735, 736, 112 Am. St. Rep. 794, 100 N. W. 1097 (assault by member of gang engaged in building railroad fence); *Williams v. Gobble* (1901) 106 Tenn. 367, 61 S. W. 51 (plaintiff's minor son injured as a result of following directions given by the driver of a horse-power thresher furnished by defendant).

For other decisions predicated non-liability on the same ground, see *post*, §§ 2353 to 2356 (ejection from railway cars), §§ 2382 to 2392 (fraud), and

combined with phraseology suggestive of the sphere of action within which the servant's functions are exercised.²

§§ 2463 and 2482 (wrongful use of criminal process).

In *Paulton v. Keith* (1901) 23 R. I. 164, 54 L.R.A. 670, 91 Am. St. Rep. 624, 49 Atl. 635, an action against the proprietor of a theater for damages for the refusal of his manager to permit an officer to enter the stage to serve a writ in plaintiff's behalf on an actor engaged therein, it was held that, in the absence of any specific evidence that the refusal was within the scope of the manager's authority, a verdict for the defendant had properly been directed. The court argued thus: "The cases relied on by the plaintiffs, so far as they support them, are based upon lawful authority to a servant to do the act from which the injury arose, and upon an excess of force or bad judgment in doing it. This is clearly right. If one employs another to do a certain thing as his servant, retaining the right of control, oversight, and discretion in the performance of the act,—the servant acting in place of the master, and not independently,—the master is responsible for the way in which the thing is done. But it is a very different thing to hold a master responsible for an act which he has never authorized a servant to do, simply because the latter is his servant, and on the strength of it to allow the statements of the servant to be put in to bind the principal. The plaintiff's claim goes to this extent, but the cases cited do not."

2 "The test of the liability of the master for the torts of his servant is not whether or not the act was done in accordance with his instructions, but is whether or not the servant at the time of committing the tort was acting within the scope of his authority in the business of the master. If the act was done within the scope of authority, and while the servant was engaged in his master's business, the latter is bound for it." *Pittsburgh, C. C. & St. L. R. Co. v. Adams* (1900) 25 Ind. App. 164, 56 N. E. 101.

The servant's act must be "performed in the line of the employment of such agent, and in the execution of the authority conferred." *Atchison, T. & S. F. R. Co. v. Brown* (1897) 57 Kan. 785, 48 Pac. 31.

In *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849, the master's liability was affirmed on the ground that the evidence did not show that the servant was "acting without authority in a matter not connected with the employment."

"The liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant has stepped aside from his employment to commit a tort which the master neither directed in fact nor could be supposed, from the nature of his appointment, to have authorized or expected the servant to do." Cooley, Torts, p. 535, quoted in *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709.

"The master is liable for all injuries to person or property caused by the negligence of the servant, if the act which results in the injury is done while the servant is acting within the scope of his employment, in the master's service, though the act was not necessary to the performance of the servant's duties, or was not expressly authorized by the master or known to him." 20 Am. & Eng. Enc. Law, 2d ed. 163, quoted in *Steele v. May* (1902) 135 Ala. 483, 487, 488, 33 So. 30.

"The master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act beyond the scope and duties of his employment." *Flinn v. World's Dispensary Medical Asso.* (1901) 64 App. Div. 490, 72 N. Y. Supp. 243.

"It is well settled generally that a railroad company is responsible in damages to a trespasser for torts committed upon him by a servant who, in the commission of the tort, is acting in the line of his employment and within the scope of his authority,—not within the scope of his authority as applied to the commission of the tort, for no authority for such commission could be conferred, but within the scope of his authority to rightfully do the particular thing which he did do in a wrongful manner." *Dixon v. Northern P. R. Co.* (1905) 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620.

With reference to the criterion of liability thus indicated, it has been laid down that the servant's "agency extends to doing everything reasonably necessary for the efficient performance of his master's business in the station to which his master has appointed him;"³ that the master is not liable for an unauthorized act of his servant, although the servant himself supposed that he was authorized to do it;⁴ and that the right of action is predicable, irrespective of whether the servant's authority is established by direct evidence as to its bestowal, or is a matter of implication from the character of the functions intrusted to him.⁵

The clause italicised is clearly an incorrect statement. What the court obviously meant to say was that a master cannot, *as a matter of fact*, be supposed to have authorized the tort.

³ Fitz Gibbon, L. J., in *Cullimore v. Savage South Africa Co.* [1903] 2 I. R. 589, 636.

"The servant is invested with authority to use the necessary means to the performance of the duties assigned him." *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373.

"When authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment." *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597. This passage was quoted in *Robards v. P. Bannon Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, 431.

"If . . . property be intrusted to an agent or servant for sale or safe-keeping, there is clearly an implied authority to do all such things as may be proper and necessary for the protection of that property; or if a servant be assigned to a position requiring the performance of certain duties, he has an implied authority to do all such things

as may be required to enable him to perform those duties. And for all acts done within the scope of the employment and the limits of the implied authority the master is liable, however erroneous, mistaken, or malicious such acts may be; but for acts done beyond that limit the corporation cannot be made liable, unless express authority has been shown, or there be subsequent adoption or ratification of the act complained of." *Carter v. Howe Mach. Co.* (1878) 51 Md. 290, 34 Am. Rep. 311.

⁴ *Mallach v. Ridley* (1887) 43 Hun, 336 (instructions to opposite effect held erroneous).

⁵ "The general rule is that a master is not liable for the tortious act of his servant, unless that act be done either by an authority, express or implied, given him for that purpose by the master." Pollock, C. B., in *Roe v. Burkenhead, L. & C. J. R. Co.* (1851) 7 Exch. 36.

"I suggest that an employer is liable for an act done by a servant in the course of his service or in the scope of his employment, upon the ground of agency only; in other words, upon the ground that the act of the servant is the act of his master. The liability of the master must rest upon authority, and upon 'authority in fact.' 'Apparent authority' is nugatory in law, if 'apparent' means fictitious or nonexisting. The only distinction which I can understand between 'authority in fact' and 'apparent authority' derived from the scope of a servant's employment is that the one is derived from express instructions, and that the other is the authority which is shown to be conferred on the servant by the nature of his service." Fitz Gibbon, L. J., in *Byrne v. Londonderry Tramway Co.*

On general principles it would seem to be sufficiently clear that, except in cases where the conditions which rendered it possible for the servant in question to commit the tort complained of were brought about by some prior contractual dealings between the servant and the

[1902] 2 I. R. 457. In the same case, Holmes, L. J., said: "When a man engages a coachman or a butler, he is not supposed to lay down categorically all his duties. It is assumed that the very fact of the servant's employment in a particular capacity carries with it his master's authority to do the acts and discharge the functions appertaining, according to general usage, to his position; and strangers, in the absence of notice to the contrary, are entitled to deal with the servants on this basis. A servant may also be the agent of his master in matters outside the usual scope of his employment, but in such a case the employment alone is not sufficient to establish agency."

"The whole law upon the subject is necessarily founded upon the principle of authority from the employer to do the acts complained of. Sometimes the authority is express; or what is positive, if not express, by subsequent adoption, and sometimes it is implied from the nature of the duties which the servant has to perform, and which may be such that his personal action concerning them is necessarily authorized. The formula on which the employer's liability depends is usually stated in the terms whether the acts complained of were within the scope of the servant's authority." O'Brien, J., in *Barry v. Dublin United Tramways Co.* (1888) Ir. L. R. 26 C. L. 150.

The responsibility of the master "rests on the ground of express or implied authority from him." *Gaillardet v. Demaries* (1841) 18 La. 490.

"The liability of the master does not reach wrongs caused by the carelessness of the servant in work not directed by the master,—as, business of a third party, or of the servant himself, or of the master, which he did not expressly or impliedly direct him to perform." *Wiltse v. State Road Bridge Co.* (1886) 63 Mich. 644, 30 N. W. 370, quoting 1 Parson, Contr. 102.

"It is settled beyond any possibility of controversy that . . . the master's liability applies to cases of implied as well as express authority." *Crandall v.*

Boutell (1905) 95 Minn. 114, 103 N. W. 890, 891, 5 Ann. Cas. 122.

"The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto." *Robards v. P. Bannon Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, 431.

"The test of liability in all cases depends upon the authority of the master expressly conferred, or fairly inferred from the nature of the employment and the duties incident to it." Wood, Mast. & S. § 279, quoted in *Steele v. May* (1902) 135 Ala. 483, 33 So. 30; *Sawyer v. Norfolk & S. R. Co.* (1906) 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440.

"The simple test is whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to be authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and written orders." Wood, Mast. & S. § 307, quoted in *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A. (N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375; *Sawyer v. Norfolk & S. R. Co.* (1906) 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440; *Steele v. May* (1902) 135 Ala. 483, 33 So. 30; *Froomkin v. Brooklyn Daily Eagle Co.* (1906) 113 App. Div. 443, 99 N. Y. Supp. 300.

"No decisive test can be given, but in all cases the act must have been done while engaged in the prosecution of some business for the master, and that business must have been such as the servant had authority from the master to do. That is, he must have been authorized, either expressly or impliedly, to do the act in some manner, which he has improperly or wrongfully performed." Wood, Mast. & S. § 309,

injured party,⁶ the essential point to be determined must be the actual, not the apparent, scope of the servant's authority.⁷ But occasionally we find the courts reasoning upon the hypothesis that the master's liability depends upon the extent of the authority which the servant is held out as possessing.⁸

As to the doctrine that the authority of a servant to commit an illegal act cannot be implied, see § 2241, *ante*.

2277. Deductions from these general principles.—It is well settled that if the act complained of was incidental to the discharge of the functions covered by the servant's general authority, the master cannot avoid liability on any of the following grounds: That he did not specifically authorize the commission of that particular act;¹ that he

quoted in *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 643; *Collette v. Rebori* (1904) 107 Mo. App. 711, 82 S. W. 552.

⁶ Such was the situation in *Russo-Chinese Bank v. Li Yau Sam* [1910] A. C. 174, 79 L. J. P. C. N. S. 60, 101 L. T. N. S. 689, 26 Times L. R. 203, 47 Scot. L. R. 588, and *Reynolds v. Witte* (1879) 13 S. C. 5, 36 Am. Rep. 678 (§ 2489, note 1, *post*),—both cases relating to a fraudulent appropriation of money.

⁷ So laid down in *McGrath v. Michaels* (1903) 80 App. Div. 458, 81 N. Y. Supp. 109, disapproving an instruction to the opposite effect.

Compare also the statement in *West Jersey & S. R. Co. v. Welsh* (1898) 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736, that "no question of estoppel arises, as might be the case upon a contract made with an agent clothed with apparent authority. The question is as to express or implied authority to do an act in respect to . . . [a person] with whom the company had no contract relation, and to whom it owed no duty except to refrain from wilful injury."

⁸ See, for example, *Stickney v. Munroe* (1857) 44 Me. 195 (§ 2397, note 13, *post*); *Illinois C. R. Co. v. West* (1901) 22 Ky. L. Rep. 1387, 60 S. W. 290 (§ 2354, note 6, *post*); *Central of Georgia R. Co. v. Morris* (1904) 121 Ga. 484, 104 Am. St. Rep. 164, 49 S. E. 606 (liability denied because there was no evidence that the tort-feasor "was held out by the company as an agent to deal in its behalf with the public").

Compare also the cases cited in § 2285, note 6, *post*.

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¹ "Although the particular act which gives the cause of action may not be authorized, still, if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant." *Citizens Life Assur. Co. v. Brown* [1904] A. C. 423, 427.

"An act, though not ordered, is within the scope of employment if of such a nature as might be justified without such order." *Gilmartin v. New York* (1869) 55 Barb. 239.

"The master's liability for the negligence or tort of his servant does not depend upon the existence of an authority to do the particular act from which the injury resulted. In most cases where the master has been held liable for the negligence of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed to the master. The principal is bound by a contract made in his name by an agent, only when the agent has an actual or apparent authority to make it; but the liability of a master for the tort of his servant does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing the act with the authority." *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 26, 7 Am. Rep. 293.

"It is not the test of the master's liability for the wrongful act of the servant from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable

for the negligent or tortious act of the servant, the servant acted not only without express authority to do the wrong, but in violation of his duty to the master." *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 133, 134, 21 Am. Rep. 597. Similar language was used in *Robards v. P. Bannon Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, 431.

"The rules we have stated lead to the conclusion that the principal is liable for the tort of the agent, where the particular act, although wilful and not directly authorized, was within the line of the agent's duty." *Evansville & T. H. R. Co. v. McKee* (1884) 99 Ind. 519, 50 Am. Rep. 102.

"The test of the master's liability is not whether the injury is the result of acts committed by the express authority of the master, but whether the servant had authority to act in respect to the business in which he was engaged when the injury was committed; and for all acts done by the servant in the execution of his employer's business, within the scope of his employment, the master is liable." *Lang v. New York, L. E. & W. R. Co.* (1894) 80 Hun, 276, 30 N. Y. Supp. 137.

"The universally recognized rule is that a principal is civilly liable for the neglect, fraud, or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act." *Garretzen v. Duenkel*, 50 Mo. 104, 11 Am. Rep. 405.

"It must be conceded that, if the agents of appellant acted within the scope of their employment in committing the wrongful act, then it is liable, notwithstanding they may have used means within such scope which appellant did not authorize, and had no reasonable ground to expect would be resorted to." *Topolewski v. Plankinton Packing Co.* (1910) 143 Wis. 52, 126 N. W. 554.

For other cases which support the statement in the text, see *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922; *Standard Oil Co. v. Parkinson* (1907) 82 C. C. A. 29, 152 Fed. 681; *Ziegenhein v. Smith* (1904) 116 Ill. App. 80; *Pennsylvania Co. v. Weddle* (1884) 100 Ind. 138; *At-*

chison, T. & S. F. R. Co. v. Randall (1888) 40 Kan. 421, 19 Pac. 783; *Conway v. New Orleans & C. R. Co.* (1894) 46 La. Ann. 1429, 16 So. 362; *Meade v. Chicago, R. I. & P. R. Co.* (1896) 68 Mo. App. 92; *Shamp v. Lambert* (1909) 142 Mo. App. 567, 121 S. W. 770; *Winfrey v. Lazarus* (1910) 148 Mo. App. 388, 128 S. W. 276; *Robertson v. Bennett* (1878; N. Y. Super. Ct.) 12 Jones & S. 66; *Hogle v. H. H. Franklin Mfg. Co.* (1907; Sup. Ct.) 105 N. Y. Supp. 1094; *International G. N. R. Co. v. Anderson* (1891) 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; *Texas & P. R. Co. v. Hayden* (1894) 6 Tex. Civ. App. 745, 746, 27 Am. St. Rep. 902, 17 S. W. 1039, 26 S. W. 331.

In *Hardeman v. Williams* (1910) 169 Ala. 50, 53 So. 794, in an action for assault and battery by defendant's servant, a requested charge that the jury could not find for plaintiff for an assault and battery on her unless it was committed by defendant's servant, and while such servant was actually engaged in the performance of the services for which he was employed, and unless the assault and battery was incident to the performance of his particular duties, was held to have been properly refused as misleading, because the jury might have inferred therefrom that defendant was not liable for an assault and battery committed by his servant, unless the latter was employed for that particular purpose.

In *Miller-Brent Lumber Co. v. Stewart* (1910) 166 Ala. 657, 51 So. 943, 21 Ann. Cas. 1149, an action for assault by defendant's servant when refused entrance to plaintiff's land through a gate, the trial judge was held to have properly refused instructions, that, though the servant was authorized to go through the gate, such authority did not carry with it the authority to assault plaintiff while the servant was attempting to go through; that if the servant assaulted plaintiff without defendant's authority, defendant would not be liable; and that, before the jury could find for plaintiff, they should believe from the evidence that the servant had authority from defendant, express or implied, to commit the assault. Such instructions would have tended to lead the jury to suppose that expressed or implied authority to commit the particular act complained of was essential to render defendant liable.

had no knowledge of it; ² or that it involved an abuse or excess of the authority conferred by him.³

² *Standard Oil Co. v. Parkinson* (1907) 82 C. C. A. 29, 152 Fed. 681; *Hardeman v. Williams* (1910) 169 Ala. 50, 53 So. 794; *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421, 19 Pac. 783; *Shamp v. Lambert* (1909) 142 Mo. App. 567, 121 S. W. 770; *Winfrey v. Lazarus* (1910) 148 Mo. App. 388, 128 S. W. 276; *Aycrigg v. New York & E. R. Co.* (1864) 30 N. J. L. 460; *Robinson v. Bennett* (1878; N. Y. Super. Ct.) 12 Jones & S. 66.

³ "If . . . [the servant] were so acting [within the scope of his employment], then, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable." Blackburn, J., in *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 8 C. P. (Exch. Ch.) 148, 25 Eng. Rul. Cas. 115 (railway porter, supposing that a passenger had got into a wrong train, pulled him out of it).

"The master is liable, although the servant may, by unnecessary violence or otherwise, have abused his authority," or may have "used a wrong discretion in the manner of exercising his authority." *Walker v. South Eastern R. Co.* (1870) L. R. 5 C. P. 640 (arrest).

"If the station master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority." Mellor, J., in *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 535 (arrest).

In a Scotch case the court referred to the instances "in which a servant, while discharging what it is within the scope of his duty to discharge, acted under a mistaken notion of his own, in such an unjustifiable or careless manner as to render his employer responsible." *Hanlon v. Glasgow & S. W. R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 559, 36 Scot. L. R. 412, 6 Scot L. T. 337.

"A master is liable for the trespass of his servant committed within the scope of his authority, even though, in exercising this authority, he use unnecessary violence." *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916.

"While it cannot be held, ordinarily, that a corporation or an individual, in conferring power to act within a particular scope, intended to confer authority to abuse such power, or had reasonable ground to expect that it would be abused, such corporation or individual is, nevertheless, responsible for such abuse." *Topolewski v. Plankinton Packing Co.* (1910) 143 Wis. 52, 126 N. W. 554.

"Where a servant acts within the scope or limits of the authority conferred upon him, designing to discharge the duty owed by him to his employer, and he acts erroneously, or in a case where the authority cannot, under the circumstances, be lawfully exercised, there the employer must bear the responsibility, for the act is within the limits of the authority conferred upon the servant." *Rown v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471, 474 (arrest of passenger for nonpayment of fare).

The master "will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders." *Robards v. P. Bannon Sever Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, 431.

If the posting of the libel was done "in the course of his employment as a servant of the defendant, . . . the defendant is liable for it, even though it was in excess of his authority, and wrongful." *Fogg v. Boston & L. R. Co.* (1889) 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109.

"The fact that the servant in committing the tort may have exceeded his actual authority" does not relieve the master from liability. *Crandall v. Boutell* (1905) 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122.

"The authority to make the arrest and to confine the prisoner implied the authority to use such force or violence as was necessary. The servant, through a want of judgment and discretion, used an unjustifiable amount and character of force and violence. He did so in an attempt to execute the authority to arrest and imprison, and the master is

The *rationale* of the master's liability for tortious acts which "come within the scope of the servant's general duty, although in doing the particular act complained of he may have exceeded his authority," is that, in most cases where a duty is to be performed or an act done by a servant, some discretion must be vested in him to whom the doing of it is committed, and where this is so, the master cannot enjoy

liable for the injury thus wrongfully inflicted upon the plaintiff." *Southern R. Co. v. James* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303.

In *Pollock on Torts*, Webb's Am. ed. p. 98, one of the specified classes of wrongs which are said to be imputable to the master embraces those which "consist in excess or mistaken execution of a lawful authority." On p. 104, it is observed that, to establish a right of action against the master in cases covered by this class, "it must be shown that (1) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do; (2) the act, if done in a proper manner, or under circumstances erroneously supposed by the servant to exist, would have been lawful." This statement was cited with approval in *Ploof v. Putnam* (1910) 83 Vt. 252, 26 L.R.A. (N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277.

"The fact that . . . [the servant] was only authorized to do the act in a certain way does not save the master from liability. If he was authorized to do the act at all, the master is liable for the consequences of his doing it in a different manner, if the mode adopted by him is so far incident to the employment that it comes within its scope; for, having given the servant any authority in the premises, he alone must suffer for its abuse." Wood, Mast. & S. § 309, quoted in *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 643.

"An act is said to be within the scope of the servant's employment when, although itself unauthorized, it is so directly incidental to some act or class of acts which the servant was authorized to do that it may be said to be a mode, though no doubt an improper mode, of performing them. For an impropriety or excess on the part of the servant in the course of doing something which was authorized, the master will be responsible, but not for an act

wholly unconnected with the class of acts which the servant was authorized to do." Clerk & L. Torts, 3d ed. p. 70, quoted in *Sheppard Pub. Co. v. Press Pub. Co.* 10 Ont. L. Rep. 243.

See also *Ewbank v. Nutting* (1849) 7 C. B. 797 (shipowner held liable for conversion, where the captain sold the cargo of a ship which was in a leaky condition; abuse of discretionary authority to act in an emergency); *Miller-Brent Lumber Co. v. Stewart* (1910) 166 Ala. 657, 51 So. 943, 21 Ann. Cas. 1149 (assault); *Pittsburgh C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849 (master said by court, *arguendo*, to be liable, although the means adopted for accomplishing an end within the scope of his employment were "outside of his authority"); *Kansas City, Ft. S. & G. R. Co. v. Kelly* (1887) 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172 (trespasser forced off rapidly moving train on a dark night); *Sanford v. 8th Ave R. Co.* (1861) 23 N. Y. 343, 346, 80 Am. Dec. 286 (use of unnecessary force in ejecting a passenger for nonpayment of fare); *Shea v. 6th Ave R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480 (plaintiff thrown by driver from platform of street car which he was attempting to cross while the street was obstructed by the car); and the cases cited in § 2285, *post*.

In *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597, the court said: "It is, in general, sufficient to make the master responsible that he gave to the servant an authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty,

the benefit of his servant's acts which involve this discretion, without being responsible for their result. This rule is held especially applicable "where the master is absent, and the duty to be performed vicariously is general in character, as in the case of conductors of public vehicles, railway servants, and the like."⁴

or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another. . . . If he [the servant] is authorized to use force against another, when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business." The phrase, "goes beyond the strict line of his duty" (which was also adopted in *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170; *Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392; *Tillar v. Reynolds* (1910) 96 Ark. 358, 30 L.R.A.(N.S.) 1043, 131 S. W. 969; *Barmore v. Vicksburg, S. & P. R. Co.* (1904) 85 Miss. 428, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594), seems to be intended to embody the same idea as that which is expressed by the words "abused his authority," which occurs in the preceding sentence. To ascribe to it the meaning which it would ordinarily be assumed to bear would have the effect of committing the court to the manifestly incorrect doctrine that a master may be liable in respect of an act done by a servant outside the scope of his authority. The same criticism is applicable to the following passage in the opinion delivered in *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep. 141. "It matters not that he *exceeded the powers con-*

ferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service." *Conchin v. El Paso & S. W. R. Co.* (1910) 13 Ariz. 259, 28 L.R.A.(N.S.) 88, 108 Pac. 260. For other instances of the same description of lax phraseology, see *Smith v. Munch* (1896) 65 Minn. 256, 68 N. W. 19, where it was laid down that the rule, *Respondeat superior*, takes effect, although the servant "may have exceeded his authority;" and *Eichengreen v. Louisville & N. R. Co.* (1896) 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219, where it was held to be error to instruct the jury that no recovery could be had, if the servant's authority had been exceeded. "Excess of authority" is an inadequate defense only in cases where the excess has relation merely to the manner of doing an act which is itself authorized.

⁴ *Lucas v. Mason* (1875) L. R. 10 Exch. 251, where the point actually decided was that the chairman of a public meeting was not liable for 'he acts of officers in assaulting a person whom they thought to be disturbing the peace. In delivering the judgment of the court, Pollock remarked: "Where the relation of master and servant exists, the former is liable for the tortious acts of the latter, wherever they are such as come within the scope of the servant's general duty, although in doing the particular act complained of he may have exceeded his authority, providing what he does is in the honest belief that he is executing his master's orders."

"The principle that is applied to solve that question [i. e., whether the given act was within the scope of the servant's authority] is that, where the nature of the duty the servant has to perform is such as to require immediate action for the effectual performance of that duty, the law considers the servant to be

necessarily invested with authority to determine whether the conditions of such action exist. Where the duty is such as to require such action, and he makes a mistake in supposing the conditions exist when they do not in fact, the employer is liable. The reports are full of examples of cases which turn on the distinction whether the duty is such as to involve the necessity of immediate and peremptory interference by the servant." O'Brien, J., in *Barry v. Dublin United Tramways Co.* (1888) Ir. L. R. 26 C. L. 150. In the same case Holmes, J., observed that the question to be determined is "whether, having regard to the nature of the servant's employment, he is a proper person to exercise a judgment as to whether the state of circumstances that would justify the act has arisen, and if he is found to be so, the master will be liable for any mistake made by him in such exercise of judgment."

"When a person puts another in his place to do certain acts in his absence, he necessarily leaves him to determine for himself, according to his judgment and discretion, according to circumstances and exigencies that may arise, when and how the act is to be done, and trusts him for its proper execution; consequently he is answerable for the wrongful execution of the act, either in the manner or occasion of doing it, provided it is done bona fide in the prosecution of his business, and within the scope of the servant's express or implied authority, and not from mere caprice or wantonness, and wholly outside the duties imposed upon him by the master." Wood, Mast. & S. § 288, quoted in *Knowles v. Bullene* (1897) 71 Mo. App. 341; *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 179, 180, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375.

In *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 293, the grounds upon which a passenger who had been improperly expelled from a railroad car was held entitled to recover were thus stated: "The expulsion of the plaintiff, if not justified by his misconduct, was an unlawful assault, and the question arises, whether the defendant is responsible for the injury occasioned by the unlawful act of its servant, done under a mistake of facts, or a mistake of judgment upon the facts, though in the course of the business of his master. This question

must be answered in the affirmative, in view of the nature of the service in which the conductor was engaged, and the principle upon which the liability of the master for the acts of the servant rests. . . . The company had the right to enforce order and decency by expelling from the car a passenger guilty of disorderly and indecent conduct. The defendant could only act through agents. The appointment of a conductor carried with it, as an incident, authority to maintain order and to eject a passenger who had forfeited his right to be carried by his misconduct. This authority, it is true, was confined to the expulsion of persons who, in fact, misbehaved themselves so as to justify their expulsion; but whether, in a given case, the misconduct was such as to justify an expulsion, must necessarily be determined at the time of the transaction. The duty of deciding is cast upon the conductor; he represents the defendant; he may misunderstand or misjudge the facts; he may act unwisely or imprudently, or even recklessly; but the business of preserving order and enforcing the regulations of the company is committed to him, and for his acts in that business the company is responsible." The statement of principles in this case was referred to with approval in *Peck v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 587, where the right to recover for an assault, committed upon a man by a railway servant in carrying out instructions to exclude from a car set apart for women all men who were not accompanied by women, was affirmed on the ground that it was the servant's "employment in the service and business of the defendant to effect the object for which he was especially detailed. That he went beyond the limit of his instructions, if the overstep was made with an honest purpose of doing the duty put upon him, without wilfulness, or malice, or purpose of his own, did not take him beyond the scope of his employment for the defendant, or out of the sphere of its business. . . . It was his employment at that moment for the defendant, to see to it that the regulation made by it was observed by all whom it concerned. Though he was not instructed to carry it out by physical means, when he used those means he was acting, in his conception, in the purpose for which he was stationed

2277a. Scope of authority considered with reference to the circumstance that the wrongful act was done in an emergency.—The evidential significance of the circumstance that the tort complained of was committed in an emergency may present itself for consideration under one or other of two aspects.

(1) It may be adduced with reference to a contention that the emergency in question was one of a kind that might be expected to occur more or less frequently in the course of the servant's employment, and that he might consequently be regarded as having been invested with an implied authority to deal with such emergencies in a certain manner whenever they should occur. The point of view is illustrated by several cases involving the liability of employers for conversion and for wrongful arrests.¹

(2) It may be relied upon as the basis of an argument that, under the given circumstances, the servant was justified in doing something which was beyond the scope of his normal powers.²

there; he was acting in the scope of his employment, and though he may have exceeded not only his instructions, but the rights of the defendant to use force, if he did so only in excess of zeal, or impetuosity of natural temper, and without malice towards the person removed, and with no purpose of his own, he was still the agent of the defendant, and it is liable for his act."

"The defendant must be held to have taken upon itself the risk of errors of judgment on the part of the servants, and of mistakes, in the exercise of the discretion confided to them, and to be liable for their misjudgment and abuse of discretion in the use of them." *Hariman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

"If the master leave to his servant a discretion as to the manner in which his duty is to be performed, he must be responsible for the manner in which that discretion is exercised. If he undertake to determine for himself the manner in which his servant shall perform his prescribed duties, the obligation is on him to see that such instructions are carried out, and that the servant does not substitute his own methods for those of his master." *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445, 454.

In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373,

the defendant's liability was denied on the ground that the "assault complained of was not an act done from a wrong judgment in regard to a matter committed by the master to the discretion of the servant."

¹ See § 2403, note 1, and § 2466, notes 1 to 4, *post*.

² In *Madara v. Shamokin & Mt. C. Electric R. Co.* (1899) 192 Pa. 542, 43 Atl. 995, where a passenger on a street railway was injured by a collision between two cars, the facts and the conclusions arrived at were thus stated: "When the case came to trial in the court below, the defense set up was that Visick, who brought the second car, was a mere intermeddler, and acted without any authority from the railroad company. The defendant offered no evidence to establish this fact, but relied on that of plaintiff to make it out. It was conceded that Visick was an employee of the company, though not a conductor or motorman, but in just what capacity was not clear. Nicholas Madara testified positively, that he heard Visick say to the motorman he would go for the car, and the motorman assented, while the latter remained in charge of the disabled car then standing on a steep down grade. The court below, in a charge quite as favorable to defendant as it had a right to ask, submitted to the jury to find whether, in the exigency, Visick acted by the au-

2278. Operation of the test of scope of authority in respect of restricting the master's liability.—It would seem that, if the phrase "scope of authority" is understood as connoting the whole class of acts which the servant is hired to perform, it ought not to produce any confusion or conflict of doctrine. When construed in such a sense, that phrase manifestly covers the same area of responsibility as the phrases "scope of employment," "course of employment," and their congeners.¹ This equivalence of meaning has been categorically

thority or instructions of the motorman in bringing up the relieving car, instructing them, if they did so find, then he was for the time being an employee of defendant; if, on the other hand, he acted of his own motion, then he was a mere stranger, and the railway company was not answerable for his negligence. There was a verdict and judgment for plaintiffs, and we have this appeal by defendant, assigning for error the instructions of the court as already noticed. It is argued that there was no sufficient evidence of any authority in Visick to act for the company, because there was no authority vested in the motorman to direct him to procure another car; and that, even if the motorman had such authority, the evidence wholly failed to show that he exercised it. There was evidence showing that Visick sanded the rails when they were attempting to move the disabled car; that he gave instructions to the motorman how to manipulate the machinery to start it; when all their efforts proved futile, then Visick told the motorman he would procure another car, and the motorman assented. Under any view of this testimony, the court could not properly take the case from the jury. The disabled car was on a steep grade, a point full of peril to the passengers; surely, duty required the motorman, familiar with the machinery of the car, to remain at his post for their protection; nor could they stay in that position indefinitely; humanity, as well as safety, dictated that immediate efforts for the relief of helpless women and children should be made; whether the motorman did that which was most prudent under the circumstances was for the jury to say."

In *Ephland v. Missouri P. R. Co.* (1897) 137 Mo. 187, 35 L.R.A. 107, 59 Am. St. Rep. 498, 37 S. W. 820, 38 S. W. 926, where the defendant was held

liable for injuries sustained where a passenger jumped off a moving train when he heard the brakeman exclaiming that a collision was imminent, the court reasoned thus: The *ratio decidendi* was that, although the ordinary duties of the brakeman did not include that of directing passengers, or of managing passenger cars, yet—"in case of emergency, in which the lives of passengers and the destruction of property are threatened and the danger is imminent, the nature and purpose of the employment of a brakeman implies the duty to give aid whenever necessary, in preventing the threatened disaster; and, in circumstances of peril, fright, and panic, passengers have the right to rely on his directions. The scope of authority is determined from the general nature of the employment and the emergency calling for its exercise, as shown by the evidence in the particular case."

In *Baker v. Metropolitan Street R. Co.* (1910) 142 Mo. App. 354, 126 S. W. 764, two of the men in a car barn undertook to operate a car to which passengers had been transferred from another disabled one, and which had been kept waiting so long for a regular crew as to produce a blockade. It was held to be a question for the jury whether they were within the scope of the employment so as to charge the company with liability to a person on the sidewalk, who was injured through the derailment of the car.

See also the cases cited in § 2292, note 1, *post*.

¹ The logical relation between the two phrases in this point of view is indicated by such statements as the following:

"It is now undoubted that an act is within the scope of the servant's employment when, although it is unauthorized, it is so directly incidental to some act or class of acts which the servant was authorized to do that it

asserted in a few instances,² and it has been taken for granted in many others.³ But the reports contain many decisions which indicate that, for practical purposes, it may sometimes make a very material difference whether a certain state of facts is considered with reference to the question whether the act complained of

may be said to be a mode, though no doubt an improper mode, of performing the act authorized. It is also no doubt true that the master's liability for the unauthorized torts of his servant is limited to an unauthorized mode of doing authorized acts." *The State of Missouri* (1896) 22 C. C. A. 239, 46 U. S. App. 245, 250, 76 Fed. 376.

"To render the master liable for the torts of his servant, it is, as a general rule, sufficient to show that he gave the servant authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act was done in the course of his employment." *Southwestern Portland Cement Co. v. Reitzer* (1911) — Tex. Civ. App. —, 135 S. W. 237.

"By the general law of master and servant, the master is not liable for the malicious torts of the servant, committed outside the scope of his employment. The wrongful act must be one which the servant is empowered, under some circumstances, to do. It must be something which his employment contemplated." *Rahmel v. Lehnendorff* (1904) 142 Cal. 681, 65 L.R.A. 88, 89, 100 Am. St. Rep. 154, 76 Pac. 659.

² In *Citizens' L. Assur. Co. v. Brown* [1904] A. C. 423, 90 L. T. N. S. 739, 73 L. J. C. P. N. S. 102, 20 Times L. R. 497, 53 Week. Rep. 176, the words, "within the scope of his authority," or, what is the same thing, "within the scope of his employment," are used in the judgment of the Privy Council.

In *Dyer v. Munday* [1895] 1 Q. B. (C. A.) 742, Rigby, L. J., remarked: "As to the other point raised in this appeal, it seems to me that some confusion has arisen, owing to the use of different expressions which, in my opinion mean, the same thing. If the expression 'scope of authority' means 'authority,' the case would be different; but it seems to me that it has exactly the same meaning as the expression

'course of employment,' and the act complained of must be done in the course of the employment of the person doing it, though it may be beyond any authority actually given to him."

In *Sanderson v. Collins* [1904] 1 K. B. 628, 632, 73 L. J. K. B. N. S. 358, 52 Week. Rep. 354, 90 L. T. N. S. 243, 20 Times L. R. 249, Collins, M. R., used the phrase "within the scope of his authority" as one which was connotative of the "class of acts" which the servant was engaged to perform.

"The supposed cause of action here relied on was the striking of plaintiff with the missile mentioned; and the right to recover depends upon the question whether that act was impliedly authorized by the railroad company; in other words, whether it was within the scope of Tucker's employment, and done by him in good faith, for the benefit of the company." *Illinois C. R. Co. v. Ross* (1888) 31 Ill. App. 170.

The language used in the above English cases shows that the late Judge Jaggard was mistaken to some extent when, in discussing the meaning of the phrases "scope of authority" and "course of employment," he remarked: "In England generally, and in America frequently, they are used indiscriminately. The later English cases, however, seem (for the matter is not certain) to have followed the general American usage, and regard the 'course of employment' as indicating the widest measure of liability, as distinguished from 'scope of authority,' which signifies the more restricted rule." *Penas v. Chicago, M. & St. P. R. Co.* (1910) 112 Minn. 203, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926, 934.

³ In *Thames S. B. Co. v. Housatonic R. Co.* (1855) 24 Conn. 40, 63 Am. Dec. 154, the court seems to have regarded the scope of the two phrases as being different. But such a position would scarcely be maintained in any jurisdiction at the present day.

was authorized, or with reference to the question whether it was done in an improper manner within the scope of the servant's employment.⁴ The diverse conclusions to which a court may be directed by the application the two criteria are occasionally observed in cases where the gravamen of the claim is negligence.⁵ But the most numerous and significant illustrations of that diversity are, as might be expected, furnished by the decisions concerning wilful torts. Specially instructive are some of those rendered in cases where the right of recovery has been denied in suits brought to recover for the ejection of trespassers from trains and other public vehicles;⁶ for the arrest and prosecution of supposed offenders;⁷ for the wounding or killing of persons believed by watchmen and similar employees to have committed or to be about to commit some crime injurious to the property of the defendants;⁸ for the killing or wounding of a person who was endeavoring to prevent the seizure of his property by the servant in question;⁹ and for other descriptions of acts which involve physical maltreatment. It is manifest that, merely as a matter of logical classification, the torts which were in these instances held not to be imputable to the defendants, because they were deemed to be outside the scope of the authority of the tort-feasors, were, under another aspect, also susceptible of being regarded as incidents of the performance of the duty of the tort-feasors to protect the property and interests of their employers. The practical importance of the distinction adverted to is also noticeable in many of the cases which involve the frauds of servants,—more particularly those which relate to inten-

⁴ So far as regards the latter situation it is "one of the first principles that, if one employs another to do a certain thing, he is liable for all the acts of irregularity committed by that other in doing it." Crowder, J., during the argument of counsel in *Haseler v. Jemoyne* (1858) 5 C. B. N. S. 530, 532.

For a case in which an instruction was held erroneous on the ground that both tests were referred to, see *Penas v. Chicago, M. & St. P. R. Co.* (1910) 112 Minn. 203, 30 L.R.A.(N.S.) 627, 149 Am. St. Rep. 470, 127 N. W. 926, 931 (§ 2279, note 4, *post*).

⁵ See, for example, *Wilson v. Peverly* (1823) 2 N. H. 548, and *Andrews v. Green* (1882) 62 N. H. 436, and the comments therein in § 2313, notes 6, 7, *post*.

⁶ See §§ 2353 to 2356, *post*.

⁷ See §§ 2463 *et seq.*, *post*.

⁸ Particular attention is directed to

the following cases, reviewed in § 2369, *post*: *Grimes v. Young* (1900) 51 App. Div. 239, 64 N. Y. Supp. 859 (note 1); *Sandles v. Levenson* (1903) 78 App. Div. 306, 79 N. Y. Supp. 959, affirmed in 176 N. Y. 610, 68 N. E. 1124 (mem.) (note 1); *Letts v. Hoboken R. Warehouse & S. S. Connecting Co.* (1904) 70 N. J. L. 358, 57 Atl. 392 (note 2); *Golden v. Newbrand* (1879) 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537 (note 2); *Belt R. Co. v. Banicki* (1902) 102 Ill. App. 646 (note 11); *Davis v. Houghtellin* (1891) 33 Neb. 582, 14 L.R.A. 737, 50 N. W. 765 (note 3); *Holler v. Ross* (1902) 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472 (note 4).

⁹ See *Kinsella v. Hamilton* (1890) 26 Ir. Rep. 671, § 2368, note 2, *post*, and the comments there made upon the decision.

tional misstatements in bills of lading and similar instruments.¹⁰ If the scope of the tort-feasors' employment is adopted as the appropriate test of the master's responsibility for such a misstatement, the conclusion seems unavoidable that he should be held answerable whenever the evidence shows that the execution and delivery of the instrument in which it was inserted was a part of the tort-feasor's duties. But it is apparent from an examination of the cases relating to the subject that the right of recovery has invariably been treated as a matter depending upon the extent of the tort-feasor's implied authority, and that in this point of view the master's liability has been denied by most of the courts which have had occasion to discuss the question.

2279. Logical objections to this test of liability.—It seems difficult to avoid the conclusion that, as a test for the determination of the master's liability in respect of a particular tort, the conception of an assumed authority in respect of its commission is wholly inappropriate. Manifestly the implication of an authority proceeding from him cannot, as a general rule, be entertained without doing violence to the actual facts.¹ That is to say, the test of authority is essentially inconsistent with the fundamental hypothesis upon which all

¹⁰ See §§ 2384 *et seq. post*.

¹ "It is true the master does not authorize the servant to get drunk, nor does any master authorize the negligence in a servant for which he is made liable. The question is as to the employment: the fitness of the agent is always at the risk of the master." Keating, J., in the judgment delivered for the majority of the court in *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 602, 613.

In *Dyer v. Munday* (1895) 1 Q. B. (C. A.) 742, Lord Esher M. R., observed: "The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable." The phrase "scope of authority," as here used, obviously refers to the servant's "actual," as contrasted with his "implied," authority. Its use in this connection is a good example of the confusion which may result from its ambiguous meaning.

The following remarks, although they

relate solely to one kind of tort, are of general application: "It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed, it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds." *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394, 410, 411.

In *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504,

legal implications other than those which are absolutely fictitious must be based. The force of this consideration is especially obvious in those cases where the imputation of liability to the master involves the paradox of predicating an implied authority with regard to acts that were expressly prohibited by him.² The bare statement of such a result might, it would seem, fairly be regarded as a *reductio ad absurdum* of the theory on which this test depends. At present, however, there are no indications that any adverse criticism which has been, or may be, leveled at it, will induce the courts to abandon it. Usage, virtually coeval with the rule *Respondeat superior* itself,³ seems to have embedded it so firmly in Anglo-American jurisprudence that it cannot now be dislodged.⁴

the court said: "We cannot help thinking that there has been some useless subtlety in the books in the application of the rule *Respondeat superior*, and some unnecessary confusion in the liability of principals for wilful and malicious acts of the agents. This has probably arisen from too broad an application of the *dictum* of Lord Holt, that 'no master is chargeable with the acts of his servant but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master.' *Middleton v. Fowler* (1699) 1 Salk. 282. For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in good faith, to do his lawful work, would be as little likely to authorize negligence as malice; and either would then be equally *dehors* the employment. Strictly, the act of the servant would not, in either case, be the act of the master. . . . In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment, as is virtually recognized in *Ellis v. Turner* (1800) 8 T. R. 531."

² See § 2285 *post*.

³ See *Tuberville v. Stampe* (1698) where the *ratio decidendi*, as stated in the report of the case in 1 Ld. Raym. 264, was that "it shall be intended, that the servant had authority from his master, it being for his master's benefit."

⁴ In *Macdonnell on Mast. & S.* 2d ed. p. 247, note (4), we find the following remarks: "Many decisions state that

the test is whether the servant has 'authority.' This term is the source of much confusion. It means either (1) express authority given by a principal to an agent; (2) conduct which would lead persons to believe that an agreement was authorized by his principal; and (3), in regard to torts, acts which are incidental to and somehow connected with the duties of the agent or servant, or are done in the course of his employment. A newspaper is, at common law, liable for libels published by the negligence of a servant, even if the servant has been expressly told not to publish the particular libelous matter. A banker is liable for the fraud of a cashier which is committed in some matter connected with his duties, even though the fraud be contrary to the wishes of the banker. It is only by straining language that we can say in such cases that a person has implied 'authority' to do that which he was expressly forbidden to do. . . . It is in fact basing the master's and employer's liability on a legal fiction, to make it turn on a question of authority."

The following passages from the elaborate opinion of Jaggard, J., in *Penas v. Chicago, M. & St. P. R. Co.* (1910) 112 Minn. 203, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926, may also be quoted: "His [the master's] authority to the servant to do the act complained of is in strict logic as wholly irrelevant as the fact that he may have expressly forbidden the servant so to act. His authority does not exist in fact. If the language of authority be used, the authority is purely fictitious. See *Macdonnell on Mast. &*

C. VARIOUS ELEMENTS WITH REFERENCE TO WHICH THE MASTER'S LIABILITY IS DETERMINABLE.

2280. Wrongful act wilfully done.—In another chapter (see §§ 2239 *et seq.*, *ante*) it has been shown that in almost all the jurisdic-

S. 247 [quoted *supra*]. It exists by construction, and this in cases wherein it is attributed, although the act complained of was not for the benefit of the master, but to his affirmative disadvantage. It is 'imputed' or 'quasi' (cf. Real, and Quasi Contracts, 9 Cyc. 242, 243), as distinguished from 'actual' authority. . . . While the language of authority is often used to describe the liability of the master under such and similar circumstances, it is strained to meet the conclusion which the court has reached by independent reasoning. . . . The equivocation in the constantly recurring middle terms 'authority,' 'scope of authority,' 'course of employment,' and their congeners, is also a prolific source of error in decision. The reasoning of the law in this connection has been largely formal and nominalistic. It is saturated with the methods of schoolmen. Its vices are those of mediæval logic. The inevitable penalty for failure to clearly define terms has been peculiarly marked. . . . (a) It has just been pointed out that 'authority' is used in three senses: (1) That of real or actual authority, express or naturally implied; (2) that of fictitious or imputed authority, of which (3) apparent authority is really one variety. The ambiguity is plain. We reiterate: It is a palpable misnomer to hold the master liable because of the authority to the servant to do the thing which the master has openly, in good faith, and expressly forbidden the servant to do. It is still more misleading to trace the liability of the master to the authority of the servant, when the master has not only forbidden the servant's conduct, but also when the servant has not acted in the furtherance of the master's business, nor for the protection of the master's property, nor in performance of his assigned duty, but for the servant's own benefit, and to the master's damage. Yet, as has been pointed out, in many groups of such cases the master has been held responsible. The authority of

the master survives [in many cases] as a 'lazy, easy reason' for the master's liability. The term 'implied authority,' as used generally and by the trial court here, is worse than ambiguous. It is constantly treated as including (1) authority which is naturally inferred from actual authority; (2) authority apparent from the course of dealing between the parties, or from an established and known course of business; (3) imputed by law on recognized principles entirely apart from the actual instructions given. A jury is generally the proper judge in the first class of cases, often of the second, and rarely, if ever, of the third. The authorities have recognized the certainty of consequent errors. Macdonnell, Mast. & S. 247, note [see *supra*]; 4 L.R.A. (N.S.) 492." The question whether plaintiff is entitled to a new trial was thus discussed: "The court charged first that the master was liable within the scope of the brakeman's actual authority, express or implied. He then charged that the master was liable for what the servant did in the course of his employment with a view to the furtherance of the master's business, and not for any purpose personal to himself, in which case the actual authority was immaterial. He finally charged that the company was not liable if the act was beyond the scope of his actual agency or authority. It is obvious that this charge submitted the Blackstone test, then the later English criterion, and finally reverted to the rule of the great commentator. The anachronism is as plain as it is confusing. The criteria are hopelessly inconsistent. Under the first charge, 'if . . . authority was expressly withheld, or its exercise forbidden, then . . . the defendant company would not be liable.' Under the second charge, 'the fact that [the brakeman] exceeded his actual authority, or even disobeyed his instructions, would not alter the rule' that the defendant would be liable."

tions with which we are concerned in this treatise, a wrongful act which in other respects appears to have been within the scope of the servant's employment is at the present day deemed to be none the less imputable to his master because it was wilfully done. The wilful quality of the tort complained of is, therefore, an element of slight, and constantly diminishing importance. Here the subject is referred to again merely for the purpose of calling attention to the importance of guarding against the confusion which, as the reports show, may result from the circumstance that the word "wilful" is one of ambiguous connotation, inasmuch as it may be used simply as the antithesis of "inadvertent," or in the sense of "induced by a personal motive."¹ The present writer ventures to express the opinion that the preferable method of avoiding that confusion is to restrict the word consistently to the former of these senses, and to employ for the latter some phraseology of explicit and unequivocal import. The theory upon which some courts have proceeded, that the latter sense is the proper one, would seem to furnish a much less satisfactory solution of the difficulty.²

¹In *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518, the leading case with regard to the older doctrine, the consequences of this ambiguity are quite apparent in Lord Kenyon's judgment; for he passes from the conception of an immunity founded upon the circumstance that, under the common-law forms of pleading, an action of trespass could be maintained only against a principal tort-feasor to the conception of an immunity predicated upon the malicious quality of the act complained of. See § 2238, note 1, *ante*.

In *Toole Furniture Co. v. Ellis* (1908) 5 Ga. App. 271, 63 S. E. 55, the phrase "wilful trespass" was used in the sense of a trespass outside the scope of the servants' employment. This instance is the more noteworthy, as the Georgia Code expressly declares masters to be liable for "voluntary" torts. See § 2261, *ante*.

²In *Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 274, 7 Am. Rep. 448, the court said: "Conceding the law to be clear that the defendant would not have been liable for the act of the conductor, if it was wilful and malicious on his part, still it was a question of fact."

In *Rounds v. Delaware, L. & W. R.*

Co. (1876) 64 N. Y. 129, 21 Am. Rep. 597, the court reasoned thus: "It is said that the master is not responsible for the wilful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility. . . . If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant as to that transaction does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible. And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge, or to charge that it was sufficient to exempt the defendant from liability that the act of the brakeman in putting the plaintiff off the car

2281. Master's ownership of instrumentality by means of which, or with relation to which, the servant's tort was committed.—In § 27, *ante*, it has been stated that testimony showing merely that the defendant owned the instrumentality which, while under the control of another person, occasioned injury to a third party, is not of itself sufficient to justify the inference that the person by whom the instrumentality was controlled was working for the defendant in the capacity of a servant. In the same section the reader will also find a review of several decisions which illustrate the probative significance of ownership as an element bearing upon the question whether a person proved or conceded to have been for some purposes a servant of the defendant was acting as his servant in respect of the particular work which was in progress when the given injury was inflicted. Some additional decisions of this type, which were overlooked when the earlier part of the treatise was being compiled, are cited in the footnote.¹ We shall now proceed to investigate the significance of ownership, considered as a circumstance which tends to prove that a person proved or conceded to have been a servant of the defendant

was wilful. He had already charged that if the brakeman acted 'wilfully and maliciously towards the plaintiff, outside of and in excess of his duty,' in putting him off of the car, the defendant was not liable. If the counsel intended to claim that the defendant was exempt from responsibility if the brakeman act wilfully, although without malice, the point was not well taken. That the brakeman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty intrusted to him. But a wilful act which will exempt a master from liability for the tort of his servant must be done outside of his duty and his master's business. The charge was therefore strictly correct." Similar language was used in *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170.

In *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940, it was held that a prayer for an instruction denying the right of the plaintiff to recover because, according to his evidence, the motorman's act was "malicious, and not within the scope of his employment," was properly rejected, because the evidence as a whole was legally sufficient for the jury to find from it that the motorman was not

acting "wilfully," but was "negligent" in not properly stopping the car before the collision which caused the injury complained of.

¹ In *Spitzer v. Nassau Newspaper Delivery & Exp. Co.* (1897) 20 Misc. 327, 45 N. Y. Supp. 682, the evidence showed that the driver of the wagon in question worked for two express companies which delivered newspapers, and kept their horses and wagons in the same place, and that he drove for the defendant in the morning and for the other company in the afternoon. It was conceded that, as the defendant's name was shown to have been on the wagon, this fact raised a prima facie presumption against the defendant "on the issue of the ownership of the wagon and the employment of the driver." Held, that the question whether the wagon was being used by the authority of the defendant in the afternoon was for the jury, there being no evidence which conclusively rebutted the presumption.

In *Tuomey v. O'Reilly, S. & F. Co.* (1893; N. Y. C. P.) 3 Misc. 302, 22 N. Y. Supp. 930, where the plaintiff fell through the entrance to a cellar, left uncovered while defendant's servants were engaged in delivering barrels of ale, the complaint alleged that the defendant was at the time of the plain-

with regard to the work which he was performing at the time when the tort complained of was committed was, in respect of its commission, acting within the scope of his employment.

It is a well-settled rule that, "wherever the master intrusts a horse or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing in-

tiff's injury engaged in brewing business in the city of New York, and owned trucks and horses, and employed drivers and assistants, in and about his business. Held that, as this was not denied by the answer, it must be taken as admitted (Code Civ. Proc. § 522); and that this admission, considered together with evidence that the truck from which the ale was being delivered at the time when plaintiff was injured bore the name of "O'Reilly, Skelly, & Fogarty," with the defendant's refusal to disprove its ownership thereof, and the employment of the men assisting in the delivery of the ale, was sufficient to sustain a finding that the truck was the property of defendant, and the men its servants and employees.

In *Diel v. Zeltner Brewing Co.* (1898) 30 App. Div. 291, 51 N. Y. Supp. 930, where the plaintiff tripped over some skids which were lying on a sidewalk beside a brewery wagon, the fact that the name of the defendant company was on the wagon was conceded by defendant's counsel to be prima facie evidence that the vehicle was "owned by it and in its service." Discussing the contention that the presumption thus raised was rebutted by the evidence given on the trial, the court said: "The defendant's brewery was situated in the city of New York. In the city of Mount Vernon, at the place where the accident occurred, there was a building bearing the sign, 'Depot and Bottling Department of The Henry Zeltner Brewing Company.' From this place beer, both bottled and in kegs, was sold and delivered. For the defendant, a witness (Hobby) was called, who testified that he carried on business there on his own account, buying from the defendant and other brewers, and selling to his own customers. The defendant, by its own wagons, delivered beer to Hobby, daily or nearly every

day; Hobby then delivered the beer, by other wagons, to his own customers. The wagons and teams which Hobby used for delivering the beer to his customers were the defendant's property, the wagons bearing the defendant's name. It appears, also, that he used the defendant's pass books and bill-heads, all the bills being made out in its name, with the addition of 'William Hobby, Agt. and Bottler.' The appellant is right in its contention that neither the ownership of the wagons, nor the privilege given Hobby to use its name in dealing with his customers, rendered it liable for an injury to a third party with whom it had no contractual relations. But there is evidence in the case which tends to show that the management of the wagon was in the defendant. Hobby testified: 'The Henry Zeltner Brewing Company had no control over the conduct of my business at that place. I run it myself. The wagons that are used in the conduct of that business are run by The Henry Zeltner Brewing Company and William A. Miles & Company and the Pabst Brewing Company. They are simply loaned to me to use to carry on that business. The horses are fed by me, and the drivers are paid by me.' And, again, speaking of the defendant, 'they allow me to use their wagons and horses; they supply me with them; they have to do all that business and it is all included in the price paid by me.' I think the natural interpretation of the expression, 'that the wagons are run,' is that they were operated, controlled, and managed by the defendant. This construction is emphasized by the distinction the witness himself draws. He says, referring to the business, 'I run it myself.' No officer of the defendant was produced to show what the exact relation between it and Hobby was, and while the character of the

trusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment.”² On the other hand, it is agreed that evidence which goes no further than to show that the instrumentality by means of which or in respect of which a servant committed a certain tort was owned by the master is not sufficient to establish a vicarious liability on the part of the master.³

billheads and pass books which the defendant permitted Hobby to use would not estop it from denying Hobby's agency as against persons not dealing with him on the strength of his apparent authority, still it was some evidence of the actual relation between the parties. Considering both the way in which the business was carried on and the testimony of Hobby already quoted, we are of opinion that there was sufficient evidence to justify the trial court in submitting to the jury the question whether the persons in charge of the wagon were the employees of the defendant.”

In *Sibley v. Nason* (1907) 196 Mass. 125, 12 L.R.A. (N.S.) 1173, 124 Am. St. Rep. 520, 81 N. E. 887, 12 Ann. Cas. 938, where plaintiff, while rightfully on the running board of an electric car, was struck by the hub of the wheel of a wagon, evidence that defendant owned the wagon was held to be admissible to show that it was being used in defendant's service at the time when the injury was inflicted.

Hiroux v. Baum (1908) 137 Wis. 197, 19 L.R.A. (N.S.) 332, 118 N. W. 533, the inference that a minor whose negligence in operating an automobile caused the injury complained of was operating it under his father's authority, and consequently as his father's servant, was held to have been warrantable, where the evidence tended to show that at the time of the accident, he had, in pursuance of an agreement made between his father and the vendor of the machine, been taken out by the latter to be taught the proper method of handling it.

“Third persons have the right to assume that when they find an agent in possession of the principal's property, managing the same, such possession and management by the agent or servant is by permission of the principal or master.” *Polatty v. Charleston & W. O. R. Co.* (1902) 67 S. C. 391, 100 Am. St. Rep. 750, 45 S. E. 932.

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² Coleridge, Ch. J., in *Rayner v. Mitchell* (1877) L. R. 2 C. P. Div. 357.

³ “I cannot adopt the proposition in *Sleath v. Wilson* (1839) 9 Car. & P. 607, 2 Moody & R. 181, that whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. I think that a servant can only be said to be acting in the employment of his master so long as he is doing some act with his master's assent.” Cockburn, Ch. J., *Storey v. Ashton* (1869) 38 L. J. Q. B. N. S. 223 (deviation by driver of carriage). This statement was quoted in *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133, where the court also remarked: “It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant, while the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished him by the master with which to perform the ordinary duties of his employment.” The court also quoted with approval the statement in *Shearman & Redf. on Negligence*, § 63, “that, if the act complained of be committed by the servant while at liberty from the service of the master and while pursuing his own interests exclusively, there can be no question of the master's freedom from liability, even though the injury would not have been committed without the facilities afforded the servant by his relation to the master.”

“The act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property.” *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597. Yet in the later case, *Quinn v. Power* (1882)

Such evidence, it is obvious, is equally consistent with the inference of a loan or license,⁴ or with the inference of a user by the servant.

87 N. Y. 537, 41 Am. Rep. 392, the ruling in *Sleath v. Wilson*, *supra*, was referred to, without any expression of disapproval. That ruling was also cited as an authority in *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 486, 14 L. ed. 509 decided, it will be observed, before the case in which Chief Justice Cockburn criticized it unfavorably.

In *Branch v. International & G. N. R. Co.* (1898) 92 Tex. 288, 71 Am. St. Rep. 844, 47 S. W. 974, it was laid down that the negligence of a servant, while engaged in operating a hand car on a railway track, not in the performance of his duty, could not be imputed to the railway company, on the mere ground that the car was in his possession, and that he was charged, as a part of his duty, with its management and control.

In *Sweeden v. Atkinson Improv. Co.* (1910) 93 Ark. 397, 27 L.R.A.(N.S.) 124, 125 S. W. 439 (elevator case), one of the several general principles laid down was that "the possession of facilities afforded by the master" in the use of which the injury was done will not make the act attributable to the master.

In *Baird v. Hamilton* (1826) 1 Sc. Sess. Cas. 797, the following remarks were made by Lord Glenlee: "There is something founded in our nature which views the mere connection of dominion as inferring a liability for injury done to anything which is our property. I do not justify the feeling, but it is a natural one, and we see it exemplified in the doctrine of deodand; and there is a great deal in the simple ground that the damage was done by the defender's horse and cart, when no one was looking after them; nor is it a sufficient defense for the party to say, 'I hired a servant to attend to it.' The master is liable for the carelessness of his servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For, suppose a servant takes offense at another man, and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it,—he is acting for himself, and the master is

not liable. But in this case the injury was done by the defender's horse and cart, and by the negligence of his servant."

See also *Haack v. Fearing* (1867; N. Y. Super. Ct.) 5 Robt. 528, 4 Abb. Pr. N. S. 297, 35 How. Pr. 459 (liability of owner of yacht for negligence of one of the crew in regard to the firing of a cannon, held not to be predicable on the mere ground that the tort-feasor had possession and control of the appliance); *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373 (fact that blow complained of was inflicted with a hatchet furnished by the master, to be used for a wholly different purpose in connection with the servant's business,—held to be immaterial).

In *Douglas v. Cassady* (1901) 9 Scot. L. T. 220, it was held that a relevant case was not made by a declaration which merely averred that a servant threw phosphorus out of his master's window, unless it is also alleged that the phosphorus belonged to the master. But, under the rule enounced in the *Baird Case*, *supra*, it seems clear that even the inclusion of such an allegation would not suffice to render the declaration relevant.

⁴ *Powell v. McGlynn* [1902] 2 I. R. (C. A.) 154, 194, 224. In that case, where the plaintiff was knocked down and injured by a runaway pony attached to a trap, which had been driven by M., but was left standing by him in the street when it took fright, the pony and trap were the property of B. Held, by the court of appeal, that there was no evidence to support the finding in favor of the plaintiff; that no presumption of the relationship of master and servant arose from the fact of M. driving B.'s pony and trap; that the offer to pay expenses was made on the basis of B. having lent the pony and trap to M., and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least equally consistent with a state of facts on which B. would not be liable, he was entitled to a nonsuit or a direction in his favor. Fitzgibbon, L. J., said: "No doubt, ownership of the thing which does the mischief often sup-

for his own purposes, without the knowledge or consent of the master.⁵

plies prima facie evidence sufficient to make the owner responsible for the damage. If we refer, for example, to the barge and omnibus cases, the person in charge was manifestly acting as the servant of someone, and presumably of the owner. In such cases it is more frequently a question of the identity of the master, than of the existence of the relation of master and servant between the negligent person and somebody else. Here a runaway pony did the mischief: the pony belonged to Bradlaw; the use of the pony and trap had been given by Bradlaw to M'Glynn; and the injury occurred while M'Glynn was in charge. But nothing further was proved."

In *Braverman v. Hart* (1907) 105 N. Y. Supp. 107, it was held that the owner of an automobile was not liable for an injury caused by the negligence of a person not under his control or direction, to whom he had delivered the machine under an agreement that he was to use it for hire and pay the purchase price out of the money derived from its use.

In *Shiells v. Edinburgh & G. R. Co.* (1856) 9 Sc. Sess. Cas. 2d Series, 1199, the defendant was held not to be liable for injuries inflicted by the defendant's van and horse, while they were being driven by the servant of his independent contractor.

In *Doran v. Thomsen* (1907) 74 N. J. L. 445, 66 Atl. 897, the court thus discussed the sufficiency of the declaration: "The first and third counts plainly disclose no cause of action. They are apparently based upon the erroneous assumption that, because the defendant loaned his motor vehicle to someone over whom he had no direction or control at the time of the accident, he shall be held liable for the mere loaning. But no such liability rests upon him. . . . These counts contain no allegation that the vehicle was used at the time in the owner's business. Nor is there any allegation therein that the vehicle was under the control or management of the defendant, or that the person driving it was under the control of the defendant, or that the relationship of master and servant existed between the defendant and the driver."

In *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 338, where the declaration in an action for the death of a

child who had been run over by an automobile alleged that the defendants "permitted one P. to take and run it," a demurrer was held to have been properly sustained.

⁵In *Lotz v. Hanlon* (1907) 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731, where the plaintiff was run down by defendant's automobile, the court made the following remarks: "The evidence establishes the fact that the man driving the machine when the accident occurred was in the defendant's regular employment as chauffeur; that the machine was intrusted to his care and keeping, only, however, for defendant's own use as he might direct. So much is supplied. But it comes to nothing that the driver was the defendant's servant, if it appears that at the time the accident happened he was not on the master's errand of business. If he were on an errand of his own, then as long as so engaged he did not stand in the relation of servant. The evidence on part of the defendant, and not attempted to be contradicted or discredited, leaves it clear of all doubt that the three persons occupying the machine with the driver when the accident occurred were there by invitation of the driver, that they were entire strangers to the owner of the machine, and that the machine was being employed by the driver on this occasion without the knowledge of the owner. . . . So far as appears, the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and therefore entirely apart from his master's business."

"The master is not to be held to respond for the negligent acts of the servant, done outside the scope of the master's business and the servant's employment, and while the servant is pursuing his own affairs exclusively, even though facilities afforded to the servant by his relation to the master were used in committing the injury, if such facilities were not used with authority or consent of the master." *Chicago Consol. Bottling Co. v. McGinnis* (1899) 86 Ill. App. 38, (former appeal [1893] 51 Ill. App. 325).

"The owner or keeper of an automo-

2281a. Same subject considered with reference to the burden of proof.—It seems impossible to escape the conclusion that, in a strictly logical point of view, the doctrine stated in the latter part of the preceding section involves the corollary that a nonsuit should always be granted, or a verdict for the defendant directed, where the evidence goes merely to the extent there stated. This doctrine seems to be reflected in the cases cited below.¹ But in most of the instances in which the question has been considered, a less rigorous theory has

bile will not be held liable for a negligent homicide committed therewith in a public street by a person old enough to be discreet and responsible in the eyes of the law, who took the machine, without the knowledge of the former, from a shop or garage where it had been left, although the person who thus took and drove the machine was inexperienced in its operation and unlicensed to run it, notwithstanding the leaving of the automobile at the shop or garage furnished the opportunity whereby such person got possession of it." *Lewis v. Amorus* (1907) 3 Ga. App. 50, 59 S. E. 338.

For other authorities relating to the situation adverted to in the text, see §§ 2294 to 2299, *post*, relating to deviations from prescribed routes by drivers of vehicles, and to the unauthorized use of vehicles for the accommodation or pleasure of the servant or third persons.

See also the cases cited in § 2288, notes 1, 2, and 3, and § 2289, *post*.

¹In *Lotz v. Hanlon* (1907) 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731, the court made the following remarks: "It was essential to a recovery in this case that it be made to appear that the accident from which plaintiff's injury resulted occurred while the person in charge of the automobile was using it in the course of his employment, and on his master's business. Plaintiff offered no direct evidence as to this, but, having shown the ownership of the machine to be in the defendant, sought to derive from this circumstance, and this alone, not only the fact that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's errand. If, when plaintiff rested, a nonsuit had been ordered, he could not have been heard to complain. Ownership of the

machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion. In itself it is but one of a series of circumstances, and its significance depends on the extent of the general concurrence of these. If they indicate something different, the scant basis that this single fact otherwise might afford is reduced below the point of sufficiency. Because its value as a probatory fact so entirely depends upon attending circumstances, it is always the duty of the party seeking to establish through it a *prima facie* case, to develop the whole situation, so that its significance may be correctly measured. When he fails in this regard, and his evidence leaves the general situation undisclosed and this without explanation of the failure, he is liable to suffer from the inference that what was not disclosed was prejudicial to his case. Where this occurs the mere fact of ownership can count for little." It seems doubtful whether this decision is entirely consistent with that rendered in *Moon v. Matthews*, note 3, *infra*.

In *Sarver v. Mitchell* (1907) 35 Pa. Super. Ct. 69, an action against the owner of an automobile for causing the death of a child while the automobile was in charge of the owner's chauffeur, it was held that evidence of the ownership of the machine was not sufficient in itself to charge the defendant with liability, but that the plaintiff must go further, and show that the machine was being used in the course of the master's business. The ruling in this case was said in *Moon v. Matthews* (1910) 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219 (note 3, *infra*), to have been based upon the ground that there was no evidence to

been adopted; *viz.*, that a servant may be presumed *prima facie* to have been acting in the course of his employment, wherever it appears not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged tort was committed, it was being used under conditions resembling those which normally attended its use in connection with the master's business or household affairs.² Having regard to the fact that the evidence, if any, which might tend to show that the scope of the employment was transcend-

show that, at the time of the accident, the car was being used in or about the owner's business.

² In *Beard v. London General Omnibus Co.* [1900] 2 Q. B. (C. A.) 530, Romer, L. J., said: "I agree that the plaintiff's appeal fails. If one sees in the streets of London an omnibus admittedly belonging to the defendant company, driven in the ordinary way by a person who appears to be a driver, the presumption is that he is authorized by the company. That presumption may be removed. In this case it was rebutted by the plaintiff's evidence, for it proved that the *de facto* driver was not the person authorized to drive, but a person authorized and employed to act as conductor. In such a case the onus of showing some special authority given to the conductor to do the act which he did lies upon the plaintiff. No such authority was shown, and no case of necessity to do the acts which the conductor did was suggested, nor do the facts lead to any presumption that a case of necessity had arisen." Smith, L. J., said: "I agree that, on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negligence, there would be a *prima facie* case that the omnibus was being driven by an authorized servant of the company within the scope of his employment. But that is not this case, for it was expressly opened to the jury as a case in which the omnibus was not being driven by the driver who was employed to drive it, but by the conductor. When a case is so opened, that negatives the presumption that the omnibus was being driven by the authorized agent of the company, because *prima facie* it is not the duty of the conductor to drive, any more than it is the duty of the driver to take fares. My brother Romer, in the course of the argument,

put the illustration of an omnibus being driven by a stranger to the defendants. In such a case it would be impossible to say that the proof that the omnibus was being driven by a stranger would raise any case against the company. The plaintiff must, in such a case, have gone on to show that the stranger was driving with the consent or approval of the company, or on such emergency that their consent must be implied. There was no evidence on either of these points as regards the conductor; and therefore Lawrence, J., came to the conclusion—and, in my opinion, rightly—that the plaintiff had not made out a *prima facie* case."

In *O'Reilly v. McCall* [1910] 2 I. R. (C. A.) 42, where the plaintiff's injury was caused by an automobile, the evidential situation in the present point of view was thus referred to by Fitzgibbon, L. J.: "At the close of the plaintiff's case, the evidence that the chauffeur was at the time of the accident acting within the scope of his employment was merely presumptive, the presumption arising from the facts (1) that the car which did the damage was proved or admitted to be the defendant's car; and (2) that the person who was driving it was employed by the defendant as a chauffeur. The presumption arising from these facts ceased when, or if, sufficient and uncontradicted evidence was given to prove that what brought Whittaker to Wood quay was not the defendant's business."

In *Perlstein v. American Exp. Co.* (1901) 177 Mass. 530. 52 L.R.A. 959, 59 N. E. 194, in order to prove that the negligent driver was a servant of the defendant, acting within the scope of his employment at the time of the accident, the plaintiff relied upon the inference, that a person driving such a team as described, the wagon being

ed, must, in the nature of the case, be more readily accessible to the master, it is considered to be only reasonable that the burden of producing that evidence should be laid on him.³ By one court the fact of ownership has been treated as an element which is sufficient of

marked "American Express Company," was one of the servants then engaged in the defendant's business. The court said: "If the routes prescribed for the defendant's business were such that at this time none of them could be driven through that part of Harrison avenue without, for the time, abandoning the service in which he was engaged, and going off for some purpose of his own, the defendant would not be liable, even if the team which is said to have caused the collision was one of its teams and was driven by a person who was regularly employed in its service."

"There is a strong presumption that cars operated on the tracks of a street railway company are being run by the authority of the company, and not by strangers or by employees acting beyond the scope of their duties." *Baker v. Metropolitan Street R. Co.* (1910) 142 Mo. App. 354, 126 S. W. 764. This case obviously does not go as far as the other Missouri cases cited in note 4, *infra*.

In *Rumpf v. Fresh Food & Ice Co.* (1907) 7 New So. Wales St. Rep. 260, 24 W. N. 50, it was proved that a boy by whose negligence in riding a horse the plaintiff was injured was in the employ of the defendant; that the horse he rode belonged to the defendant; that he was carrying an empty milk can, and that the defendant was carrying on business as a milkman. Held sufficient evidence to throw on the defendants the onus of proving, if they could, that the boy was not at the time of the accident acting in the course of his employment.

In *Curley v. Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N. Y. Supp. 35, a *prima facie* case was held to have been made out, where the testimony showed that the driver of the electric cab which collided with plaintiff's horse had upon his hat a plate with the words, "Electric Vehicle," and a number; that the same words were upon a plate upon the cab; and that the drivers in the employ of the defendant, from the time it began business until the month of June before the accident,

wore a similar inscription upon their hats.

In *Birnbaum v. Lord* (1894) 7 Misc. 493, 28 N. Y. Supp. 17 (boy run over), the court reasoned thus: "The complaint was sufficient in alleging that the wagon belonged to defendants, and was driven by one of their agents or servants, although it does not otherwise allege that the latter was then engaged in the defendants' business, but that is involved in the allegation that the wagon was driven by their agent or servant; for, if the driver was not engaged upon his master's business, he would be neither agent nor servant, but his own master. As to the proof of ownership of the wagon, the defendants' name was on the wagon, and there is no pretense of evidence on the trial that it did not belong to them. No witness was called by them on that point, although the proof of the fact, if it existed, must be deemed to be in defendants' possession. All presumptions on that point were therefore against them. *Wennerstrom v. Kelly* (1894) 7 Misc. 173, 27 N. Y. Supp. 326. The ownership of the wagon and the agency of the driver were therefore questions for the jury."

The doctrine stated in the text was also affirmed in *Stewart v. Baruch* (1905) 103 App. Div. 577, 93 N. Y. Supp. 161, but there it was held that the weight of evidence showed that the chauffeur of an automobile was using it for his own purposes.

³In *Long v. Nute* (1907) 123 Mo. App. 204, 100 S. W. 511 (automobile accident), the court reasoned thus: "The failure of defendant to testify that the chauffeur was using the automobile for his own ends and without authority, and his failure to procure the evidence of the chauffeur, raises the presumption that the latter was about the master's business at the time of the accident, and was in possession of the automobile by his consent. [*Baldwin v. Whitcomb* (1880) 71 Mo. 651.] Where a servant who is employed for the special purpose of operating an automobile for the master is found operating it in

itself to warrant the conclusion that the servant was acting in the course of his employment under the owner.⁴ But the weight of authority is decidedly opposed to this view, and it may safely be pronounced unsound.

the usual manner such machines are operated, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master, and the burden is on him to overthrow this presumption by evidence which the law presumes he is in possession of. It would be a hard rule, in such circumstances, to require the party complaining of the tortious acts of the servant, to show by positive proof that the servant was serving the master, and not himself; and the fact that the chauffeur made a detour from the direct route from defendant's home to the fair grounds does not change the presumption or relieve the master's liability for injuries caused by careless driving." The court affirmed an instruction to the effect that, from evidence that the automobile belonged to the defendant, and the chauffeur was in his employ, the jury might infer that at the time of the collision the chauffeur was about defendant's business and acting within the scope of his authority.

In *Moon v. Matthews* (1910) 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219, the statement in the second sentence of the passage quoted above was referred to with approval. The court distinguished *Lotz v. Hanlon*, note 1, *supra*, on the ground that the plaintiff there had rested, after having merely showed the defendant's ownership of the machine, and that the evidence was accordingly insufficient to connect the defendant with the injury. But the actual state of the matter seems to be that, in the earlier case, the attention of the court was not directed to the essential importance of the element of the manner in which the given instrumentality was being used, and formulated a doctrine into which that element did not enter at all.

⁴In *Shamp v. Lambert* (1909) — Mo. App. —, 121 S. W. 770, evidence that defendant admitted his ownership of the automobile which struck plaintiff, and that the chauffeur in charge thereof was his chauffeur, was held to

show prima facie that plaintiff was injured through the negligence of defendant's servant while acting within the scope of his employment. In the opinion of the court the word "chauffeur" imported of itself a person having charge of or operating an automobile.

In *Fleishman v. Polar Wave Ice & Fuel Co.* (1910) 148 Mo. App. 117, 127 S. W. 660, when plaintiff, while walking on a city sidewalk, was struck by the tongue of a wagon, which was run into by another wagon, evidence that defendant's name was on the latter wagon was held to be competent to show that such wagon was in charge of defendant's servants, and they were acting in the course of their employment at the time of the accident. In this case the court reviewed a large number of decisions. Most of them, however, involved merely the question whether ownership was a circumstance from which the relationship of master and servant could be inferred, and therefore do not lend any real support to the doctrine contended for. Among other cases, *Perlstein v. American Exp. Co.* note 2, *supra*, was referred to as embodying the doctrine that "the plaintiff, by proving that the wagon was branded with the defendant's name, established prima facie that the driver was the servant of the defendant and acting within the scope of his employment." But an examination of that case will show that this view of its effect is erroneous, and that it really proceeded upon the ground that the fact of ownership is presumptive evidence to the extent stated, wherever the vehicle in question was apparently being used in the same manner that it would ordinarily be used in such a business as that carried on by the defendant. It can scarcely be supposed that the Missouri court, if the point were fairly raised, would apply its theory in a case where the delivery wagon of a store had caused an injury, while it was being driven about the streets of a city in the small hours of the morning. Yet its language, in the unqualified form in which it was used,

Whatever position may be taken with regard to the points adverted to in the preceding paragraph, the liability of the defendant is clearly a question for the jury, whenever the evidence tends to show not only that the instrumentality which caused the injury complained of belonged to him, but that it was being used for the purpose of his business.⁵

The evidential import of ownership in actions against fathers for the torts of their minor children is discussed in § 2270, *ante*.

2282. Instrumentality owned by a person other than the master.—

If the other circumstances involved in a case are consistent with, or require, the inference that the tort complained of was within the scope of the servant's employment, the mere fact that the instrumentality which occasioned the plaintiff's injury did not belong to the master will not preclude him from recovering damages.¹ The action is deemed to be maintainable or not maintainable, according as his use of the instrumentality was or was not authorized, expressly or impliedly, by the master.² Such authorization is manifestly a proper inference wherever it is provided by the contract of hiring that the

seems to go to the length of imputing a presumptive liability to the storekeeper under such circumstances.

⁵ In *Cleveland v. Newsom* (1880) 45 Mich. 62, 7 N. W. 222, where a servant, while on an errand for his master, drove against a foot passenger, it was held that the defendant had the burden of showing that the servant was not engaged in the course of his employment, but was driving around for pleasure.

In *Reilly v. Hannibal & St. J. R. Co.* (1887) 94 Mo. 600, 7 S. W. 407, an action by parents against a railroad company for negligently killing their minor child with a switch engine, while carrying certain of the company's employees from the roundhouse to their meals, evidence that the engine had been so used in an open and notorious manner from six weeks to three months with the knowledge of the yard master, and that the superintendent had frequently seen it so used, and was in a position to know all about it, was held to be sufficient to justify the court in submitting to the jury the question whether such use was known to the company and acquiesced in by it, and whether when so used the engine was engaged in the business of the company.

In *Louisville Water Co. v. Phillips*

(1905) 139 Ky. 614, 89 S. W. 700, plaintiff proved that defendant's inspector was the person who drove over decedent, and that the vehicle was the vehicle of the defendant; and it was shown that the inspector's vehicle was never used, except in the service of the company. Held, that a prima facie case authorizing a recovery was established, and an instruction that, if decedent was killed by the inspector, who was pursuing his own ends exclusively, defendant was not responsible, was properly refused.

¹ *Fletcher v. Boston & M. R. Co.* (1861) 1 Allen, 9, 79 Am. Dec. 695, where the court approved the ruling of the trial judge, that, "if the train by which the injury was caused was in the care of the defendants' servants, subject to their exclusive direction and control, at the time of the accident," then it was immaterial who in fact were the owners of the engine and cars constituting the train.

² In *Patten v. Rea* (1857) 2 C. B. N. S. 606, 26 L. J. C. P. N. S. 235, 3 Jur. N. S. 892, 5 Week. Rep. 689, where the general manager of a horse dealer drove his own gig against plaintiff's horse while he was on his way, first, to collect a debt due to his master, and afterward to consult a doctor, the question

whether the defendant was liable was held to have been properly submitted to the jury, although the vehicle belonged to the servant himself, and there was no evidence of any express command from the master to use it on the given occasion. Cockburn, Ch. J., was of opinion that any significance which might otherwise have been attached to these elements was overcome by that part of the evidence which showed that the vehicle and horse were kept by the defendant free of charge to the servant, and ordinarily used by him in the performance of journeys about his master's business, and that the master was cognizant of the course which his servant was pursuing at the time, and did dissent. Having regard to these circumstances and to the nature of the business, the employee must be assumed to have had authority to exercise his discretion as to the mode of performing his duty to his master. Williams, J., adverting to the exception taken, that the trial judge had misdirected the jury in not leaving to them the question whether the horse and gig driven by the manager were used by him on his master's business, at the instance and express request of the defendant, observed: "It clearly is not necessary in cases of this sort that there should be any express request; the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here."

In *Turcotte v. Ryan* (1907) 39 Can. S. C. 8, affirming (1906) 15 Quebec L. R. (K. B.) 472, where T., an employee of D., while in discharge of the duties of his employment, driving his own horse attached to a vehicle belonging to his employer, who also owned the harness, negligently caused injuries to C., which resulted in his death, it was held that the master and servant were jointly and severally responsible in damages. In the lower court the ground upon which the master's liability was disputed by counsel was that the master could not exercise any supervision over the work. This ground was clearly untenable if the tort-feasor was to be regarded as standing in the relation of servant to the defendant, for the purposes of the journey in question. It was, however, a point open to argument, whether he was not simply a bailee in respect of the ve-

hicle; and the rationale of the dissenting judgment of Lacoste, Ch. J., in the lower court, was that this was really his position. But in view of the fact that he was driving in the discharge of the duties which he had been engaged to perform, such a conclusion could, it is apprehended, have been justified only by clear and specific evidence that he had ceased for the time being to be a servant. Such evidence is not disclosed by the report.

In *Goodman v. Kennell* (1827) 3 Car. & P. 167, a person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left for the jury to say whether or not the horse was taken by the servant with the implied consent or authority of the defendant. The following statement made by Park, J., to the jury, must be taken with the qualifications indicated by the footing upon which the case was thus submitted to them: "I cannot bring myself to go the length of supposing that, if a man sends his servant on an errand without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act." A new trial was moved for, but refused.

In *Wilson v. Pennsylvania R. Co.* (1899) 63 N. J. L. 385, 43 Atl. 894, where damages were claimed for injuries sustained in a collision with a wagon belonging to an express company, driven by a person employed by a railway company to carry the mail bags, which had previously been carried on foot or in a push cart, it was held that a nonsuit was proper, as there was no evidence that the company furnished the wagon, or authorized or even knew of its use.

In *Stretton v. Toronto* (1887) 13 Ont. Rep. 139, a municipal employee who had been despatched to procure a wrench for the purpose of shutting off the water from a street hydrant which had burst had, without the knowledge or consent of defendants, wrongfully taken possession of a horse and buggy belonging to defendants' city commissioner, and therewith ran down the plaintiff. Held, that defendants were not liable.

servant is to use, for the purposes of the stipulated work, an instrumentality belonging to himself.³

2283. Time at which the wrongful act was done.—There are two classes of cases in which this element is material:

(1) Cases in which the given tort was committed while the servant was off duty; that is to say, at a time when his contract did not oblige him to perform any duty. It is clear that, where the evidence discloses this situation, the master cannot ordinarily be held responsible.¹ The circumstances presented in many of the cases that belong to this class are such that the master's nonliability might also be predicated on the ground that the servant's act related to his own personal affairs.² But the injured person is equally precluded from recovery

³ In *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861 (collapse of wagon caused by overloading), the court observed: "By hiring the wagon the appellant made it his own as to third persons, notwithstanding that, as between the appellant and Taylor, the wagon belonged to Taylor."

¹ In *Southern R. Co. v. Power Fuel Co.* (1907) 12 L.R.A.(N.S.) 472, 82 C. C. A. 65, 152 Fed. 917, where a railway company was held not to be liable for the damage caused by a fire which was started by a section man while he was sleeping in a boarding car, the court approved the following statement in 1 Shearm. & Redf. on Neg. § 147. "In determining whether a particular act is done in the course of the servant's employment, it is proper, first, to inquire whether the servant was, at the time, engaged in serving his master. If the act is done while the servant is at liberty from service, and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master."

In *Brown v. Purviance* (1828) 2 Harr. & G. 316, a servant was sent to remove a vessel from a wharf into the stream. After placing and mooring it there, he took the vessel's boat to return to the shore, and abandoned it, so that it floated away and was lost to the owner. Held, that when he had finished mooring the vessel, his employment ceased, and that the acts done after-

ward did not render his master liable.

In *Rohl v. Metropolitan R. Co.* (1890) 7 Times L. R. 2, the door of a guard's van in a train, having been left open by a railway servant who was going home on the train after his work for the day was ended, struck and killed a passenger on another train. Coleridge, J., ruled that the company was not liable, because the relation of master and servant did not exist between it and the servant at the time, while he was being so conveyed on the train.

For other cases in which it was held that no action lay, see *St. Louis & S. F. R. Co. v. Wyatt* (1907) 84 Ark. 193, 105 S. W. 72 (switchman assaulted a person who was intending to become a passenger); *Fletcher v. Baltimore & P. R. Co.* (1895) 6 App. D. C. 385 (person standing at a highway crossing was struck by a piece of timber thrown from a car by a laborer who was allowed to ride home on a repair train after his day's work was ended, and to carry refuse timber for his own fuel); *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375 (assault by servant after working hours); *Dells v. Stollenwerk* (1890) 78 Wis. 339, 47 N. W. 431 (servants of man who had contracted to move a house erected steps at the conclusion of the day's work, the erection not being within the scope of the contract).

As to the effect of evidence showing that an injured servant was off duty at the time when he was injured, see §§ 1555-1557, *ante*.

² See preceding note.

where the given act was done for the master's benefit, and was of such a nature that, if it had been done while he was on duty, it would have been within the scope of his employment.³ Whether the servant was on or off duty is a matter that is usually determinable with reference to the question whether he was actively engaged in the performance of the work for which he was hired.⁴ But this test is not invariably controlling. A master is chargeable with a tort committed after the day's work is concluded,⁵ or during an interval allowed for a meal,⁶ if its commission involved a default in respect of some duty then incumbent on the servant.

(2) Cases in which the given tort was an incident of some punitive act done by the servant in the interests of the master. The circumstance that such an act was performed some time after the commission of the offense which induced it sometimes operates to take it out of the scope of the servant's employment. This result is illustrated both in cases where the act involved merely an assault,⁷ and in

³ *Lima R. Co. v. Little* (1902) 67 Ohio St. 91, 65 N. E. 861 (conductor whose day's work was finished undertook to give the signal for the starting of his car after it had been transferred to the charge of another conductor).

⁴ See cases cited in the preceding notes.

⁵ In *Chapman v. New York C. R. Co.* (1865) 33 N. Y. 369, 88 Am. Dec. 392, the liability of a railway company for the value of some horses which were run over by a train after they had escaped onto the track through an opening negligently left in the railway fence by a servant of the company, while he was engaged in a business that concerned himself alone, was affirmed on the ground that the terms of his employment required him, if he saw anything amiss after his day's labor was finished, to give the necessary attention to it without being specially directed to do so.

In *Noblesville & E. Gravel Road Co. v. Gause* (1881) 76 Ind. 142, 40 Am. Rep. 224, a tollgate keeper, having charge of the gate at all times, but not required to collect toll at night after 9 o'clock, let the beam of the gate down upon the plaintiff, who was endeavoring to pass the gate after that hour, and injured him. Held, that the company was liable, and that the trial court had rightly refused to give an instruction to the effect that the gate keeper ceased

to be in defendant's employment after the hour had passed after which he was required to collect tolls. In view of the fact that he was in full charge of the tollhouse, and that his duties were continuous, such an instruction was open to the objection that it ignored his agency for other purposes.

⁶ *Riordan v. Gas Consumers' Asso.* (1907) 4 Cal. App. 639, 88 Pac. 809 (master liable for injuries caused by a runaway horse which his servant, after having driven it to his own house during the lunch hour, for his own accommodation, had negligently failed to fasten when he was about to feed it upon the highway).

⁷ In *Baltimore & O. R. Co. v. Strube* (1909) 111 Md. 119, 73 Atl. 697, where the plaintiff had been arrested, and afterward assaulted, by an employee of a railway company who was also a special constable, a requested instruction to the effect that, as soon as the arrest was completed, the tortfeasor lost his dual capacity of officer and agent, ceased to be an employee of defendant, and became only an officer of the state, was properly refused, for the reason that "the arrest and the assault must be treated as so merged together into one transaction as to be scarcely separable for practical purposes, even though theoretically they could possibly be regarded as distinct acts." See

cases where an actual or supposed criminal is apprehended by the servant himself, or given into the custody of an officer of the law.⁸

2284. Place at which the wrongful act was done.— The cases under this head are divisible into three classes.

(1) Cases in which the servant's work was normally performed upon certain premises occupied by his master, and the tort complained of was committed outside those premises altogether, or outside the particular portion of them which was appointed for the discharge of his contractual functions. The decisions with regard to this situation seem to furnish no more definite doctrine than this,—that the locality of the tort is an element which tends, but not conclusively, to prove that the tort-feasor was not acting within the scope of his employment. But some courts have gone very far in affirming the master's nonliability as a matter of law.¹ It seems to be at least open to argument, whether in all the instances in which the claimants were unsuccessful, the torts complained should not have been regarded rather as amounting to an abuse of the authority of the tort-feasor than as a total departure therefrom. The more reasonable doctrine, perhaps, is that an act belonging to the category covered by the contract of service, and done for the master's benefit, should not be deemed beyond the scope of the servant's employment merely because it was done outside the area to which the performance of his duties was expected to be, and normally was, confined. It will be observed that, as we are here dealing with an act done for the benefit of the master, and not of the servant himself or of a third person, the

also the cases cited in § 2348, note 3, *post*.

⁸ See *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 11 Cox, C. C. 621, 23 L. T. N. S. 612, 19 Week. Rep. 127 (§ 2465, note 1, *post*); *Daniel v. Atlantic Coast Line R. Co.* (1904) 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718 (§ 2465, note 1, *post*); *Walker v. Southeastern R. Co.* (1870) L. R. 5 C. P. 640, 39 L. J. C. P. N. S. 346, 23 L. T. N. S. 14, 18 Week. Rep. 1032 (§ 2475, note 1, *post*).

¹ The cases as to wrongful arrests by special policemen outside the premises of their employers are reviewed in § 2480, *post*.

Other cases in which the locality was treated as an element negating liability are the following: *Oxford v. Peter* (1862) 28 Ill. 434 (servant directed to drive trespassing cattle out of a certain

field followed them along a land, and in doing so caused the injuries complained of,—see § 2312, note 5); *Lee v. Nelms* (1876) 57 Ga. 253 (farm servant injured, outside his master's field, trespassing cattle which he had been driving out); *Illinois C. R. Co. v. Ross* (1888) 31 Ill. App. 170 (flagman stationed at a highway crossing had assaulted boy on the company's premises, but outside the limits of the highway); *Yates v. Squire* (1865) 19 Iowa, 26, 87 Am. Dec. 418 (servant instructed to turn a trespassing horse out of a certain pasture struck it with a whip after it had passed onto the highway,—see § 2312, note 6, *post*); *McKay v. Hudson River Line* (1900) 56 App. Div. 201, 67 N. Y. Supp. 651 (purser of boat temporarily imprisoned person charged by another passenger with theft, after former had left the boat and delivered up his ticket at the wharf).

problem is relieved of the embarrassing element which has to be reckoned within the class of cases adverted to in the following paragraph.

(2) Cases in which the servant was performing, outside his master's premises, work of which the essential feature was that it required him to travel in a certain direction and within a certain area more or less exactly defined by his master's instructions. Nearly all the cases which involve this situation are concerned with the effect of a deviation made, either for his own purposes, or for the accommodation of a third person, by a servant engaged in managing vehicles.² The conflict of doctrine which is disclosed by those cases may be said to reflect, broadly speaking, a difference of opinion as to the crucial point, whether an injurious act done during the deviation should be regarded as an act done at a time when the servant was wholly occupied with matters that concerned only himself or the third person in question, or as an act done while he was occupied concurrently in matters of that description and also in the performance of his appointed function of managing the vehicle on behalf of the master.

(3) Cases in which the servant was in the employment of an independent contractor and doing work on another person's premises. With reference to the situation thus indicated, it has been held that the master cannot be held liable for the tort, if it was committed at a place where the servant was not required to be in the course of his duties.³

2285. Wrongful act done in disobedience of master's orders.—

Evidence that a given tort was committed by a servant in contravention of his master's orders may tend to establish one or other of two essentially different situations.

(1) The disobedience of the servant may have been of such a character as to warrant or require the conclusion that the tort was incidental to some function which he was not authorized to undertake at all, or not authorized to undertake at the given time and place. In this instance the effect of the disobedience is to carry the servant entirely outside the scope of his employment, and the master's liability is negatived for that reason.¹ It is obvious that the question whether

² See §§ 2294 *et seq.*, *post*.

Another case which may be referred to in this connection is *Smith v. Spitz* (1892) 156 Mass. 319, 31 N. E. 5, where a billposter created a nuisance on a public highway 15 miles away from where he was employed to do his work. See § 2320a, *post*.

³ *Mayer v. Thompson-Hutchison Bldg.*

Co. (1894) 114 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 623, where the injury was caused by the fall of some bricks from a wall of a building under construction, and one of the alternatives indicated by the evidence was that they were pushed off the wall by an employee after its completion.

¹ The following remarks of Buller, J.,

this situation or the one discussed in the next paragraph is predicably may, in cases close to the border line, involve considerable difficulty.²

(2) The disobedience may have relation merely to the manner in which an act incidental to the authorized functions of the servant was performed. It is well settled that, under the circumstances thus indicated, the fact of the servant's having departed from his instructions does not absolve the master from liability. This doctrine and its *rationale* are clearly explained in a leading decision of the Supreme Court of the United States.³ It has also been enunciated or recognized in numerous other cases.⁴ The decisions cited in the sub-

show that before the end of the eighteenth century, this had been recognized as the consequence of this description of disobedience: "Suppose a master ordered his servant not to take his horses and carriage out of the stable, and the latter went in defiance of his master's orders; there is no authority which says that the master shall be liable for any injury done to another by such an act of the servant, though, indeed, if the master had ordered the servant to go a particular journey, and in the course of it the latter did an injury to some third person, the authorities which have been determined say that the master is liable in that case." *Fenn v. Harrison* (1790) 3 T. R. 757, 762.

² See, for example, *Waller v. South-eastern R. Co.* (1870) L. R. 5 C. P. 640, 39 L. J. C. P. N. S. 346, 18 Week. Rep. 1032, 23 L. T. N. S. 14, where the liability of a railway company for a wrongful arrest was denied on the ground that it was an "act beyond the scope of the servant's employment, and in contravention of his instructions." (See § 2475, note 1, *post*.)

³ *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 14 L. ed. 502. The following remarks may be quoted: "There may be found in some of the numerous cases reported on this subject *dicta* which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depend on the question whether the servant, at the time he did the act complained of, was acting in the course of his employment, or, in other words, whether he was or was not at the time in the relation of servant to the defendant. . . .

We find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondeat superior* would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive, to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the '*causa causans*' of the mischief; while the proximate cause, or the *ipsa negligentia* which produces it, may truly be said in most cases to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety."

⁴ "If the act is one within the scope of the servant's employment, and is done in the master's service, an action lies against the master, and the master is liable, even though he has directed the servant to do nothing wrong." *Martin, B.*, in *Seymour v. Greenwood* (1861) 6 Hurlst. & N. 359, 365.

joined note show that it is equally applicable whether the disobedience involved an infringement of the master's regulations or general

In *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. (Exch. Ch.) 525, 17 Eng. Rul. Cas. 258, where "the defendants' omnibus was driven before the omnibus of the plaintiff, in order to obstruct it," Willes, J., said: "It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment? . . . I do not speak without authority when I treat that as the proper test. Take the ordinary case of a master of a vessel, who it must be assumed is instructed not to do what is unlawful, but what is lawful; if he has distinct instructions not to sell a cargo under any circumstances, but he does so under circumstances consistent with his duty to his master, the master is liable in damages to the person whose goods are sold."

"The principle to be deduced from the authorities on this subject is that, where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do." Kelly, C. B., in *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 8 C. P. (Exch. Ch.) 148, 25 Eng. Rul. Cas. 115. In his judgment delivered in the lower court (1872) L. R. 7 C. P. 415, Willes, J., remarked: "It is not sufficient, in order to excuse a master, to show that the particular act was wrongful, or even that the servant was warned not to do what was wrong."

"The master may be liable, although

he directed the act to be done in a legal manner, and the cause of action is not the act itself, but the illegal and unauthorized mode of its performance."

Kinsella v. Hamilton (1890) 26 Ir. Rep. 671.

If the act was "within the scope of the servant's employment and authority, . . . and . . . in doing what he did he undertook to act for the company, and not for himself or for his own ends, the company is not exonerated, although the servant may have deviated from instructions in executing the authority." *Hoffman v. New York C. & H. R. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 337.

"The defendants were responsible for this act [piling lumber]. . . . It was an act done by him [the servant] in the prosecution of their business, and they are not relieved from responsibility therefor by his departure from their instructions in the manner of doing it. The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do. If the owner of a building employs a servant to remove the roof from his house, and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions, because it was done in the business of the master. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own." *Cosgrove v. Ogden* (1873) 49 N. Y. 255, 257, 10 Am. Rep. 361.

"That the . . . servant may have exceeded the authority with which he was clothed, or have acted in direct disregard of express orders given him in the premises, and in violation of the

instructions regarding the manner in which the servant's functions were to be performed, or a neglect of an order given with reference

duty with which he was intrusted, will not ordinarily constitute a defense which the company will be heard to urge in its justification, as against one who has unjustly suffered from the wrongful act of such servant. This is so for the palpable reason that, the right to summarily eject intruders from its cars being coupled with a condition that such right must be exercised in a lawful manner, the company cannot delegate to an agent the power thus conferred upon it by law, without at the same time becoming strictly answerable for any abuse thereof on the part of its agent." *City Electric R. Co. v. Shropshire* (1897) 101 Ga. 33, 34, 28 S. E. 508.

The fact that the conduct of the servants constituting the negligence complained of was a violation of their duty to the employer, or was needless, reckless, or wanton, does not exonerate the master. *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

"The test of the master's responsibility for the act of his servant is not whether the act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do." *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421, 19 Pac. 783.

"A master is responsible for the torts of his servant done in the course of his employment, . . . and not for a purpose personal to himself, whether the same be done wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of his master." Syllabus written by the court for *Kwiechen v. Holmes & H. Co.* (1908) 106 Minn. 148, 19 L.R.A.(N.S.) 255, 118 N. W. 668.

"If . . . [the servant] was authorized to do the act at all, the master is liable for the consequences of his doing it in a different manner, if the mode adopted by him is so far incident to the employment that it comes within its scope, for, having given the servant any authority in the premises, he alone must suffer for its abuse." Wood,

Mast. & S. § 309, quoted in *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 645; *Collette v. Rebori* (1904) 107 Mo. App. 711, 717, 718, 82 S. W. 552.

"It may have contravened the master's purposes or directions, but a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects than can a master who puts machinery in motion escape liability, on the ground of good intentions, from injuries accruing from defects of machinery. Out of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to the master; but within that orbit, they are so imputable, whatever the master may have meant." Wharton, Neg. § 160; statement adopted in *Alsever v. Minneapolis & St. L. R. Co.* (1902) 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841, 843.

"The law . . . makes a master liable for acts of negligence done by his servant, although such acts are unauthorized, or even contrary to instructions, when the negligent acts are done in the execution of the master's business for which the servant has been employed." *Loomis v. Hollister* (1903) 75 Conn. 718, 55 Atl. 567.

For other authorities which sustain the statement in the text, see *Singer Mfg. Co. v. Kahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; *New York C. & H. R. R. Co. v. United States* (1908) 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304; *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922; *St. Louis, I. M. & S. R. Co. v. Grant* (1905) 75 Ark. 579, 88 S. W. 580, 1133; *Lewis v. Schultz* (1896) 98 Iowa, 341, 67 N. W. 266; *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Johnson v. Bryan* (1841) 1 B. Mon. 292; *Smith v. Munch* (1896) 65 Minn. 256, 68 N. W. 19; *Crandall v. Boutell* (1905) 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122; *Barmore v. Vicksburg, S. & P. R. Co.* (1904) 85 Miss. 426, 428, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594; *Compher v. Missouri & K. Teleph. Co.* (1907) 127 Mo. App. 553, 106 S. W. 536; *Aycrigg v. New York & E. R. Co.* (1864) 30 N. J. L. 460; *McCann v.*

to some particular occasion or piece of work.⁵ In some instances it has been referred more less distinctly to the consideration that the

Consolidated Traction Co. (1896; N. J. Err. & App.) 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888; *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 299; *Hoffman v. New York C. & H. R. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 337; *Sharp v. Erie R. Co.* (1906) 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250; *Geraty v. National Ice Co.* (1897) 16 App. Div. 174, 44 N. Y. Supp. 659; *McCauley v. Hutkoff* (1897; — App. Div. —) 20 Misc. 97, 45 N. Y. Supp. 85; *Riegler v. Tribune Asso.* (1899) 40 App. Div. 324, 57 N. Y. Supp. 989; *Simmon v. Bloomingdale* (1903; N. Y. City Ct.) 39 Misc. 847, 81 N. Y. Supp. 499 (arrest of customer in store); *Moon v. Matthews* (1910) 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; *International & G. N. R. Co. v. Anderson* (1891) 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; *Johnson v. Central Vermont R. Co.* (1884) 56 Vt. 707 (instruction approved, which stated that the fact of the given injury was attributable to the servant's failure to obey orders).

⁵ *Betts v. De Vitre* (1868) L. R. 3 Ch. 441, 37 L. J. Ch. N. S. 325, 18 L. T. N. S. 165, 16 Week. Rep. 529 (infringement of patent); *Western Real Estate Trustees v. Hughes* (1909) 96 C. C. A. 658, 172 Fed. 206 (floor lowered beyond the point indicated by the master's orders); *Heenrich v. Pullman Palace Car Co.* (1884) 20 Fed. 100 (passenger injured by negligent discharge of pistol which a railway porter had, in violation of rules, received into his custody); *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328 (trespasser, in violation of rules, ejected from a train while it was in motion); *Postal Teleg. Cable Co. v. Brantley* (1895) 107 Ala. 683, 18 So. 321 (trees cut by workmen to make a way for a telegraph line); *Ward v. Young* (1884) 42 Ark. 542 (trespasser shot by man placed in charge of orchard); *Armstrong v. Cooley* (1849) 10 Ill. 509 (fire set out on prairie); *Consolidated Ice Mach. Co. v. Keifer* (1896) 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799 (trial judge properly refused to allow defendant to prove directions to foreman to build a sufficiently strong truss to support a tank which fell); *Layton v. Deck* (1895) 63 Ill. App. 553 (liquor supplied to drunkard in contravention of a "dram shop act"); *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. 849 (section foreman, finding track obstructed, transferred hand car to the track of another company); *Healy v. Johnson* (1904) 127 Iowa, 221, 103 N. W. 92 (servant undertook to handle a certain piece of machinery); *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421, 19 Pac. 783 (horse injured which was taken by section hands who had been directed to get some men to help them in rounding up cattle); *Buel v. New York Steamer* (1841) 17 La. 541 (captain of vessel liable for value of slave carried away in her and so lost to the owner, although the employee by whom the slave was brought aboard had in so doing disobeyed orders); *Winston v. Foster* (1843) 5 Rob. (La.) 113 (same rule affirmed); *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L. R.A.(N.S.) 162, 40 So. 714 (street car company whose conductor wrongfully procured the arrest of a passenger not excused by the fact that it had enjoined its conductors to perform their duties cautiously, prudently, and well); *Barabasz v. Kabat* (1897) 86 Md. 23, 37 Atl. 720 (assault by doorkeeper); *Powell v. Deveney* (1849) 3 Cush. 300, 50 Am. Dec. 738 (wagon left in street instead of in a specified yard); *Southwick v. Estes* (1851) 7 Cush. 385 (servants employed to remove steamer from bed of river passed over defendant's boundary line and damaged plaintiff's land); *Barden v. Felch* (1872) 109 Mass. 154 (trespasser who was maintaining his entry and possessions by force told servant who was assisting him not to lay hands on the owner); *Gray v. Boston & M. R. Co.* (1897) 168 Mass. 20, 46 N. E. 397 (drunken man ejected from waiting room by servant employed to keep it clear from loafers); *Engel v. Smith* (1890) 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21 (evidence that defendant's employees had received certain instructions regarding the guarding of a trapdoor down which plaintiff had fallen, held to have been properly excluded); *Fitzsimmons v. Milwaukee, L. S. & W. R. Co.* 98 Mich. 257, 57 N.

- W. 127 (engineer ran a train from one station to another without orders from train despatcher); *Ellegard v. Ackland* (1890) 43 Minn. 352, 45 N. W. 715 (setting out fire on land); *New Orleans, J. & G. N. R. Co. v. Albritton* (1859) 38 Miss. 242, 75 Am. Dec. 98 (engineer started train); *Garretzen v. Duencel* (1872) 50 Mo. 104, 11 Am. Rep. 405 (gun loaded by a salesman in a store, at the request of a customer, was accidentally discharged); *Mound City Paint & Color Co. v. Conlon* (1887) 92 Mo. 221, 4 S. W. 922 (wall fell owing to disregard of instructions regarding the manner which an excavation beside it was to be made); *Whitehead v. St. Louis, I. M. & S. R. Co.* (1899) 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751 (liability of railway company for injury to a boy permitted by conductor to ride on freight train, held not to be negatived by the fact that the permission was given in violation of rules); *Schmidt v. Adams* (1885) 18 Mo. App. 432 (servant sent to drive cattle out of defendant's land worried them with dogs); *Knowles v. Bullene* (1897) 71 Mo. App. 341 (liability of proprietors of a department store for the acts of a saleswoman, a floorwalker, and a superintendent of the department, in arresting and searching a customer on a charge of stealing goods which the saleswoman erroneously claimed to have observed, was affirmed, although the employees had been told not to arrest persons for theft, unless they themselves had witnessed the act); *Clack v. Southern Electrical Supply Co.* (1897) 72 Mo. App. 506 (salesman in store directed customer to go down a flight of defective steps); *Dreyfus v. St. Louis & Suburban R. Co.* (1907) 124 Mo. App. 585, 102 S. W. 53 (street railway company liable for an injury caused by the sudden starting of a car while the plaintiff was alighting, though the car had been, in violation of rules, stopped between cross streets); *Wickham v. Wolcott* (1901) 1 Neb. (Unof.) 160, 95 N. W. 366 (fire set out on land); *Weber v. Lockman* (1902) 66 Neb. 469, 60 L.R.A. 313, 92 N. W. 591 (cattle driven to pasture at a prohibited time); *Driscoll v. Carlin* (1887) 50 N. J. L. 28, 11 Atl. 482 (plaintiff injured through falling over lumber left on sidewalk, and improperly left there for several days, contrary to master's instructions); *Pennsylvania R. Co. v. Thompson* (1892) — N. J. L. —, 24 Atl. 182 (non-compliance with an injunction of a court); *Salisbury v. Erie R. Co.* (1901) 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117 (section foreman intrusted push car to a third person); *Rhinesmith v. Erie R. Co.* (1909) 76 N. J. L. 783, 72 Atl. 15; *Farmers' & M. Bank v. Butchers' & D. Bank* (1857) 16 N. Y. 125, 69 Am. Dec. 678 (check certified by teller in favor of a person who had no money to his credit); *Cosgrove v. Ogden* (1872) 49 N. Y. 255, 10 Am. Rep. 361 (lumber for building in course of erection was piled on a path); *Ochsenbein v. Shapley* (1881) 85 N. Y. 214, 219 (boiler while being tested was subjected to a pressure greater than that specified by the master); *Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392 (deviation of ferryboat from regular route); *O'Connell v. Samuel* (1894) 81 Hun, 357, 30 N. Y. Supp. 889 (forcible means used to reclaim property sold on instalment plan); *Tierney v. Syracuse, B. & N. Y. R. Co.* (1895) 32 N. Y. Supp. 627 (telegraph operator opened siding for a train other than those specified in his instructions); *Oliver v. North Pacific Transp. Co.* (1870) 3 Or. 84 (servant directed to fire a cannon on board a vessel, as a signal of departure, fired it towards the wharf, where plaintiff was standing); *French v. Cresswell* (1886) 13 Or. 418, 11 Pac. 62 (sheep taken onto another person's land); *Philadelphia, W. & B. R. Co. v. Brannen* (1885) 1 Sadler (Pa.) 369, 2 Atl. 429 (locomotive whistle sounded at a time and in a manner prohibited by rules); *Whaley v. Citizens' Nat. Bank* (1905) 28 Pa. Super. Ct. 531; (janitor of building sent electric current through railing and shocked a person who laid his hand upon it); *Texas Trunk R. Co. v. Johnson* (1889) 75 Tex. 158, 12 S. W. 482 (train derailed, owing to its being run at an excessive speed); *Cook v. Houston Direct Nav. Co.* (1890) 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475 (injury to child whom the servants on a steamboat had allowed to come on board in contravention of their master's command); *Chandler v. Deator* (1876) 1 Tex. App. Civ. Cas. (White & W.) 239 (defendant's son shot mules while he was getting out of a field); *Missouri, K. & T. R. Co. v. Rodgers* (1896) — Tex. Civ. App. —, 35 S. W. 412 (boy injured while riding

remedial right of an aggrieved party ought not to be in any wise affected by instructions of which he had no notice.⁶ But the ascrip-

on hand car by invitation of servants in control, held to be entitled to recover, although the invitation was contrary to rules; *Houston & T. C. R. Co. v. Bell* (1903) — Tex. Civ. App. —, 73 S. W. 56 (instruction held proper by which jury were directed that assault in question was imputable to the defendant, although such an act had been expressly forbidden); *Houston & T. C. R. Co. v. Bulger* (1904) 35 Tex. Civ. App. 478, 80 S. W. 557 (servant in full charge of pumping station disobeyed orders to prevent persons from coming on the premises; employer held liable to person who was permitted by him to enter); *Missouri, K. & T. R. Co. v. Price* (1908) 48 Tex. Civ. App. 210, 106 S. W. 700; *Lewis v. Mammoth Min. Co.* (1908) 33 Utah, 273, 15 L.R.A.(N.S.) 439, 93 Pac. 732 (engineer in charge of donkey engine permitted another to operate it); *Reinke v. Bentley* (1895) 90 Wis. 457, 63 N. W. 1055 (injury caused by negligence of foreman who, while taking down a derrick, disregarded instructions to call upon an expert in such work whenever he had to perform it); *Read v. McGivney* (1904) 36 N. B. 513 (servant hired to pile up pieces of unburnt wood left over from previous fires violated order forbidding him to light the piles).

For cases in which assaults made by servants for the purpose of reclaiming from third persons property belonging to their masters were held to be imputable to the masters, although they had given instructions to refrain from the use of force, see *Dyer v. Munday* [1895] 1 Q. B. 742, 749, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week Rep. 440, 59 J. P. 276; *Shear v. Singer Sewing Mach. Co.* (1909) 171 Fed. 678; *McClung v. Dearborne* (1890) 134 Pa. 396, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698.

In *Regg v. Buckley Newhall Co.* (1911; — App. Div. —) 72 Misc. 387, 130 N. Y. Supp. 172, the evidence showed that the defendant company, having sold plaintiff an article on the instalment plan, directed its servant to demand payment or take the article, if he could do so "by lawful means and without any interference with plaintiff's rights," and without committing

any acts of assault, engaging in any disorderly conduct, or indulging in any force or incivility. It was also proved that the agent obtained possession of the wringer after committing an assault on plaintiff. Held, that the complaint had been improperly dismissed, since the act was done in the prosecution of defendant's business, and the defendant had clothed the agent with the discretion of determining whether the means by which he possessed himself of the chattel were "lawful or without interference with the rights of the plaintiff."

In *Porter v. New York C. R. Co.* (1861) 34 Barb. 353, the defendant was held to be liable, under the New York "Act to Prevent Extortion by Railway Companies" (Laws, 1857, p. 432), for the act of a conductor in demanding and taking excessive fare, even though he had in so doing contravened instructions.

⁶ "The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability." Willes, J., in *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 17 Eng. Rul. Cas. 258.

"Third persons can see and know the general scope of the employment in which the servant is engaged, but they have no means of knowing the secret orders given to him." *Philadelphia, W. & B. R. Co. v. Brannen* (1885) 1 Sadler (Pa.) 369, 2 Atl. 429.

"It would be no defense to the master to prove that he had given his coachman orders to be careful, and not drive against others. It was his duty not only to give such orders, but to see that they were obeyed. It will be seen, therefore, that it is the character of the employment, and not the private instructions given by the master to his servant, that must determine the measure of his liability in any given case." *McClung v. Dearborne* (1890) 134 Pa. 396, 406, 407, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698.

"A master cannot screen himself from liability for an injury committed by his servant within the line of his employment, by setting up private instructions or orders given by him, and their violation by the servant. By putting the servant in his place, he becomes re-

tion of any materiality to this circumstance is manifestly inconsistent not only with the general theory that the sole test of the master's responsibility is the quality of the given tort, as being within or beyond the scope of the servant's employment, but also with a principle which has been specifically enounced in at least one case, and has been taken for granted in many others, *viz.*, that the essential question to be determined is the actual, not the apparent, extent of the servant's authority.⁷

The doctrine which prevails in Scotland regarding the consequences of the servant's disobedience is apparently the same as that which has been adopted by the common-law courts in England and the United States.⁸

It has been held that one who has been injured by the servant of another, as the result of certain arrangements made between him and the servant, with the knowledge that those arrangements were in contravention of the master's directions, cannot hold the master responsible for the injury.⁹

sponsible for all acts within the line of his employment, although they are wilful and directly antagonistical to his orders." Wood, Mast. & S.—statement adopted in *Steele v. May* (1902) 135 Ala. 483, 33 So. 30.

In *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597, the court referred to the servant's departure from "private" instructions.

⁷ See § 2276, note 7, *ante*.

⁸ "The consideration whether the act was done in contravention of the defenders' order or not had nothing to do with the legal liability of the defenders." *Fraser v. Younger* (1867) 5 Sc. Sess. Cas. 3d series 861 (direction to the jury, in a contrary sense, held to be wrong in law).

In *Fraser, Mast. & S.* 282, ed. 1882, the law is thus stated: "The question how far the master's having given express or implied orders to his servant not to do the particular act from which the injury resulted will relieve him of liability is one as to which, at first sight, the *dicta* seem conflicting; but so far as any principle can be applied, it appears to be this: If a master authorize his servant to do an act attended with some risk to third persons, and merely caution him to be careful, or even order him to do it in a particular way, he will not thereby relieve himself of the consequences resulting from

the servant's disregarding such orders. He, in such a case, trusts to the servant's skill, care, and obedience, and is himself alive to the risk involved. Moreover, by the master's authorizing the act, the servant comes to be within the sphere of his duty, though he act negligently or rashly, or disobediently take his own wrong way. On the other hand, if the master has not merely ordered the act to be done in a certain way, and in that way only, but has positively forbidden its being done at all, there is no ground for attaching liability to him, as in such a case the servant is not acting within the scope of his employment at all." The learned author cites in *Keith v. Keir*, F. C. (1810–1812), (Sc. Sess. Ct.) p. 679, not a very distinct authority for the doctrines formulated by him. See § 2313, note 5, *post*.

⁹ *Snider v. Crawford* (1891) 47 Mo. App. 8. There it was agreed between the defendant and the plaintiff, a mechanic who had to do some work in an elevator shaft, that the cage might be run as usual to the second story, and the injury complained of was received because another arrangement was made between the servant and the plaintiff, for the convenience of the plaintiff alone. The court said: "We know of no case which goes to the extent that a person may request the servant to violate his master's orders, and then recover for

2286. Wrongful act done for the benefit of the master.—So far as regards a wrongful act done by a servant in the course of his employment, it is clear that, whatever may be the result, actual or contemplated, of that act with respect of the master's interests, the master is responsible to the injured person. In this instance, therefore, the circumstance that the act was done with the view of benefiting the master, or that it did benefit him, possesses no independent probative significance. It follows that, where the rule *Respondeat superior* is declared to be operative in respect of torts committed by a servant "in the course of the employment and for the master's benefit," a wholly superfluous element is introduced into the statement.¹

injuries inflicted upon him by such violation, nor can such a rule be supported on any sound moral principle."

This qualification of the general rule is recognized in note 40 to Lewis's ed. of Bl. Com. p. *430, where it is stated that the master is liable for the acts of his servants, "unless the party injured knew that they were absolutely contrary to his command." The editor cites in support of this proposition Thomas, Universal Jur. 84, and Browne, Actions at Law, 174. As these works are not accessible to the present writer, he is unable to say whether or not the doctrine thus formulated is supported by any judicial authority.

¹This combination of elements is found in the well-known judgment of Willes, J., in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. (Exch. Ch.) 259, 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298. But the immateriality of the element of benefit, so far as regards acts done within the scope of the servant's employment, has now been declared by the House of Lords in *Lloyd v. Grace* [1912] A. C. 716. See § 2395, *post*. That judgment has also destroyed the authority of the remarks of the judges who, in *Clydesdale Bank v. Paul* (1877) 4 Sc. Sess. Cas. 4th series, 626, where a stockbroker was held liable in respect of a check forged by his clerk, laid stress upon the benefit which accrued to the stockbroker from the proceeds of the forgery.

For American cases in which the phraseology of Willes, J., was adopted, see *Ephland v. Missouri P. R. Co.* (1897) 137 Mo. 187, 194, 35 L.R.A. 107, 59 Am. St. Rep. 498, 37 S. W. 820, 38 S.

W. 926; *St. Louis, I. M. & S. R. Co. v. Grant* (1905) 75 Ark. 579, 584, 585, 88 S. W. 580, 1133.

"The rule has often been expressed in the terms that, to bind the principal, the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal, since, if there is authority to do the act, it does not matter if the principal is benefited by it." Lord Esher, M. R., in *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. (C. A.) 714. This decision was overruled by the House of Lords in *Lloyd v. Grace* [1912] A. C. 716, but not on grounds that affect the above statement.

In *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 17 Eng. Rul. Cas. 258, an instruction was approved which "amounts to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant." Byles, J.

If the act "was done in the course of the servant's employment, and in furtherance thereof, the law will regard the act as having been impliedly authorized by the master." *Thompson v. Wright* (1899) 109 Ga. 466, 34 S. E. 560, quoting *Wood, Mast. & S.* § 300.

"The act was intended by him to be for his master's benefit, and was one which his duty required, if the facts were as supposed." *Staples v. Schmid* (1893) 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193.

In *Ploof v. Putnam* (1909) 83 Vt. 252, 26 L.R.A. (N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277, the court ap-

With respect to cases where the only possible conclusion from the rest of the evidence is that the act complained of was done outside the scope of the servant's employment, the authorities show clearly that the mere circumstance of its having been done with the intention of furthering the master's business will not render the master responsible to the party aggrieved by it.²

proved the statement in Pollock on Torts, Webb's Am. ed p. 98, that a master is liable even for a wilful wrong, "provided the act is done on the master's behalf, and with the intention of serving his master."

In one case we find it stated that an act done by an agent in the course of his employment is imputable to his principal, "because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal." *New York C. & H. R. R. Co. v. United States* (1908) 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304. Such a statement seems to be open to exception both for the reason that the "benefit of the principal" is treated as an element possessing an independent significance in cases where the given act is done within the scope of the employment, and also for the reason that the phrase "in the course of the employment" is apparently viewed as being one of a more extensive connotation than the phrase "within the scope of the employment," a conception for which there is no adequate authority.

² In *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 17 Eng. Rul. Cas. 258, Blackburn, J., said: "It is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses."

"If the servant, instead of doing that which he is employed to do, does something else which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit

or to serve the master. It must be something done in attempting to do what the master has employed the servant to do." *Daniel v. Atlantic Coast Line R. Co.* (1904) 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718 (arrest).

"That that act to be done by the servant might possibly result, or was intended to result, in benefit to defendants, is not the test of authority." *Reaume v. Newcomb* (1900) 124 Mich. 137, 82 N. W. 806.

In *Brown v. Jarvis Engineering Co.* (1896) 166 Mass. 75, 32 L.R.A. 605, 55 Am. St. Rep. 382, 43 N. E. 1118, the servants of a contractor who was building a foundation for a printing press undertook, at the direction of their foreman, to assist the driver of a van to unload the rolls of paper which it contained, and, while so engaged, injured him. At the trial the defendant requested two rulings: First, that the action could not be maintained; secondly, that the foreman of the defendant had no authority to bind the defendant by ordering his men to help unload the rolls of paper from the dray driven by the plaintiff; and, if he did so order any of his men, that the defendant would not be responsible for their acts while engaged in helping unload the van. Both of these instructions the presiding judge refused to give, and instructed the jury that, if the foreman, for the purpose of carrying forward the work which he was sent to do, and for the benefit and advantage of the defendant, ordered his men to assist in unloading the dray, and one of them did so assist, the defendant would be responsible for any injury he may have suffered by the careless act of the workman who assisted in unloading the van. A verdict for the plaintiff was set aside, and the defendant's exceptions to the refusal of the judge to give the rulings requested, and to the ruling given, were sustained by the supreme court, which said: "The defendant employed these men to construct a founda-

The only class of cases, therefore, in which the purpose of the servant to benefit the master, and the circumstance that master was, in point of fact, benefited, can be differentiating factors, are those which turn upon the effect of evidence which, apart from that which relates to his intention, is of ambiguous import, as being susceptible either of the inference that the given tort was committed in the course of

tion in the basement, and did not employ them to unload vans, or to do any other act, although such act might in some way expedite the business of the master. The act of the defendant's servants was not a necessary or natural or proper result of anything that the servants were employed to do. If they had volunteered at the request of the plaintiff to assist him in unloading the van, the defendant would not have been liable. *Potter v. Faulkner* (1861) 1 Best. & S. 800, 31 L. J. Q. B. N. S. 30, 8 Jur. N. S. 259, 5 L. T. N. S. 455, 10 Week. Rep. 93. Here the act of unloading was without the knowledge or request of the plaintiff, and was therefore an act for which the defendant is not responsible. . . . Even if the act of Healey [foreman] in directing the men to unload the van was for the purpose of carrying forward the work, and for the benefit of the defendant, yet, as this act was not within the scope of his employment, the defendant is not responsible. In the construction of a building, it frequently happens that one set of workmen has to wait until another set of workmen gets through, but it never has been supposed that this would authorize a foreman of a gang of painters to direct his men to assist carpenters or plasterers, or to attempt to do their work, although the doing of it might in a sense be said to facilitate the carrying forward of the work of painting. Men are employed because they are supposed to be skilful in their particular trades, and when they are set to do a work within their trade, they carry no implied authority from their master to engage in any other trade."

In *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 13 N. W. 415, where a trespasser sustained injury by reason of the manner in which he was ejected from a train by a brakeman, the trial court instructed the jury that "even though the instructions and rules of the company placed the matter of the removal of trespassers or nonpaying

passengers from the trains, under the immediate charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because, in this instance, the brakeman acted without orders or direction from the conductor." The supreme court disapproved this instruction, as being one which "proceeds upon the theory that where a person is employed to do one thing, and he volunteers to do another, his act shall nevertheless be deemed to be within the scope of his employment, if his purpose was to serve his employer. But in our opinion the purpose of the employee is not, in a case like the one at bar, material. The court, we think, was misled by a distinction which has been drawn by courts in a different class of cases. Where the question is as to whether the employer is liable for a wilful injury done by an employee, it is sometimes important to inquire whether the employee's purpose was to serve his employer by the wilful act. . . . The rule is that an employer is not liable for a wilful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the wilful act. Where the employee is not acting within the course of his employment, the employer is not liable, even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment." This case was cited with approval in *Coll v. Toronto R. Co.* (1898) 25 Ont. App. Rep. 55 (plaintiff ejected from street car).

Numerous other authorities sustaining the doctrine in the text are furnished by the cases in which employers have been held not liable for unlawful arrests and for the ejection of trespass-

the servant's employment, or of the inference that it was committed from personal motive, or with a view to the advantage of a third party.³

2287. Wrongful act not done for the benefit of the master.—The circumstance that the wrongful act complained of was not done "for the benefit" of the master has sometimes been alluded to as a factor essentially inconsistent with the inference that it was done within the scope of the tort-feasor's employment.¹ But the preponderance of authority is now distinctly in favor of the doctrine that, if the incidents and character of the act complained of were such as to warrant that inference, the master cannot avoid liability on the mere ground that the act did not enure to his benefit.²

The phrase, "not done for the master's benefit," is sometimes used with regard to acts done solely in the interests of third persons or of the servant himself.³ But under such circumstances it seems better

ers from trains. See §§ 2353 to 2356, *post*.

See also *Kearns v. Wilson* (1885) 19 So. Aust. Rep. 28 (manager of farm seized and detained some cattle belonging to plaintiff, because he suspected that plaintiff's servant had killed his employer's cow); *Hunter v. McRae* (1897) 15 New Zealand L. R. 701 (stallion which was biting a mare belonging to the servant's master was struck so violently that his owner had to kill him).

In one case we find it laid down that "the master is liable for the intentional misconduct of the servant, if the tort be committed in the service of the master, and for the benefit of the employer." *The State of Missouri* (1896) 22 C. C. A. 239, 46 U. S. App. 245, 76 Fed. 376. Unless the ambiguous phrase "in the service of" is construed as being equivalent to "within the scope of the employment," this statement evidently conflicts with the doctrine established by the cases cited above.

³ See §§ 2288, 2289, *post*.

In *Fishkill Sav. Inst. v. National Bank* (1880) 80 N. Y. 166, 36 Am. Rep. 595, where the plaintiff's bonds had been converted by the defendant's cashier, the court emphasized the fact that the wrong was "committed for the benefit of the defendant."

¹ See, for example, *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 602, 11 Jur. N. S. 843, 13 L. T. N. S. 300, 12

Week. Rep. 1023 (act described as not being "in any way for the benefit of the master"); *Stickney v. Munroe* (1857) 44 Me. 195 (same element relied on); *Kane v. Boston Mut. L. Ins. Co.* (1908) 200 Mass. 265, 86 N. E. 302 (accepted doctrine said to be that, in order to affect a master with liability, the act complained of must have been done for the benefit of the master); *Fetting v. Winch* (1909) 54 Or. 600, 38 L.R.A. (N.S.) 379, 104 Pac. 722, 21 Ann. Cas. 352 (same doctrine referred to by the court, *arguendo*); *St. Louis, I. M. & S. R. Co. v. Lavendusky* (1908) 87 Ark. 540, 113 S. W. 204 (want of authority inferred as to an act which was "not for the benefit" of the employer).

² In § 2395, *post*, the reader will find a review of the cases which bear upon this point, so far as it has relation to the fraud of servants or agents.

In *William v. Southern R. Co.* (1903) 115 Ky. 320, 73 S. W. 779, where a brakeman pushed a boy off a moving freight car, it was held improper to instruct the jury to the effect that if the act of the servant was malicious, and not "in the interest and business" of the defendant, no recovery could be had. This ruling settled the question left undecided in a case decided not long before (*Illinois C. R. Co. v. McManus* [1902] 24 Ky. L. Rep. 81, 67 S. W. 1000).

³ See, for example, *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168.

to refer the master's nonliability directly to the notion that, in the very nature of the case, an act of this description must have been done outside the scope of the servant's employment. See § 2288, *post*.

2288. Wrongful act done with a personal object, or from a personal motive.—It is well settled that, if the tort complained of was of such a description, in respect of the incidents of time, place, and quality, that it may properly be imputed to the master, the claim of the aggrieved party cannot be defeated by showing that the motive which prompted the servant to commit it, or the purpose which he sought to accomplish by committing it, was of a purely personal character.¹

¹In *Ward v. General Omnibus Co.* (1873) 42 L. J. C. P. N. S. (Exch. Ch.) 265 (see § 2333, note 1, *post*), where an omnibus driver lashed with his whip at a servant of a tramway company who had mounted the step to get at the number of the omnibus, Kelly, C. B., remarked: "His motive may have been a mixed one; but still, if he was acting in the interests of his employers and used his whip negligently, they are liable."

"The legal aspect of an act [within the scope of the servant's employment] is not changed because the servant superadds malice or other personal motive to his wrongful act." *Hardeman v. Williams* (1910) 169 Ala. 50, 53 So. 794.

"The master would be liable if the act was wrongful, without reference to the question of whether the purpose of the conductor was to serve his master or to gratify his private malice. The intent of the conductor should not have any influence upon the question of the liability of the master, where the act performed comes within the general scope of his employment." *Indianapolis, P. & C. R. Co. v. Anthony* (1873) 43 Ind. 183.

"Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means." *Pittsburgh C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399 (401, 402), 52 Am. Rep. 675, 1 N. E. 849.

"Where a person is injured by the act of a servant, done in the course of his employment, we see no good reason

why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of a particular intention, it is not perceived how the presence of such intention can be held to excuse the master. We do not say that when the nature of the act is such as to render it equivocal whether the act comes within the scope of the servant's employment or not, the intention with which the act is done is not to be looked to, in determining its true character. What we say is, that when it plainly appears the act of the servant was done in the course of his employment, the wilfulness or wrongful motive of the servant in doing the act will not excuse the master." *Passenger R. Co. v. Young* (1871) 21 Ohio St. 518, 525, 8 Am. Rep. 78.

It is well settled "that, if the act of the servant which has occasioned the mischief is within the scope of the employment, the fact that it was maliciously done does not affect the question of the master's liability under a proper rule of damages." *Stranahan Bros. Catering Co. v. Coit* (1896) 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634 (vendor's servant put foul water in milk delivered to customer).

"The test of the master's liability is not the motive of the servant, but whether that which he did was something which his employer contemplated, and something which, if he could do it lawfully, he might do in the employer's name." Cooley, Torts, p. 536, quoted in *Alsever v. Minneapolis & St. L. R. Co.* (1902) 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841; *Guttner v. Pacific*

But evidence to this effect often has a material bearing upon the preliminary question, whether the tort was, in point of fact, within the scope of the servant's employment. There is ample authority for the proposition that, except in cases where the performance of some

Steam Whaling Co. (1899) 96 Fed. 617.

"The test of a master's liability is whether the act was within the scope of the servant's duties under his employment; and not the spirit or motive animating the servant in his action." *Texas & P. R. Co. v. Lyons* (1899) — Tex. Civ. App. —, 50 S. W. 161.

In *Meade v. Chicago, R. I. & P. R. Co.* (1896) 68 Mo. App. 92, the defendant was held liable where a station agent whose duty it was to keep objectionable persons out of the station joined a third person in the practical joke of saturating with benzine, and setting on fire, the clothes of a person who was lying asleep in the station.

In *Schmidt v. Vanderveer* (1906) 110 App. Div. 758, 97 N. Y. Supp. 441, where plaintiff was beaten while he was being ejected from defendant's premises, it was held that the court had properly refused a request for instruction to the effect that, if the jury believed that the reason why the assault was committed by the servant was that he was then revenging himself for the use of opprobrious language by the plaintiff or by a person supposed by him to be the plaintiff, the jury could not find a verdict against the defendant, the court said: "If the defendant was in fact putting the plaintiff off by the battery, that he adopted that way out of private revenge did not exonerate the master. . . . But if the battery was not committed in putting or to put the plaintiff off, or, if you will, to give him at the same time a good drubbing for coming on, and teach him not to come again (for all of which the master would be liable), but, on the contrary, was done solely as an independent and disconnected act of revenge of the servant, the master would not be liable for it."

In *Miller-Brent Lumber Co. v. Stewart* (1910) 166 Ala. 657, 51 So. 943, 21 Ann. Cas. 1149, a requested instruction that, if the servant assaulted plaintiff as a result of anger aroused by plaintiff's conduct, plaintiff could not recover, was held to have been properly refused. The

court observed that its hypothesis might have been true, and yet liability might have been imputable to defendant in the mental condition in which he was then, since it did not ascribe the cause of the assault to a state of feeling or temper, independent of the servant's relation to the service and to his master. "In other words, it did not hypothesize an act outside of the scope of his employment, committed on his personal private account."

In *Burns v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1896) 4 App. Div. 426, 38 N. Y. Supp. 856, the refusal of the trial judge to instruct the jury that, if the act of the defendant's conductor in putting the plaintiff off a railway car was for his own purpose the company was not liable was approved on the ground that "the master is liable if it was done in the course of his service and intended to be for the master's interest." The refusal of another instruction that, if the acts were done "with a purpose of his own," the defendant was not liable, was also approved. The court said: "Manifestly this proposition is not a correct one, for the purpose of his own might have been to put the plaintiff off the car, in the interest of defendant, and in obedience to his instructions. Such a purpose clearly would not exonerate the defendant."

See also *Hamilton v. Third Ave. R. Co.* (1873) 53 N. Y. 25, 28 (motive of conductor in wrongfully putting off a passenger held to be immaterial); *Gracey v. Belfast Tramway Co.* [1901] 2 I. R. 322 (servants sent with horses to a blacksmith's forge, to have them shod, raced them along a public highway and frightened plaintiff's horse so that it ran away).

Compare also *Soderlund v. Chicago, M. & St. P. R. Co.* (1907) 102 Minn. 240, 13 L.R.A.(N.S.) 1193, 113 N. W. 449, where a railway company was held liable under the Minnesota fellow servant act for an injury sustained by a servant, owing to the negligence of fellow servants who, while traveling on a hand car to the place of work, ran it

absolute obligation is concerned,² the master cannot be held responsible if it appears that the act which occasioned the given injury was done by the servant solely with a view to some purely personal object.³ The acts with reference to which this doctrine has been applied may be classed under the following heads:

(1) Acts prompted by malice, resentment, ill-will, animosity, or spite.⁴ The master's nonliability for acts of this description has been

at an excessive speed, for their own amusement.

It may be remarked that a similar principle holds with reference to contracts. "It appears to be well settled in English law that the liability of a principal on a contract entered into by his agent, within the terms of his authority, cannot be affected by the unknown motives by which the agent was actuated in making the contract." Mathew, L. J., in *Hambro v. Burnand* [1904] 2 K. B. 10. In the lower court Bigham, J., had adopted the view of the dissenting judge in *North River Bank v. Aymar* (1842) 3 Hill, 262, "that, though an agent had acted within the terms of his authority, it was competent to the court to look into the mind of the agent, and, if he had misapplied his authority for his own purposes, the principal was not bound." But Collins, M. R., pointed out that the question has subsequently been "mooted several times in America, and ultimately the American courts have authoritatively laid it down as the true principle that, where a written authority given to an agent covers the thing done by him on behalf of his principal, no inquiry is admissible into the motives upon which the agent acted."

² As to the absolute obligations which are predicated upon contracts of carriage, etc., see chapters CIII, and CIV, post 6.

As to those which are predicated upon the inherently dangerous quality of the instrumentality which caused the injury, see § 2503.

In two cases the rationale of decisions affirming the liability of the master for injuries resulting from acts done by servants for their personal convenience (see note 10, *infra*) was that they were subject, as occupants of real property, to certain absolute obligations in respect of the protection of the plaintiffs, so far as that protection could be secured by the exercise of reasonable care. *Simonton v. Loring* (1878) 68 Me. 164,

28 Am. Rep. 29 (occupant of upper tenement liable for damage resulting to lower one from the negligence of his janitor in leaving open the faucet which regulated the flow of water in the urinal); *Corrigan v. Union Sugar Refinery* (1868) 98 Mass. 577, 96 Am. Dec. 685 (person walking along a passage was struck by an empty beer keg thrown from a window by a servant to whom his master supplied beer as a beverage). In neither of these cases was the question raised whether the servant was acting within the scope of his employment.

³ "If a servant goes outside of his employment, and, without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible." *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543, 547, quoted in *Girvin v. New York C. & H. R. R. Co.* (1901) 166 N. Y. 289, 59 N. E. 921; *Miller v. Wanamaker* (1908) 111 N. Y. Supp. 786.

In *Burns v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1896) 4 App. Div. 426, 38 N. Y. Supp. 856, the court held that the defendant could not complain of an instruction which was "substantially to the effect that so far as the conductor was acting in the performance of his duty as agent of the defendant, the defendant was liable for his acts; but if the altercation was one between the conductor and the plaintiff, wholly unconnected with the business of the defendant, the defendant would not be liable." The opinion was expressed that "if counsel desired a more full explanation as to just what the conductor's motives and purposes must be in order to exonerate the defendant, he should have made specific requests to charge, in which the correct rule was stated."

⁴ "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the

master will not be liable." *Croft v. Alison* (1821) 4 Barn. & Ald. 590.

"If a driver, in a moment of passion, vindictively strikes a horse with a whip, that would not be an act done in the course of his employment." Williams, J., during argument of counsel in *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 531, 17 Eng. Rul. Cas. 258. In the same case, Blackburn, J., in commenting on the direction of the trial judge, observed: "If the jury should come to the conclusion that he did the act, not to further his master's interest, or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible."

"Suppose a servant takes offense at another man and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it—he is acting for himself, and the master is not liable." Lord Glenlee, *arguendo*, in *Baird v. Hamilton* (1826) 1 Sc. Sess. Cas. 1st series, 797.

"If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible." *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597.

"If, however, the wrongful act, resulting in the injury, was done by the servant outside of his employment, and not in the execution of his master's business, but to gratify the servant's personal ill-will or malice, the master is not liable, although the servant was at the time in his employment." *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 261, 54 Atl. 891 (liability of master a question for the jury, where driver of wagon struck a boy who had climbed into it, and caused him to fall off).

"If his [the master's] business is done or is taking care of itself, and his servant, not being engaged in it, nor concerned about it, but impelled by motives which are wholly personal to himself, and simply to satisfy his own feeling

of resentment, whether provoked or unprovoked, commits an assault upon another when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he and he alone is responsible." *Haehl v. Wabash R. Co.* (1893) 119 Mo. 325, 24 S. W. 737 (trespasser killed by watchman).

In *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170, it was held to be a question for the jury whether the act of a street car driver in driving the car against plaintiff's buggy, which was obstructing the track, owing to a blockade of other vehicles, which prevented it from proceeding, was done with a view to the employer's service, or merely for the purpose of injuring the plaintiff.

See also the following cases, in all of which acts of personal violence were involved: *Ward v. General Omnibus Co.* (1873) 42 L. J. C. P. N. S. (Exch. Ch.) 265, 28 L. T. N. S. 850, affirming (1873) 27 L. T. N. S. 761, 21 Week. Rep. 358; *Lumsden v. London & S. W. R. Co.* (1867) 16 L. T. N. S. 609; *Farry v. Great Northern R. Co.* [1898] 2 I. R. 352; *Gillespie v. Hunter* (1898) 25 Sc. Sess. Cas. 4th series. 916, 35 Scot. L. R. 714, 6 Scott. L. T. 23; *Texas & P. R. Co. v. Williams* (1894) 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440; *Rahmel v. Lehndorff* (1904) 142 Cal. 681, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 659; *Lynch v. Florida C. & P. R. Co.* (1901) 113 Ga. 1105, 54 L.R.A. 810, 39 S. E. 411; *Illinois C. R. Co. v. Ross* (1888) 31 Ill. App. 170; *Mogk v. Chicago City R. Co.* (1898) 80 Ill. App. 411; *Evansville & C. R. Co. v. Baum* (1868) 26 Ind. 70, 73; *Everingham v. Chicago, B. & Q. R. Co.* (1910) 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912 C, 848 (testimony as to servant's reputation for quarrelsomeness held to be immaterial, on the ground that assault was committed to gratify his malice or spite); *Hudson v. Missouri, K. & T. R. Co.* (1876) 16 Kan. 470; *O'Banion v. Missouri P. R. Co.* (1902) 65 Kan. 352, 69 Pac. 353; *Louisville & N. R. Co. v. Routt* (1903) 25 Ky. L. Rep. 887, 76 S. W. 513; *McGilvray v. West End Street R. Co.* (1895) 164 Mass. 122, 41 N. E. 116; *Cofield v. McCabe* (1894) 58 Minn. 218, 59 N. W. 1005; *Holler v. Ross* (1902) 68 N. J.

held to be no less predicable where the tort-feasor is a vice principal than where he is a subordinate servant.⁵

L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; *Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 277, 7 Am. Rep. 448; *Hoffman v. New York C. & H. R. R. Co.* (1878) 14 Jones & S. 526, affirmed in (1880) 87 N. Y. 25, 41 Am. Rep. 337 (conductor kicked a trespasser from the platform of a railway car while it was in motion); *Sharp v. Erie R. Co.* (1906) 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250; *Froomkin v. Brooklyn Daily Eagle Co.* (1906) 113 App. Div. 443, 99 N. Y. Supp. 300; *Daniel v. Atlantic Coast Line R. Co.* (1904) 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718; *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373; *Nelson Business College Co. v. Lloyd* (1899) 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 54 N. E. 471; *Rudgeair v. Reading Traction Co.* (1897) 180 Pa. 333, 36 Atl. 859; *Texas & P. R. Co. v. Lyons* (1899) — Tex. Civ. App. —, 50 S. W. 161 (instruction embodying rule in text held to have been properly refused, for the reason that the evidence did not warrant it); *Lytle v. Crescent News & Hotel Co.* (1901) 27 Tex. Civ. App. 530, 66 S. W. 240; *Texas & N. O. R. Co. v. Taylor* (1903) 31 Tex. Civ. App. 617, 73 S. W. 1081; *Hidalgo v. Gulf, C. & S. F. R. Co.* (1910) — Tex. Civ. App. —, 128 S. W. 683; *Dixon v. Northern P. R. Co.* (1905) 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620; *Linck v. Matheson* (1911) 63 Wash. 593, 116 Pac. 282; *McKain v. Baltimore & O. R. Co.* (1909) 65 W. Va. 233, 23 L.R.A. (N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634; *Bergman v. Hendrickson* (1900) 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304.

For cases in which the injury complained of affected property, see *Anonymous Case* referred to in *The James Seddon* (1866) L. R. 1 Adm. & Ecc. 62, p. 64 (captain of vessel ran it against another); *Miller v. Wanamaker* (1908) 111 N. Y. Supp. 786 (driver at department store, being angered at the refusal of plaintiff to allow him to unload his wagon before that of plaintiff, kicked plaintiff's horse, and caused him to run away).

Evidence that a brakeman pulled

plaintiff from the brace rods under a freight car where he was riding, dragged him out while the train was moving, cursed him, and threw a stone at him, plaintiff's foot being run over and crushed during the act, tends to show that the brakeman's act was prompted by personal malice. *Illinois C. R. Co. v. King* (1899) 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552.

For cases in which the right of servants to recover for injuries caused by the acts of fellow servants with whose defaults their employers would otherwise have been chargeable was denied on the ground that the acts in question were done for the purpose of gratifying the personal resentment of the tort-feasors, see *Gabrielson v. Waydell* (1892) 135 N. Y. 1, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969 (§ 1466, ante).

⁵ In *Johnson v. Alabama Fuel & I. Co.* (1910) 166 Ala. 534, 52 So. 312, the evidence showed that A., the general manager of the defendant's mine, had gone to the tent where the plaintiff and her intestate were living, and arrested her intestate without a warrant, and under circumstances indicative of malice. Why he did this, unless it was to gratify some personal animosity, did not appear. A. then placed the intestate in a house kept by the defendant for the confinement of prisoners, and there left him for some hours. Between 9 and 10 o'clock in the evening, A. took intestate from the house, carried him away into the woods, and there shot him to death. The court, after observing that these facts did not justify the inference that the murder was committed by A. while in the execution of his agency, proceeded thus: "Nor is the controlling principle, or its application to the facts, affected by the consideration that Adams was a vice principal for the defendant corporation, if it be a fact that he was a vice principal. Corporations may, and often do, create vice principals, who, in their general management of the corporate business, so partake of the corporate entity that their acts have the same effect upon corporate responsibility as if done or expressly authorized by the governing board or stockholders, and so

(2) Acts done by the servant with a view to his own pecuniary advantage.⁶

(3) Acts done with a view to the personal enjoyment of the servant himself. In some of the cases under this head the acts in question were designed, and had a necessary tendency, to alarm or otherwise annoy third persons.⁷ In others no such object was aimed at.⁸

corporations may become responsible in cases for the indictable crimes of their agents. But this does not impair the doctrine that the corporation is bound only when its vice principal acts, however improperly, negligently, or maliciously, in the execution of the corporate functions. When he steps wholly aside from his authority, and does an act to gratify personal malignity, or to accomplish another purpose personal to himself, and having no relation to the business of the corporation, as, for aught appearing to the contrary, was the case here, the corporate master is no longer responsible."

⁶ *Pittsburgh, Ft. W. & C. R. Co. v. Maurer* (1871) 21 Ohio St. 421 (railroad company not liable for injuries resulting from the obstruction of a highway crossing by refuse removed from its cars by a brakeman, and placed in the highway for his own use; see § 2396, note 1, *post*); *Burke v. Shaw* (1882) 59 Miss. 443, 42 Am. Rep. 370 (child injured by falling into a heap of ashes which the defendant's engineer had deposited on an open lot, in pursuance of an arrangement under which he was allowed to sell them to third persons for his own profit; see § 2396, note 1 (e), *post*); *Illinois C. R. Co. v. Latham* (1894) 72 Miss. 32, 16 So. 757 (brakeman tried to extort money from a trespasser on a freight train, and upon his refusal to pay, ejected him while the train was in motion; see § 2353, note 13, *post*); *Larson v. Fidelity Mut. Life Assn.* (1898) 71 Minn. 101, 102, 73 N. W. 711 (district insurance agent who was responsible for the acts of his subagents procured the arrest of one of them on a charge of embezzling the insurance company's funds; see § 2464, note 4, *post*); *McDermott v. American Brewing Co.* (1901) 105 La. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498 (driver of delivery wagon used force in order to compel the payment of customer's debt for which, under the arrangement made between him and his

master, he was responsible; see § 2367, note 3, *post*); *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1910) 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517 (similar facts; see § 2367, note 3, *post*).

In *Fletcher v. Baltimore & P. R. Co.* (1895) 6 App. D. C. 385, it was held that a railroad company was not liable to a person standing at a highway crossing, for injuries received by being struck by a piece of timber thrown by an employee from a repair train on which he was allowed to ride home from work and to bring refuse timber for his own fuel. On appeal (1897) 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35, this decision was reversed, but solely on the ground that as the evidence tended to show personal fault on the part of the defendant, a verdict had been improperly directed in his favor.

In *Sullivan v. Morrice* (1903) 109 Ill. App. 650, an employer gave his servant permission, after the close of his week's work, to gather up waste material cut off by the carpenters on the premises where the servant was employed, and to carry it to his home for kindling wood. Held, that the master was not liable for injuries caused to a third person through the servant's negligence in throwing pieces of wood from the roof of the house. The contention of plaintiff was that it was the duty of the defendant to see that the servant did nothing likely to injure third persons while he was taking away the wood.

⁷ *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166 (employee on a train, in attempting playfully to strike another employee, accidentally hit a passenger); *Peter Anderson & Co. v. Diaz* (1906) 77 Ark. 606, 4 L.R.A.(N.S.) 649, 113 Am. St. Rep. 180, 92 S. W. 861 (defendant's bartender assisted one customer in pouring alcohol over the foot of another, who was drunk,

(4) Acts having relation to the physical necessities and convenience of the servant. Considered with reference to the facts presented, the cases under this head are scarcely harmonious. In some of them full effect has been given to the general principle that the master cannot be held liable in respect of an act done by the servant for the purpose of attaining an object which concerns himself alone.⁹ In others

and in setting it on fire); *Stephenson v. Southern P. Co.* (1892) 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234 (engineer backed a locomotive for the purpose of frightening the passengers on a street car which was crossing the track); *Berry v. Boston Elev. R. Co.* (1905) 188 Mass. 536, 74 N. E. 933 (plaintiff arrested as a practical joke); *Louisville, N. O. & T. R. Co. v. Douglass* (1892) 69 Miss. 723, 30 Am. St. Rep. 582, 11 So. 933 (baggage master on train went into express car and joined the express messenger in frightening a colored boy, so that he jumped from the train); *Canton Cotton Warehouse Co. v. Pool* (1900) 78 Miss. 147, 84 Am. St. Rep. 620, 28 So. 823 (machinery in factory so manipulated as to frighten a visitor); *Evers v. Krouse* (1904) 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181 (garden hose used in such a manner as to frighten a passing horse); *Brunner v. American Teleg. & Teleph. Co.* (1892) 151 Pa. 447, 25 Atl. 29 (dynamite cap exploded so as to frighten horse); *International & G. N. R. Co. v. Cooper* (1895) 88 Tex. 607, 32 S. W. 517, reversing (1895) — Tex. Civ. App. —, 30 S. W. 470 (engineer turned hot water on plaintiff through a hose inserted in his pocket).

In a good many cases, however, it has been held that the master may be held liable for acts done for the sole purpose of causing fear either in men or animals. See § 2379, *post*, for the rationale of such decisions.

For cases in which actions brought by servants to recover for injuries caused by the acts of fellow servants whose misconduct would otherwise have been imputed to the employer were unsuccessful for the reason that the acts in question were done for the personal amusement of the tort-feasors, see *Galveston, H. & S. A. R. Co. v. Currie* (1906) 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073 (§ 1642, *ante*); *Novelty Theater Co. v. Whitcomb* (1910) 47 Colo. 110, 37 L.R.A.(N.S.)

514, 106 Pac. 1012 (§ 1466, *ante*); *Sullivan v. Louisville & N. R. Co.* (1903) 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171 (§ 1466, *ante*).

⁸ *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 602, 11 Jur. N. S. 843, 13 L. T. N. S. 300, 12 Week. Rep. 1023 (shed which had been lent to a master's carpenter was set on fire by the carelessness of a journeyman while smoking); *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518, 5 Times L. R. 417 (master not liable for fire caused by the servant's "getting up fireworks for his own amusement." Hawkins, J., *arguendo*); *Chicago, B. & Q. R. Co. v. Epperson* (1887) 26 Ill. App. 72 (torpedo placed on track by a section foreman); *Sammis v. Chicago, B. & Q. R. Co.* (1901) 97 Ill. App. 28 (section man took hand car); *Eaton v. Lancaster* (1887) 79 Me. 477, 10 Atl. 449 (servant of liveryman set fire to stable while he was smoking in the hayloft, whither he had gone to spend the night after his day's work was ended); *Smith v. New York C. & H. R. R. Co.* (1894) 78 Hun, 524, 61 N. Y. S. R. 235, 29 N. Y. Supp. 540 (station agent picked up track torpedoes which had been thrown from trains, and placed them on the rails merely to hear them explode); *P. Cox Shoe Mfg. Co. v. Gorsline* (1901) 63 App. Div. 517, 71 N. Y. Supp. 619 (act done out of idle curiosity); *Heard v. Flannagan* (1884) 10 Vict. L. R. (L.) (servant sent to cut a load of hay from a stack set it on fire by putting a lighted pipe in the pocket of his waistcoat while it was lying against the stack).

See also the cases which have affirmed the nonliability of masters for injuries caused by servants while engaged in managing automobiles and horse-drawn vehicles which they had borrowed without permission. § 2299, *post*.

⁹ *Southern R. Co. v. Power Fuel Co.* (1907) 12 L.R.A.(N.S.) 472, 82 C. C.

the court proceeded upon the theory that such an act may sometimes be imputable to the master on the ground of its being, in a broad sense, incidental to the servant's employment.¹⁰

A. 65, 152 Fed. 917 (damage resulting from a fire started by a member of a bridge-building gang, while he was using a boarding car as a place to sleep in during the night, and was not on duty; railway company not liable either at common law or under S. C. Civil Code, § 2135); *Hopkins v. Western P. R. Co.* (1875) 50 Cal. 190 (laborers in a construction gang created a nuisance by using a culvert under the railway near the plaintiff's house for the purposes of a privy; § 2396, note 1 (d), *post*); *Williams v. Mineral City Park Asso.* (1905) 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 Ann. Cas. 924 (member of musical band allowed a bottle from which he had been drinking beer to fall on person in the audience); *Walton v. New York C. Sleeping Car Co.* (1885) 139 Mass. 556, 2 N. E. 101 (porter of sleeping car threw out a bundle containing his personal effects, and injured a bystander); *Wiltse v. State Road Bridge Co.* (1886) 63 Mich. 639, 30 N. W. 370 (horse took fright at certain household furniture in front of the house of the receiver of the tolls at a bridge); *Morier v. St. Paul, M. & M. R. Co.* (1884) 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952 (section men who had made a fire on a railroad right of way to cook their dinner allowed it to spread onto adjoining land; on the facts a doubtful decision; see § 2303, note 8, *post*).

The liability of railway companies for injuries inflicted by servants who were using hand cars in their private business was denied in *Sammis v. Chicago, B. & Q. R. Co.* (1901) 97 Ill. App. 28; *Harrell v. Cleveland, C. C. & St. L. R. Co.* (1901) 27 Ind. App. 29, 60 N. E. 717; *Gulf, C. & S. F. R. Co. v. Dawkins* (1890) 77 Tex. 228, 13 S. W. 982; *Branch v. International & G. N. R. Co.* (1898) 92 Tex. 288, 71 Am. St. Rep. 844, 47 S. W. 974.

In *Salisbury v. Erie R. Co.* (1901) 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117, where the liability for an injury of this sort was affirmed, but merely on the ground of an absolute duty incumbent on the company. See § 2304, *post*.

In *East St. Louis Connecting R. Co. v. Reames* (1898) 173 Ill. 582, 51 N. E. 68, affirming (1897) 75 Ill. App. 28, where an engine detached from freight cars caused an injury while it was being used to carry employees to their dinner, the liability of the railway company was affirmed on the ground that, as there was a custom to use the locomotive in this manner, it was not being used at the time of the accident for a private purpose of the servants in which the company had no interest.

The following remarks, made with reference to the phrase "in the course of the employment," as used in the English workmen's compensation act of 1906 (§ 1806, *ante*), may be usefully quoted in this connection: "There are many cases where an accident may arise while a man is on the master's premises, but not engaged in active work; and whether he is then going about the premises in the ordinary course of business; or whether he is going about the premises in pursuance of the necessities of life, such as eating, drinking, respiration, and other things that need not be mentioned, and is not doing anything that is wrong or against his contract or outside his employment,—in such a case I do not doubt that the accident must be treated as one arising out of his employment." Lord McLaren in *MacKennon v. Miller* [1909] S. C. 373, 381.

¹⁰ In *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, 50 L. J. Q. B. N. S. 231, 44 L. T. N. S. 153, 25 Week. Rep. 506, 45 J. P. 603, where water was left running in a lavatory in a solicitor's private apartments by his clerk, who had entered them for a purpose of his own, the liability of the solicitor was denied on the ground that the clerk was a trespasser. But it was taken for granted that the action would have been maintainable if the negligence had been committed with relation to the water in the lavatory set apart for the clerks themselves.

In *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, 37 Week. Rep. 528, 53 J. P. 518, 5 Times L. R. 417, the master was held liable, where the faucet in the basin of a lavatory which the servant

2239. Wrongful act done for the benefit of a third person.—It is manifest that a tort committed by a servant while he was engaged in doing something for the benefit of a third person must in the nature of the case, be regarded as having been committed outside the scope of his employment, except in so far as he may have been acting under the authority of his master.¹ Such an authorization, it should be observed, is frequently one of such a nature that it involves a temporary transfer of the servant to the third person. See § 57, *ante*. The master's nonliability is then predicable on the ground of a suspension of the contractual relationship, and not upon the ground of a departure from the scope of the employment during the continuance of the relationship.

was authorized to use was left open and caused an overflow of water.

For two cases turning upon the theory of an absolute obligation arising out of the occupancy of real property, see note 2, *supra*.

¹ Upon this ground the liability of the master was denied in *Cousins v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 572 (master of roundhouse ran engine out on main line of railway company for the purpose of bringing a doctor to attend a sick neighbor); *New York, T. & M. R. Co. v. Sutherland* (1886) 3 Tex. App. Civ. Cas. (Willson) 177 (engineer used locomotive for accommodation of third person); *San Antonio & A. P. R. Co.* (1898) — Tex. Civ. App. —, 46 S. W. 374 (yardman attempted to stop a runaway horse); *Walker v. Hannibal & St. J. R. Co.* (1894) 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360 (baggage man who had made a practice of carrying drills on his car, gratuitously, and without the knowledge of the railway company, for the accommodation of a contractor, threw one out and injured the plaintiff); *Cunningham v. Grand Trunk R. Co.* (1871) 31 U. C. Q. B. 350 (baggage man on train threw out a crowbar belonging to a contractor, who, as a matter of convenience to him, was permitted to carry his tools on the defendant's trains); *Cavanagh v. Dinsmore* (1878) 12 Hun, 465 (deviation by driver of vehicle for the purpose of doing a favor to a coservant); *Sawyer v. Martins* (1888) 25 Ill. App. 521 (injury resulting from the negligence of a servant while engaged in assisting a neighbor who had come, with the own-

er's permission, to take down a sign left by a tenant who had removed from the building); *Sherwood v. Warner* (1906) 27 App. D. C. 64, 4 L.R.A.(N.S.) 651, 7 Ann. Cas. 98 (janitor of apartment house, at the request of persons sent to repair the elevator, assisting to release one of them who had been caught in the machinery); *Sweeden v. Atkinson Improv. Co.* (1910) 93 Ark. 397, 27 L.R.A.(N.S.) 124, 125 S. W. 439 (child injured while riding on an elevator at the invitation of the elevator man); *Malcolm v. McNichol* (1906) 16 Manitoba L. Rep. 411 (janitor manipulated heating apparatus at request of mechanics sent to do work with relation to it); *Lubliner v. Tiffany & Co.* (1900) 54 App. Div. 326, 66 N. Y. Supp. 659 (arrest made for the purpose of protecting the property of a customer of a storekeeper); *Atherton v. Kansas City Coal & Coke Co.* (1904) 106 Mo. App. 591, 81 S. W. 223 (disposition of goods in course of delivery; see § 2311, note 7, *post*); *Gallagher v. Russell* (1883) 11 Sc. Sess. Cas. 4th series, 53, (bargee at the request of a bargee in the service of another employer, opened the sluice in lock gates of a canal); *Parramatta River Steamers Co. v. Hizon* (1895) 16 New So. Wales L. R. 105 (government launch, while on its way to leave two private persons at a certain point before it started to take up some officials, ran into plaintiff's steamer).

For cases in which the owners of vehicles have been held not to be liable for injuries caused by the negligent manner in which they are managed by a servant who has taken them out for

2289a. Wrongful act done for the purpose of vindicating public justice.—The circumstances under which the nonliability of a master for injuries occasioned by a wrongful use of criminal process by his servant is deemed to be predicable on the ground that the object of the tortious act was the vindication of public justice, and not the protection of the master's interests, are discussed in chapter cvi. *post*.¹

the accommodation of his friends, see § 2299, *post*.

In *Burns v. Poulson* (1873) L. R. 8 C. P. 563, 42 L. J. C. P. N. S. 302, 29 L. T. N. S. 329, 22 Week. Rep. 20, it was held to be a question for the jury whether a servant of a stevedore was acting within the scope of his employment in helping to unload rails from a cart in which they had been brought to the wharf, from which they were to be loaded on a ship.

The authorities are conflicting with regard to the liability of a master for an injury received in consequence of an elevator man having failed to keep a promise made to an artisan working on the shaft, that the cage should not be moved above or below a certain level. See § 2315, notes 5 and 6, *post*.

¹The leading English case is *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 11 Cox, C. C. 621, 23 L. T. N. S. 612, 19 Week. Rep. 127 (see § 2465, note 1, *post*).

See also the cases cited, with their

appropriate cross references, in § 2283, note 8, *ante*; and *Mulligan v. New York & R. B. R. Co.* (1892) 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952 (§ 2464, note 3, *post*); *McKain v. Baltimore & O.R. Co.* (1909) 65 W. Va. 233, 23 L.R.A.(N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634 (§ 2464, note 3, *post*); *Hamilton v. Railway Comrs.* (1905) 5 New So. Wales St. Rep. 267, 22 W. R. 691 (§ 2466, note 2, *post*); and the cases reviewed in §§ 2476 *et seq.*

The general rule has been thus formulated: "Where the act is done for the punishment of the supposed criminal, or for the vindication of the law, it is not the act of the principal, and does not subject him to liability." *Markley v. Snow* (1904) 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999 (§ 2464, note 3, *post*).

The phrase, "furtherance of public justice" is also used in this connection. *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 448, 39 L. J. C. P. N. S. 241, 22 L. T. N. S. 656, 18 Week. Rep. 834.

CHAPTER XCIX.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER FOR INJURIES INFLECTED BY THE NEGLIGENCE OF HIS SERVANTS UPON THIRD PERSONS TO WHOM HE OWES NO CONTRACTUAL DUTY.

2290. Introductory.

A. SERVANTS WHOSE WORK HAS RELATION TO ROAD VEHICLES AND RIDING HORSES OWNED BY PRIVATE PERSONS.

2291. Generally.

2292. Right of action as viewed with reference to the extent of the servant's authority in respect of the given instrumentality.

2293. Injury inflicted at a place where the servant was authorized to use the given instrumentality.

2293a. Same subject further discussed.

2294. Liability as affected by the servant's deviation from a prescribed route. Generally.

2295. Same subject. Effect of servant's deviation from a prescribed route for his own purposes.

2296. Same subject. General remarks as to the conflict of doctrine.

2297. Deviation as an element in cases where the servant is not required to follow a definite route.

2298. Liability as to acts done by the servant after having accomplished the extraneous purpose of his deviation.

2299. Vehicle used on an independent journey for a purpose not connected with the master's affairs.

a. Instrumentality used without the master's consent.

b. Instrumentality used with the master's consent.

2300. Injury inflicted on a journey undertaken partly on behalf of the master, and partly for the servant's own purposes.

2301. Dangerous character of vehicle.

B. SERVANTS WORKING ON RAILWAYS.

2302. Servants whose work has reference to the operation of trains.

a. Conductors.

b. Brakemen.

c. Porters on cars.

d. Baggage masters.

e. Engineers.

f. Firemen.

g. Servants in yards.

2303. Servants engaged in the construction or repair of the permanent way.

2304. Servants whose work involves the use of hand cars.

2305. Other classes of servants on steam railways.

a. Station agents.

b. Train despatchers.

c. Telegraph operators.

d. Servants handling passenger's baggage.

e. Servants handling goods.

f. Servants at crossings.

g. Servants in mechanical departments.

i. Civil engineers.

2306. Servants of employers operating street railways.

C. SERVANTS ENGAGED IN OTHER KINDS OF TRANSPORTATION WORK.

2307. Servants working on ships.

a. Generally.

b. Liability in cases of a deviation from the appointed course.

2308. Servants working on canals.

2309. Servants working on stagecoaches.

2310. Servants of wharfingers and dock owners.

2311. Servants handling goods.

a. Work performed with relation to railway cars.

b. Work performed with relation to mercantile establishments, etc.

c. Work performed with relation to ships.

D. NEGLIGENCE OF SERVANTS WHOSE WORK HAS RELATION TO LANDS AND TENEMENTS.

2312. Servants engaged in rural work. Generally.

a. Management of animals belonging to master himself.

b. Disposition of trespassing animals.

c. Management of machinery.

d. Acts incident to the work of teamsters.

e. Felling trees.

f. Removal of earth, etc.

2313. Servants using fire in connection with rural work.

2314. Servants using fire in houses.

2315. Servants hired to manage elevators and lifts.

2316. Servants employed in buildings upon various other kinds of work.

a. Use of water.

b. Acts done with relation to gas pipes.

c. Use of electrical appliance.

d. Disposition of rubbish and waste materials.

e. Cleaning of footpaths.

f. Use of trapdoors.

g. Manipulation of awnings.

E. SERVANTS ENGAGED IN SOME MISCELLANEOUS OCCUPATIONS.

2317. Servants transmitting telegraphic messages.

2318. Servants working in and about mines.

- 2319. Servants engaged in the construction, alteration, repair, or demolition of structures.
- 2320. Mechanics and artisans of various descriptions.
- 2320a. Billposters.
- 2321. Servants whose work has relation to logs and timber.
- 2322. Servants employed in mercantile establishments.
- 2323. Servants engaged in the collection of tolls.
- 2324. Servants in places where intoxicating liquors are sold.
- 2325. Servants in places of amusement.
- 2325a. Servants employed in public parks.
- 2326. Servants employed in hunting expeditions.
- 2327. Servants engaged in salvage work.

2290. Introductory.— In this and the following chapter it is proposed to review the cases which define the extent of a master's liability for an injury occasioned by the negligence of his servant. The evidential prerequisites to the maintenance of an action on this ground are as follows:

(1) That, at the time when the given injury was sustained, the tort-feasor should have been working under the defendant's control, in the capacity either of a servant hired upon the ordinary footing, or of a special servant transferred *pro tempore* for a certain purpose. The circumstances under which one or other of these relations is deemed to exist between two persons are considered in chapter II., *ante*.

(2) That the act complained of should have been done by the tort-feasor within the scope of his employment. This prerequisite is discussed in the following sections.

(3) That the act complained of should be shown to be negligent. In actions to enforce the vicarious liability of a master, the question whether this prerequisite has been satisfied is clearly determinable with reference to the same considerations as in actions founded on the personal fault of the defendants. It would therefore be out of place in the present treatise to review the facts of the cases in which the right of recovery against masters has been dealt with as a matter depending solely upon the quality of the conduct of their servants.

(4) That the act complained of was the proximate cause of the alleged injury. To this prerequisite the same remark is, strictly speaking, applicable as to the one last mentioned. But as the subject has been discussed at some length in connection with the remedial rights of an injured servant (see chapter LXVII., *ante*), it will be advisable to supplement the authorities there cited by summarizing in

a note the effect of the cases in which proximity of cause was one of the controlling elements.¹

¹The plaintiffs were held to be entitled to recover in the following cases: *The On-The-Level* (1903) 128 Fed. 511 (negligence of care taker of scow in leaving it unattended held to be the proximate cause of an injury which its capsizing subsequently caused to libellant's stake boat, although he had himself made it fast to the stake boat, when he observed that it was swinging round and threatening to damage that and another boat); *Brown v. Pontchartrain R. Co.* (1844) 8 Rob. (La.) 45 (two freight cars left unblocked on a railroad wharf were set in motion by a high wind, and ran against plaintiff); *McDonald v. Snelling* (1867) 14 Allen, 290, 92 Am. Dec. 768 (defendant liable where his servant negligently drove a sleigh against another sleigh, thereby causing the horse to run away and injure the plaintiff, who was in a third sleigh); *Post v. Olmsted* (1896) 47 Neb. 893, 66 N. W. 828 (negligence of a driver who recklessly drove his team over a boy riding on a hand sled attached to another wagon was held to be imputable to the driver's master, although the boy had been guilty of antecedent negligence in placing himself in the position in which he was when injured).

In *Sandy v. Swift & Co.* (1908) 159 Fed. 271, where the defendant's servant driving a heavy meat wagon turned suddenly from one street into another in front of a lady as she was crossing the street, and she fell and was injured in an attempt to extricate herself from the sudden and unexpected peril arising from the servant's negligent driving, an action was held to be maintainable against the defendant, though she was not struck by the horses or wagon.

In *Englehart v. Farrant & Co.* [1897] 1 Q. B. (C. A.) 240, the defendant sent out, with a horse and cart for the delivery of parcels, a driver whose duty it was to drive the cart, and a youth whose duty it was to deliver the parcels, but not to drive at all, and who, to the driver's knowledge, did not understand how to drive. The driver left the cart to get some oil for the lamp inside the van, and during his absence the youth, in order to further the defendant's business, proceeded to turn the cart around, and while so doing caused injury to

the plaintiff's vehicle. Held, that the negligence of the driver in leaving the cart without proper attendance was an effective cause of the injury; that the defendant was liable for that negligence; and that his liability was not removed by the intervention of the act of the youth outside the scope of his employment, which was the proximate cause of the injury. Lord Esher, M. R., said: "The question is, Was that negligence of Mears an effective cause of this damage to the plaintiff? It was argued that the mere fact of the second lad taking into his own hands to drive was sufficient to prevent the liability of the defendant, although Mears was negligent. That argument seems to me to be wrong. If a stranger interferes, it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes, the defendant is not liable, if the negligence of a servant of his is an effective cause of the accident. Now, if it is necessary to draw any inference about the probability, if Mears had done what he ought to do, and had thought what was the probable result of his going away and leaving the cart with the lad in it, I think it is inevitable to come to the conclusion that he would have thought he was doing a dangerous thing. Leaving that lad in the cart with the means of driving off at any moment makes what Mears did an effective cause of what happened afterwards." Lopes, L. J., said: "The interposition of the negligence of another person between what I will call the primary negligence and the accident makes this case difficult. . . . It was Mears's blamable carelessness which induced Tucker to do what he did. It was that carelessness which was the real moving and effective cause of the mischief; and I believe that is the inference which any jury would draw from the facts of this case. If Tucker had not been in the cart, and Mears had left the cart unattended and the horse had moved on and injury had been caused to a passer-by, or if a passer-by had jumped into the cart and driven it and injured some person by negligent driving, Lipton would have been liable. Again, if Mears had asked a passer-by to stand at the head of the horse while he was absent,

The subject of the present chapter is the master's liability in respect of persons to whom he owes no special duty, contractual or noncontractual.

and the passer-by had left the horse, and the horse had gone on and injury had been caused to any person, . . . [Lipton] would have been liable. Mears's carelessness in not anticipating what might not unreasonably happen would have been the real and effective cause of the mischief. In this case Mears practically was leaving the horse and cart unattended. He knew Tucker was ordered not to interfere with the driving. He ought therefore to have anticipated that some casualty might happen, and it was his imprudence in this respect which caused the mischief." The defendant relied upon another decision of the court of appeal, *Mann v. Ward* (1892) 8 Times L. R. 699, where a drunken cabman got inside his cab and went to sleep; upon which another drunken cabman got in the cab and drove it away for his own pleasure. The injury complained of was inflicted while he was so driving. The plaintiff was nonsuited, and the nonsuit was upheld. Lord Esher, M. R., took the position that "it was not the natural consequence of the defendant's driver getting drunk, that another drunken man should get on the box and drive." In *Engelhart v. Farrant & Co.* both Lopes, L. J., and Lord Esher, expressed the opinion that this case had not been fully reported. The former said that the decision was one at which, if correctly reported, he could not himself have arrived. The latter observed that, "after all, it was only the decision of the court of appeal on a question of fact; and if the court of appeal was wrong in that case, it is not a binding authority on this court in this case."

In *Abraham v. Bullock* (1902) 86 L. T. N. S. (C. A.) 796, reversing (1901) 85 L. T. N. S. 237, where a job master from whom a manufacturing jeweler had hired a carriage with a horse and driver for the purpose of conveying a commercial traveler with a stock of jewels was held to be liable for the value of goods which were stolen while the carriage was left unattended in the street, Collins, M. R., remarked: "In the present case the breach of duty was the direct cause of the loss. The very thing contemplated by the obligation on

the defendant to take care of the carriage in Cohen's absence was the guarding against the possibility of a thief taking the jewels. If that was the object for which this duty was imposed on the defendant, it seems to me impossible to say that the stealing of the jewels by a thief was too remote a consequence of the defendant's breach of duty."

In *Taylor v. Long Island R. Co.* (1897) 16 App. Div. 1, 44 N. Y. Supp. 820, some of the contents of a brewery wagon which was struck by a train were thrown against a bystander. Held, that the question whether the negligence of the driver in attempting to cross the track was the proximate cause of the injury there caused had been properly submitted to the jury.

In *Salem Bank v. Gloucester Bank* (1820) 17 Mass. 1, 9 Am. Dec. 111, one of the grounds upon which it was contended that the defendant bank might be held liable for the loss incurred by the plaintiff through cashing its forged notes was that the defendant's officers had been negligent in so keeping the paper prepared for the signature of the president that it was stolen and put into circulation with his name forged. But the court said: "Whatever might be the opinion of the court in the case of a direct damage happening to anyone in consequence of the negligence or mismanagement of the officers of a bank, we are clear that, for the indirect and remote consequence of the negligence in this case, the corporation is not answerable. The notes, as they lay in the bank, were harmless, and could impose upon no one. They are in fact waste paper until they receive the signature of the president. In this situation they are stolen, and they are made to resemble a bank note by the felonious act of the thief, or of some person associated with him. Why should the corporation be answerable for notes thus fabricated? The negligence of their officers was the cause of loss to none but themselves; and it is only by superadding forgery to negligence, that harm is done. The negligence may be theirs, but the forgery is not; and it is not easy to see any equity in obliging them to pay for the crimes of another. As well may it be said that

A. SERVANTS WHOSE WORK HAS RELATION TO ROAD VEHICLES AND RIDING HORSES OWNED BY PRIVATE PERSONS.

As to the presumptive inferences from the fact that at the time when the given injury was inflicted the servant was using a vehicle or horse belonging to the defendant, see § 2281, *ante*.

if a bank note be filled up by the cashier, intended to be issued as a \$1 note, and a space be left large enough to insert the word 'hundred,' and the word be fraudulently inserted, it became the note of the bank for \$100. There has been no case cited which maintains such a principle, and we perceive no ground for it in reason or justice. In all cases of negligence which are the foundation of actions, it is believed the injury complained of is the direct and immediate consequence of the fault. *Causa propinqua, non remota, spectatur*. If, because these notes, left carelessly in an unfinished state, were stolen, and the president's name forged to them, the corporation are bound to pay them, then, also, if the paper not filled up at all had been stolen and so used by the felon, the corporation would have been liable. But this would be strange doctrine. If a merchant should prepare promissory notes or bills of exchange for his signature upon an expected contract, and should leave them in his desk, and someone should steal them and forge his name, can it be supposed he would be obliged to pay them? If not, why should a bank under similar circumstances be liable? The law is the same in this respect for an individual and for an incorporated company. Principals are generally liable for the misconduct of their agents, masters for that of their servants, but only for the direct effect of that misconduct. If, by the negligence of a merchant's clerk, property committed to his care be damaged or stolen, the merchant would doubtless be answerable; because the negligence is the cause of the damage, and he is bound, upon the principles of the contract of bailment, to take the best possible care of the goods so committed to him. But if his own property should be stolen and adulterated, so that a purchaser is cheated, can it be supposed that he would be answerable, because the mischief might be traced back to the negligence of his servants? Or, should he even be prevented from re-

claiming the property stolen from him, if the purchaser could prove that the servants carelessly left open the door by which the thief entered? There is no instance in the books of any liability like that which is contended for in this case. The only case which has any resemblance to it is that of *Herbert v. Pagett* (1663) 1 Lev. 64, where the keeper of the records was held answerable for an alteration in them, although made without his knowledge, and which he could not prevent. But this was decided by two judges only against Twisden; and the two rested their decision upon the strict principle that the defendant, having undertaken as a public officer to keep the records at his peril, was answerable for them. But neither the cashier of the bank nor the corporation are public officers. The latter are merely copartners, authorized by law to act as a body, by a corporate name, and are not otherwise amenable to the public than as may be provided in their act of incorporation."

In *Rochester v. Bull* (1907) 78 S. C. 249, 58 S. E. 766, it was contended that an instruction by which the jury were told that the defendant would be liable if negligence of his agent in charge of his automobile "caused" the injury should have been qualified by the addition of the word "proximately." But the court said: "This exception cannot be sustained. The court had previously charged that a person would not be liable unless his negligence was the proximate cause of the injury. Now if a person would only be liable for the proximate results of his acts when he acted himself, it would seem a queer conclusion, one which a person of ordinary reason would not draw, that when he acted through an agent he would be held liable for all injuries, whether proximate or not. The proposition is familiar to the ordinary mind that the acts of an agent within the scope of his duties are those of a master, and a master's liability for his agent's acts are the same-

As to the right of recovery for injuries wilfully inflicted by drivers, etc., see § 2377, *post*.

The circumstances under which a person conveyed in a vehicle as a passenger is entitled to maintain an action are considered in §§ 2331 *et seq.*, *post*.

2291. Generally.—The principles with reference to which the right of recovery is determinable in cases of the type discussed in this subtitle have been thus stated in a general form: "The master is liable for the act of a servant in charge of his vehicle [or horse] when the latter is acting in the main with the master's express or implied authority, upon his business and in the course of the employment, for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance with the general purpose of his occupation or in connection with the doing of the master's work."¹

The probative significance of the bare facts that the vehicle or horse which caused the given injury belonged to the defendant, and was under the control of his servant at the time when the injury was inflicted, is discussed in the section (2281) which deals generally with the ownership of instrumentalities as an evidential element.

2292. Right of action as viewed with reference to the extent of the servant's authority in respect of the given instrumentality.—The servant's want of authority in respect of the particular act which caused the injury complained of has, in two classes of cases, been treated as an element negating the right of action.

(1) The master cannot be held liable where it appears that the management of the vehicle or riding horse which inflicted the injury was neither a function with which the servant was intrusted

as if he had been acting himself. The court certainly stated correct propositions of law. True, they were general principles, but if the defendant wished anything more specific he should have requested it."

For a case in which the plaintiff was held to be precluded from recovering for the damages caused to her mowing machine, on the ground that, although the negligence of the defendant may have been in part the cause of the team having run away, that event was also a result of the negligence of the plaintiff's servant in leaving the team unhitched

and unattended in the highway, see *Page v. Hodge* (1885) 63 N. H. 610, 4 Atl. 805.

In *Mire v. East Louisiana R. Co.* (1890) 42 La. Ann. 385, 7 So. 473, the right to recover for an injury caused by the derailment of a train was denied on the ground that the evidence showed clearly that the accident, which resulted from the misplacement of a plank at a crossing, was not due to the negligence of the defendant's servants.

¹*Fleischner v. Durgin* (1911) 207 Mass. 435, 33 L.R.A. (N.S.) 79, 93 N. E. 801, 20 Ann. Cas. 1291.

by the terms of the contract of hiring, nor a function which, whether on the ground of an emergency or for some other special reason, he was impliedly authorized to assume at the time when the injury was inflicted.¹ If the vehicle which caused the plaintiff's injury

¹ In *Beard v. London General Omnibus Co.* [1900] 2 Q. B. (C. A.) 530, an omnibus belonging to the defendant company was left by its regular driver in charge of the conductor at the end of one of its journeys. The conductor, for the purpose, it was alleged, of turning the omnibus round in readiness to start on its return journey, drove it through an adjoining street, and in so doing negligently ran down and injured the plaintiff. The plaintiff brought an action against the proprietors of the omnibus, and at the trial gave no evidence as to the conductor's authority to drive, or as to the existence of an emergency. Held, by A. L. Smith and Romer, L. JJ., that the plaintiff had not discharged himself from the burden cast upon him of showing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the defendants were entitled to judgment. Held, by Vaughan Williams, L. J., that, in general, if, in the absence of the driver of an omnibus, an accident occurs while the conductor is driving, it would be for the proprietor to show that the act was unauthorized, but that the facts of the particular case negatived the giving of authority, and that the defendants were entitled to retain the judgment. Smith, L. J., said: "I agree that on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negligence, there would be a *prima facie* case that the omnibus was being driven by an authorized servant of the company within the scope of his employment. But that is not this case, for it was expressly opened to the jury as a case in which the omnibus was not being driven by the driver who was employed to drive it, but by the conductor. When a case is so opened, that negatived the presumption that the omnibus was being driven by the authorized agent of the company, because *prima facie* it is not the duty of the conductor to drive any more than it is the duty of the driver to take fares. My brother Romer, in the course of the argument, put the illustration of an omnibus being driven by a stranger

to the defendants. In such a case it would be impossible to say that the proof that the omnibus was being driven by a stranger would raise any case against the company. The plaintiff must in such a case have gone on to show that the stranger was driving with the consent or approval of the company, or on such emergency that their consent must be implied. There was no evidence on either of these points as regards the conductor; and therefore Lawrance, J., came to the conclusion—and, in my opinion, rightly—that the plaintiff had not made out a *prima facie* case." Romer, L. J., said: "I agree that the plaintiff's appeal falls. If one sees in the streets of London an omnibus admittedly belonging to the defendant company, driven in the ordinary way by a person who appears to be a driver, the presumption is that he is authorized by the company. That presumption may be removed. In this case it was rebutted by the plaintiff's evidence, for it proved that the *de facto* driver was not the person authorized to drive, but a person authorized and employed to act as conductor. In such a case the onus of showing some special authority given to the conductor to do the act which he did lies upon the plaintiff. No such authority was shown, and no case of necessity to do the acts which the conductor did was suggested, nor do the facts lead to any presumption that a case of necessity had arisen." Vaughan Williams, L. J., said: "I think this case is somewhat on the border line. I agree that if, on the plaintiff's evidence, it was clear that the conductor was doing something outside his functions, the judgment was rightly entered for the defendants; but I do not think one has any right to assume, without any evidence being given as to what are the functions of a driver and a conductor, that it is necessarily beyond the functions of a conductor to take charge of an omnibus in the absence of the driver. It seems to me that the company send out their omnibus in charge of a driver and a conductor, and that, though they have different functions to perform, it is not

belonged to a person other than the servant's master, the master's liability will depend upon whether the servant was authorized, ex-

inconsistent with that fact that it may be within the scope of the authority of one of them temporarily to perform the duties of the other in his absence. If the evidence of the plaintiff had shown that one journey had come to an end and another commenced, and that between these points of time the conductor had turned the omnibus round, I should have thought that there was a case for the jury, and that it would be for the defendants to show that the act was outside the scope of the authority of the conductor to take charge during the absence of the driver. I have, however, looked through the evidence, and I find that the omnibus was not merely being turned round, but was in a side street, and was coming downhill at the rate of 8 miles an hour; and it does seem on the evidence as if the conductor was not merely performing some temporary duty during the absence of the driver, and that the driver may possibly have done that which he had no right to do,—that is, delegate his authority to the conductor. I think very strongly that it would be unfortunate that it should go forth to the public that, whenever a conductor is found exercising some function of the driver, no case can be made against the omnibus proprietor unless the plaintiff is in a position to call evidence to account for the temporary absence of the driver. It seems to me to be a sounder view that, where a driver and a conductor are sent out in charge of an omnibus, and complaint is made of some act done by the conductor, it should be left to the jury to say whether that act so complained of was within the authority given to the conductor. It is all very well to say that one knows that the authority given to a driver is to drive, and that given to the conductor is to conduct, but it is incorrect to say that one is entitled to deal with the case on that hypothesis. I cannot myself say whether, at the end of one journey and the beginning of the next, the conductor has any duty with reference to the horses, or what that duty, if any, may be. . . . I have considered it right to express my view that, in the absence of the driver when the omnibus is out taking passengers, *prima facie* it is the duty of the conductor to take charge of the

omnibus in the absence of the driver, and, if what he does is apparently consistent with that duty, it would be for the defendants to prove that in fact what he was doing was beyond his functions."

In *Engelhart v. Farrant* [1897] 1 Q. B. (C. A.) 240, 66 L. J. Q. B. N. S. 122, 13 Times L. R. 81, it was agreed that the defendants could not be held liable for an injury which resulted from the unskilful driving of their delivery van by a boy who had been sent out with their regular driver to assist in the distribution of the parcels, and who had undertaken to turn the van round while the driver was absent. For the other points involved, see § 2290, note 1, *ante*.

In *Wilson v. Owens* (1885) Ir. L. R. 16 C. L. 225 (decision affirmed by court of appeal), the defendant was the proprietor of a hotel and shop in the town of C., and kept a pony and chaise for his own personal use. They were not used for the purpose of the defendant's business. The accident in question occurred during a temporary absence of the defendant, who had left a servant, E., in charge of the shop only, with the authority to sell goods, and generally to see that things went right in his absence. The defendant gave E. no authority to drive. Another servant, named M., was in charge of the yard, and it was his duty to drive when the defendant required. The housekeeper had charge of the house. While the defendant was so absent, one of his relatives, who admittedly had no authority to act as his agent, called at the house, and, when leaving, was, by his request, driven by E. in the pony chaise to the neighboring railway station. When E. was so driving the pony and chaise, the accident took place. Held, that there was no evidence proper to be submitted to the jury that E. was, at the time of the accident, acting in the course of his employment as the defendant's servant. Andrews, J., said: "In considering whether there was any evidence fit to go to the jury upon the question above referred to, the whole of the evidence affecting it must be considered. Egan's evidence, on cross-examination, that he was left in charge when the defendant was away, and that he was there in the

defendant's place when he was away (which are probably the strongest statements in the entire evidence in the plaintiff's favor), cannot, as was conceded, be taken without some qualification, and must be taken in connection with his evidence that he never drove the defendant's trap; with the admitted absence of any express authority to him from the defendant to drive it; with the evidence of Thomas Quinn that it was he who ordered out the trap, and said that Egan could drive (which order, on the defendant's uncontradicted evidence, Quinn had no authority to give); with the undisputed fact that the person whose business it was to drive the pony was M'Nally, and not Egan; and with the defendant's evidence that Egan was the man he looked to, to see that, when he was away, things would go on as before."

In *Martin v. Wards* (1887) 14 Sc. Sess. Cas. 4th series, 814, 24 Scot. L. R. 586, a salesman in a shop, having borrowed a van from a friend who came with it to drive it, placed on it, with his master's knowledge and consent, certain articles which he had been directed to remove to another shop. The driver having become intoxicated, the salesman took the reins himself, and by his carelessness knocked down two children who were crossing a street. Held (dissenting Lord Craighill), that the shopkeeper was not responsible for the injury, because the salesman was acting outside his duty in undertaking to drive the van. Lord Rutherford Clark said: "If Ward, senior, had hired a van and the services of a vanman to remove bottles, and if, in the course of doing so, the vanman had run down a person on the street and injured him, I do not think that Ward would have been responsible. He would not have been in any way to blame for the accident. I think that was his true position. He allowed his son to take the use of the van when under the charge of the owner of the van. In other words, he allowed his son to employ Newton and Blair to remove the bottles in their van. He never understood or agreed that his son was to drive. . . . No doubt Ward, junior, came in the end to be the driver, and was the driver at the time of the accident. But the reason was that the person who ought to have been driving became drunk. In consequence Ward, junior, seems to have thought it best to take

the reins, and perhaps he was right enough to do so. But I do not think that makes Ward, senior, liable for the driving of the van. The son is the father's servant, but only in the shop. He was not his father's servant when driving the van, for he had no authority from his father to drive it. He was then acting for Newton in consequence of Newton's incapacity." Lord Craighill thought that the defendant should be held liable on the ground that he had knowledge of the employment of the van on his business, and had left to the son's discretion the arrangements as to the removal. There seems to be much plausibility in this view of the situation. It is possible that the defendant might also have been treated as liable on the ground that, under the circumstances, it was in a reasonable sense necessary that someone should take the place of the intoxicated driver, and that his son, acting in his interests and for the protection of his property, was impliedly authorized to engage a substitute, or to become the required substitute himself. But this aspect of the evidence was not brought to the attention of the court.

In *Reaume v. Newcomb* (1900) 124 Mich. 137, 82 N. W. 806, defendants, dry goods merchants, employed boys to drive their delivery wagons, the horses and wagons being in the care of the owner of a boarding stable. The employment of the boys lasted only from the time they received their horses and wagons at the stable until they delivered them back again in the possession of the stablekeeper. One of the boys, after he had completed his deliveries, rode one of the horses, at the instance of the stablekeeper, for the purpose of exercising him, and while so riding the horse, collided with the plaintiff on his bicycle. Held, that, as the boy was not in the employ of defendants at the time of the accident, they were not liable. The court said: "Pierce alone was responsible for the boy's act in riding the horse. Defendants did not authorize or permit him to employ the drivers for any such purpose. Hundreds and thousands of men are employed to work a portion of the day for one employer, and are at liberty to work the balance of the time for others or for themselves. If this boy had been permitted by Pierce to take the horse and wagon on business for himself or for Pierce outside of the delivery hours, defendants would not be liable

for any negligence of the boy, because it would be without the scope of the authority of either Pierce or Wescott. That the act to be done by the boy might possibly result, or was intended to result, in benefit to defendants, is not the test of authority. The act must be within the scope of his employment, in order to render his employer liable."

In *Petersen v. Hubbell* (1896) 12 App. Div. 372, 42 N. Y. Supp. 554, the regular driver of an express wagon not being present at a time when that wagon was to be driven to a railway station, a clerk in the office of the express company undertook to drive the wagon to its destination, and in so doing ran over the plaintiff. The clerk had never been regularly employed as driver, but had, on numerous occasions, driven the company's wagons on regular trips for the delivery of freight at the station. Held, that, in the absence of any prohibitive rule of the company, or of any proof upon the part of the defendant that its officers and agents were ignorant of such action on the part of the clerk, there was sufficient evidence of the implied authority of the clerk to drive the wagon, to justify the court in refusing to dismiss the complaint upon the ground that the person driving the wagon was not a servant of the company acting within the scope of his authority.

In *McEnroe v. Taylor* (1907) 56 Misc. 680, 107 N. Y. Supp. 565, where plaintiff was injured by defendant's automobile, operated by defendant's chauffeur, defendant testified that the chauffeur was acting without his authority and against his express commands. Held, that the failure of defendant at the time he was served with summons and complaint, to deny that the chauffeur was acting at the time of the accident as his employee and in the performance of duties for him, could not be considered as proof that the agent had authority. An instruction to the opposite effect was held to be erroneous.

In *Long v. Richmond* (1902) 68 App. Div. 466, 73 N. Y. Supp. 912, affirmed in (1903) 175 N. Y. 495, 67 N. E. 1084 (memo.), defendant's servant was ordered to take two ponies to a certain place, and afterwards to bring them back. He was instructed to ride the chestnut and lead the gray, and not to ride the gray or permit any person to ride him, but he permitted a third person to ride the gray. It became un-

manageable and ran into plaintiff's horse and wagon injuring them. Held, that defendant was not liable.

In *Brenner v. Ford* (1906) 116 La. 550, 40 So. 894, it was held that the plaintiff could not recover for the death of a minor child who had been run over by a vehicle which a man employed by the defendant, not as a driver, but as a groom and stableman, had, in disobedience of positive orders given at the time when he was hired, and reiterated on several subsequent occasions, taken out for his own pleasure. The court thus discussed the respective contentions of the parties: "[The defendant] . . . denies that this act of the negro was in disobedience of orders or instructions which were given to him as to the performance of duties which had devolved upon him in the discharge of his existing duties, which left his acts to be tested and passed on as if such orders had not been given. He urges that the attempt of the plaintiffs to place matters on that footing is without justification and warrant; that the orders and instructions not to drive the horse was one of the original limitations which had been placed by himself upon the authority which he conferred upon the servant, and one of the conditions of his employment; that by disobeying such instructions, he could not extend and bring inside the sphere of his duties the thing which was prohibited, and which marked the scope and fixed the extent of the servant's employment. Defendant insists that when the terms of the employment had been fixed, and by the same Weeden had been expressly prohibited (*ab initio*) from driving the horse, it could not be pretended (when he undertook afterwards to drive her) that he was doing so on the master's business or for his interest. On the contrary, it must be conclusively presumed that he was driving the horse for his own pleasure. Plaintiff's claim that the defendant, having told the servant not to drive the horse, and then told him to exercise her, without limiting him to any specific method of exercising her only by leading or riding, necessarily left the servant under the belief that he was to exercise her by driving as the only appropriate or expedient way in which she could be exercised at all, or the only way the horse was accustomed to be used. We do not think the testimony justifies the taking of this posi-

pressly or impliedly, to hire or borrow it for the purpose of performing his prescribed duties.²

(2) Another situation in which the injured person is precluded from recovering is presented where the evidence shows that, at the time when he sustained his injury, he was riding upon the vehicle or horse in question in pursuance of an invitation given by the servant, and that such an invitation was beyond the scope of the servant's authority. The purport of the cases decided from this standpoint is stated in the chapter (CVII.) in which the extent of a master's liability is considered with reference to the nature of the duty owed by him to the aggrieved party.

2293. Injury inflicted at a place where the servant was authorized to use the given instrumentality.—Where it appears that the given injury was caused by the negligence of a person in charge of a vehicle or horse; that he was a servant of its owner; that its management was one of his appointed functions, and that, at the time when the injury was inflicted, it was being used by him at a place to which he was authorized to take it, the sole issue to be determined is whether the particular act complained of was incidental to the performance of his prescribed duties, or was done for the purpose of obtaining some personal advantage or gratifying some personal feeling, or of benefitting a third person.¹ The great majority of cases involving this situation relate to torts incidental to the actual work

tion. Weeden was prohibited from the beginning from driving the animal, and that prohibition was never removed. On the contrary it was continuously reiterated. Weeden could not possibly have made any mistake on that subject. Even had he made a mistake, it was one not justified by the facts." It is not apparent why the defendant should have taken his stand upon the disputable ground of the servant's scope of authority, when he might, in view of the facts, have resorted to the defense that the servant had taken the vehicle out for his own pleasure. See § 2299, *post*.

In *Dalrymple v. McGill* (1813) Hume's Sc. Sess. Cas. 387, the master was held not to be liable for the act of a servant who, without orders, took a horse of a neighbor and rode it so hard that the horse was permanently injured.

² For a decision which supports this statement, see *John M. Hughes Sons Co. v. Bergen & W. Automobile Co.* (1907) 75 N. J. L. 355, 67 Atl. 1018, where, however, the point involved was not an

injury to a third person, but the right of the plaintiff to recover for injuries caused to an automobile by the negligence of the defendant's servant, who had borrowed it. See § 2340, note 3, *post*.

¹ For cases illustrating this rule, see the following notes.

In the *nisi prius* case, *Lamb v. Palk* (1840) 9 Car. & P. 629, a van was standing at the door of A, from which A's goods were unloading, and A's gig was standing behind the van. B's coachman, who was driving B's carriage, came up, and, as there was not room for the carriage to pass, the coachman got off his box and laid hold of the van's horse's head. This caused the van to move, with the result that a packing case fell out of the van upon the shafts of the gig and broke them. It was ruled by Gurney, B, after consultation with some other members of the court of exchequer, that B was not liable for this, as the coachman was not acting in the employ of B at the time the accident occurred.

of driving vehicles.² In many cases of this type the only questions really in dispute were whether the servant's conduct was in point

In *Page v. Defries* (1886) 7 Best. & S. 137, the court, without giving any specific reason, overruled this decision.

In *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922, it was held to be competent for the plaintiff to prove that, prior to the accident, the tort-feasor had been in the habit of driving his team to church and elsewhere, and also to show the extent and character of the driving, as bearing upon the nature of his service and the scope of his authority.

In *Collard v. Beach* (1903) 81 App. Div. 582, 81 N. Y. Supp. 619, where the plaintiff's horse was frightened by the management of an automobile owned by the defendant, it appeared that immediately before the accident the defendant, accompanied by his son and his coachman, had gone to the railway station in the automobile and had there left it; that, at the time when the accident occurred, the defendant's son and coachman were occupying it; and that the son was guiding and controlling it. It was a disputed question whether the defendant, on leaving the machine, had committed the custody thereof to his son or to his coachman. Held, that the following instruction was a proper one: If the jury find either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then, in either case, the defendant is responsible.

In *Louisville Water Co. v. Phillips* (1906) 139 Ky. 614, 89 S. W. 700, defendant merely attempted to disprove the contention that decedent was killed by its servants, without giving any evidence to show that, if the killing was done by its servants, it was not done when engaged in its business. Plaintiff proved that defendant's inspector was the person who drove over decedent, and that the vehicle was the vehicle of defendant, and it was shown that the inspector's vehicle was never used except in the service of the company.

Held, that a prima facie case authorizing a recovery was established, and an instruction that if decedent was killed by the inspector, who was pursuing his own ends exclusively, defendant was not responsible, was properly refused.

In *Guinney v. Hand* (1893) 153 Pa. 404, 26 Atl. 20, where plaintiff was injured by a beer wagon driven by an employee of defendants, the driver testified that just before the accident occurred he unloaded a barrel of porter, and undertook to tap it, as he was instructed to do for all his employer's customers; that in doing so he broke a wooden faucet, whereupon the saloon-keeper for whom he was unloading the porter asked him to go to a street some distance off and buy a faucet, giving him the money to pay for it; and that, in driving rapidly on this errand, he ran into the plaintiff. Plaintiff testified that on the day following the accident defendants came to his house, and told him that they would pay his doctor's bill and expenses, and stated that they had discharged the driver the night before. This conversation was denied by defendants. The court charged that if the jury believed plaintiff's testimony, defendant's liability was fixed; but in other parts of the charge, and in answer to several points, the question was distinctly left to the jury to determine whether the driver was acting within the scope of his employment. Held, that there was no error which justified the reversal of the judgment for the plaintiff.

² In *Jones v. Hart* (1699) 2 Salk. 441 (apparently the same as an anonymous case reported in 1 Ld. Raym. 739), Holt, Ch. J., thus stated the effect of two earlier decisions, which were not cited by name: "The servants of A with his cart ran against another cart wherein was a pipe of sack, and overturned the cart, and spoiled the sack. An action lies against A. So, where a carter's servant ran his cart over a boy, it was held the boy should have his action against the master for the damage he sustained by this negligence."

In *Croft v. Alison* (1821) 4 Barn. & Ald. 590, a coachman, finding that his master's carriage was entangled with that of the plaintiff, struck the plain-

tiff's horses with his whip, thereby causing them to move forward and overturn the plaintiff's carriage. At the trial it was left to the jury to determine whether the carriages had become entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still and without a driver, and the judge directed them to find for the defendant in case they thought so, and were of opinion that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs in case they were of opinion that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. A motion for a new trial having been made, the court laid down the law as follows: "The distinction is this: If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury."

In *Brown v. McGregor* (Sc. Ct. of Sess.) F. C. 1813, p. 232, the owner of a post chaise whose postilion rode a race with a stagecoach was held to be liable for the death of a passenger on the coach who was killed in consequence of its being overturned during the race.

In *Young v. South Boston Ice Co.* (1890) 150 Mass. 527, 23 N. E. 326, where the driver of a delivery wagon passed over to the wrong side of the highway, for the purpose of passing a stationary vehicle, and ran into the plaintiff's carriage, the trial judge refused to instruct the jury as requested by the defendant, that, if there was sufficient space to drive said ice cart to the right and avoid a collision, and it was not necessary for the defendant's servant to drive said ice cart across said middle of the traveled part of the highway in order to transact his master's business, such act of the servant, if the injury complained of was thereby inflicted, was not one for which the defendant could be held responsible. Held,

that the defendant had no ground of exception. The court said: "If all the facts were proved according to the assumption in the defendant's request, we think they were not necessarily inconsistent with the plaintiff's theory. Upon the question raised, the jury might consider all the evidence, and it was competent for them to find that, at the time of the collision, the driver drove against the plaintiff's carriage in trying to do the defendant's business, and that he was acting within the general scope of his employment. The request for instructions was rightly refused."

In *Wolfe v. Mersereau* (1855) 4 Duer, 473, where an injury was caused by the act of the driver of a runaway team in intentionally guiding them against a wagon to stop them, the ground upon which a motion for a new trial was made was that the trial judge had given a charge to the effect that if there was no negligence on the part of the plaintiff in regard to his wagon being where it was, and if the defendant's servant ran against that wagon to save himself from greater peril, the defendant was liable, even if the act was a prudent one in order to stop the horses. The court said: "Although the instinctive impulse of self-preservation prompted the act as security against a greater personal peril, it became at the moment an act of duty, if not of necessity. But the act was made necessary by previous negligence for which the master is liable, and which may properly be regarded as the cause of the injury."

In *Brough v. Towle* (1905) 187 Mass. 590, 73 N. E. 851, an action against the members of a firm engaged in a general teaming business, for injuries resulting from being struck by a team of the defendants, the evidence tended to show that when the injury was received the team was going toward the defendants' stables at about 11 o'clock in the morning; that it was the practice of the defendants not to have their teams return to the stables in the middle of the day, and to have the horses fed from pails at their stand, but that the driver of this team had done all the work assigned to him on that day; that an unusually heavy rain was falling, and that on a few occasions in extreme weather the defendants' teams had been sent to the stables. Held, that the jury was warranted in finding that the driver was acting within the scope of his em-

ployment at the time of the plaintiff's injury.

In *Bamberg v. International R. Co.* (1907) 53 Misc. 403, 103 N. Y. Supp. 297, where a passenger on a street car was injured by the pole of defendant's wagon, while it was being driven by a boy whom the teamster had permitted to take the reins, an action was held to be maintainable, both on the ground that the boy, although not regularly in the employ of the defendants, was engaged in their business, and on the ground that, as the driver had left the reins within reach so that he could seize them in case of an emergency, and had actually seized them with a view to preventing the collision between the wagon and the street car, he must be taken to have continued in control of the team while the boy was driving, and in this point of view to have been one of the culpable authors of the accident.

In *Davis v. Dregne* (1903) 120 Wis. 63, 97 N. W. 512, where the injury complained of resulted from the negligent driving of the defendant's team by his adult son, a verdict in favor of the plaintiff was held to be warranted by evidence which showed that the son was living at his father's house, and voluntarily worked about the farm, but received no wages, and was employed in raising tobacco on shares on the farm.

In *Bennett v. Busch* (1907) 75 N. J. L. 246, 67 Atl. 188, the defendant, while on a business trip in an automobile, made his headquarters at a hotel, the automobile being kept in a garage several blocks away. On the evening of the accident, on arriving at the hotel, the defendant, after telling his chauffeur that he was going out in the machine that night, directed him to go downstairs in the hotel and get oil. Instead of obeying this order literally, the chauffeur drove the automobile to the garage for the oil. While on his way there the collision occurred which caused the injury complained of. Held, that the question whether the chauffeur was acting within the general scope of his authority was properly submitted to the jury, although in this particular instance the use of the machine was in disobedience of the literal instruction of the master. The court said: "It is easy to understand how a master might order certain classes of servants to perform an act and expect exact obedience; but in directing a man of the intelli-

gence and responsibility of Harse about such a trifling matter, it was in all probability in the nature of a suggestion merely. The master's purpose was to get the oil, and there is a legitimate inference that the servant was justified in going to the garage for the purpose."

In *Winfrey v. Lazarus* (1910) 148 Mo. App. 388, 128 S. W. 276, the finding of a jury that, in bringing the defendant's automobile from the garage to a place to which he had been summoned by the defendant's married daughter, the defendant's chauffeur was acting in the course of his employment, although he had no specific instruction to make the particular trip, was held to be warranted by the testimony of the defendant and his daughter which tended to prove that she was living in his house, and that the machine was subject to the control of the members of his household.

In *Kneff v. Sanford* (1911) 63 Wash. 503, 115 Pac. 1040, an owner of automobiles for hire kept them standing in front of a hotel in charge of chauffeurs. A chauffeur while on duty took a telephone girl employed in the hotel to her home without collecting fare. On his return journey to the hotel the chauffeur injured a pedestrian. Held, that these facts showed prima facie that the chauffeur was acting within the scope of his employment at the time of the accident, and that the testimony of the owner and of the chauffeur that the owner had instructed his chauffeur not to take the telephone girls home in automobiles, unless he was either instructed to do so or was paid for carrying them, and the chauffeur had not been instructed to take home the telephone operator in question on the given occasion, did not, as a matter of law, overcome the presumption thus arising.

In *Gresh v. Wanamaker* (1908) 221 Pa. 28, 69 Atl. 1123, a complaint alleging that a machinist and chauffeur whom the defendants, the vendors of an automobile, had, at the request of the plaintiff, the purchaser, sent to repair it and take it to the city where the plaintiff lived, so negligently operated it as to overturn it and injure the plaintiff, was held not to be demurrable, although the plaintiff had not expressly averred a promise on her part to pay for the services of the employee.

In *Thomas v. Armitage* (1910) 111 Minn. 238, 126 N. W. 735, after the defendant had left the automobile which he had been driving himself to his place of business, his chauffeur, with his permission, attempted to turn it round, and brought it into collision with plaintiff's wagon. Held, that, as the driver was serving his employer, and was within the scope of his employment, the court had properly instructed the jury that his employer was answerable for his conduct, if he was guilty of negligence. Another instruction to the effect that it made no difference that the men who were driving the team were not acting for respondent, and that the owner of the buggies was entitled to recover provided those in charge of the team were not guilty of negligence, and the driver of the automobile was negligent, was also approved. The court said: "We think the charge correct. Although those in charge of the team were not at that particular time acting within the scope of their employment, yet if they were in the exercise of due care, and the vehicles were damaged by reason of the negligence of appellant's employee, then the owner was entitled to recover."

The case of *Michael v. Alestree* (1677) 2 Lev. 172, 3 Keble, 650, 1 Vent. 295, where the plaintiff was injured by a pair of intractable horses which the defendant's servant was training in a city square, may possibly be cited as an authority relevant to the situation specified in the text. But the defendant there seems to have been held liable on the ground of his personal negligence in ordering the servant to take the animals to such a place for the purpose of breaking them in, rather than on the ground of the principle *respondeat superior*. See the comments of the court in *Parsons v. Winchell* (1850) 5 Cush. 592, 52 Am. Dec. 745, and § 2233, ¶ (ff), *ante*.

The liability of the employer was also affirmed in the following cases; but they do not call for any detailed examination in connection with the subject of the present chapter:

(Unless it is otherwise stated the injury was one caused by the negligence of the driver of a horse-drawn vehicle.) *Brucker v. Fromont* (1796) 6 T. R. 659, 3 Revised Rep. 303; *North v. Smith* (1861) 10 C. B. N. S. 572, 4 L. T. N. S. 407 (groom applied spur to a horse and

caused it to kick so as to injure plaintiff); *Springett v. Ball* (1865) 4 Post. & F. 472; *Pike v. London General Omnibus Co.* (1891) 8 Times L. R. 164 (doctrine of imputed negligence not a bar to the action); *Perkins v. Stead* (1907) 23 Times L. R. 433 (automobile); *Robinson v. Huber* (1906) 6 Penn. (Del.) 21, 63 Atl. 873 (rule laid down in charge to jury); *Toole Furniture Co. v. Ellis* (1908) 5 Ga. App. 271, 63 S. E. 55; *Star Brewery Co. v. Hauck* (1906) 222 Ill. 348, 113 Am. St. Rep. 420, 78 N. E. 827, affirming (1906) 126 Ill. App. 608; *Lovingsston v. Bauchens* (1889) 34 Ill. App. 544 (servant was permitted to use master's horse and carriage in collecting rents); *Dinsmoor v. Wolber* (1899) 85 Ill. App. 152; *Brudi v. Luhrman* (1901) 26 Ind. App. 221, 59 N. E. 409; *Johnson v. Small* (1844) 5 B. Mon. 25; *Ewing v. Callahan* (1907) 32 Ky. L. Rep. 46, 105 S. W. 387, 32 Ky. L. Rep. 537, 105 S. W. 978; *Wichtrecht v. Fasnacht* (1865) 17 La. Ann. 166; *Shea v. Reems* (1884) 36 La. Ann. 966 (peddler driving to his employer's store to get goods); *Loyacano v. Jurgens* (1896) 50 La. Ann. 441, 23 So. 717; *Costa v. Yochim* (1900) 104 La. 170, 28 So. 992; *Parsons v. Winchell* (1850) 5 Cush. 592, 52 Am. Dec. 745; *Kimball v. Cushman* (1869) 103 Mass. 194, 4 Am. Rep. 528; *Huff v. Ford* (1878) 126 Mass. 24, 30 Am. Rep. 645; *Doran v. Thomsen* (1907) 74 N. J. L. 445, 66 Atl. 897 (complaint not demurrable which alleged that the plaintiff's injury was caused by the negligence of a member of the defendant's family whom he had directed and allowed to operate his motor vehicle); *Phelps v. Wait* (1864) 30 N. Y. 78; *Smith v. Consumer's Ice Co.* (1885) 20 Jones & S. 430; *Clark v. Koehler* (1887) 46 Hun, 536; *Stewart v. Baruch* (1905) 103 App. Div. 577, 93 N. Y. Supp. 161 (plaintiff run over by automobile); *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 55; *Eckert v. St. Louis Transfer Co.* (1876) 2 Mo. App. 36; *Moon v. Matthews* (1910) 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219 (automobile); *Rochester v. Bull* (1907) 78 S. C. 249, 58 S. E. 766 (plaintiff's horse was frightened by automobile and ran away); *Lawton v. Waite* (*Lawton v. Chilton*) (1899) 103 Wis. 244, 45 L.R.A. 616, 79 N. W. 321; *Davis v. Dregne* (1903) 120 Wis. 63, 97 N. W.

of fact negligent,³ or whether it was the proximate cause of the injury complained of.⁴

2293a. Same subject further discussed.—Claims for damages have also been sustained under the following circumstances: Where the defendant's servant left a vehicle unattended and unsecured upon a public highway,¹ the right of recovery being in one instance af-

512; *Anderson v. Brownlee* (1822) 1 Sc. Sess. Cas. 1st series, 422; *Fraser v. Dunlop* (1822) 1 Sc. Sess. Cas. 1st series, 243; *Baird v. Hamilton* (1826) 4 Sc. Sess. Cas. 1st series, 797; *M'Laren v. Rae* (1827) 4 Mur. Sc. 381.

³ *North v. Smith* (1861) 4 L. T. N. S. 407, 10 C. B. N. S. 572; *Aston v. Heaven* (1797) 2 Esp. 533, 5 Revised Rep. 750; *Christie v. Griggs* (1809) 2 Campb. 79; *Jackson v. Tollett* (1817) 2 Starkie, 37, 19 Revised Rep. 673; *Young v. Crystal Ice Co.* (1910) 83 Conn. 718, 76 Atl. 514 (evidence that the servant was a competent and careful driver held to be inadmissible because that fact did not tend to prove that he was not negligent on the occasion in question); *Christian v. Irwin* (1888) 125 Ill. 619, 17 N. E. 707; *Cooke Brewing Co. v. Ryan* (1906) 223 Ill. 382, 79 N. E. 132, affirming (1906) 125 Ill. App. 597; *Eaton v. Cripps* (1895) 94 Iowa, 176, 62 N. W. 687; *Shaw v. Hollenback* (1900) 21 Ky. L. Rep. 1561, 55 S. W. 686 (testimony that driver of wagon which ran into plaintiff's bicycle was a careful, reliable, and sober man is held to be inadmissible); *Leopold v. Newport Coal Co.* (1911) 142 Ky. 599, 134 S. W. 1165; *Mattingly v. Montgomery* (1907) 106 Md. 461, 68 Atl. 205; *Shaw v. Hollenback* (1900) 21 Ky. L. Rep. 1561, 55 S. W. 686; *American Straw Board Co. v. Smith* (1901) 94 Md. 19, 50 Atl. 414; *Moebus v. Herrmann* (1888) 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415; *Coulter v. American Merchants' Union Exp. Co.* (1871) 5 Lans. 67; *Moriarty v. Zepp* (1891) 42 N. Y. S. R. 824, 17 N. Y. Supp. 28; *Harpell v. Curtis* (1850) 1 E. D. Smith, 78; *McCahill v. Kipp* (1854) 2 E. D. Smith, 413; *Canton v. Simpson* (1896) 2 App. Div. 561, 38 N. Y. Supp. 13; *Steinacker v. Hills Bros. Co.* (1904) 91 App. Div. 521, 87 N. Y. Supp. 33; *Titus v. Tangeman* (1906) 116 App. Div. 487, 101 N. Y. Supp. 1000 (automobile); *Whissler v. Walsh* (1895) 165 Pa. 352, 30 Atl. 981; *McCloskey v. Chautauqua*

Lake Ice Co. (1896) 174 Pa. 34, 34 Atl. 287; *Prinz v. Lucas* (1905) 210 Pa. 620, 60 Atl. 309; *Lownds v. Robinson* (1876) 11 N. S. 364.

⁴ See cases cited in § 2290, note 1, ante.

¹ *Pierce v. Conners* (1894) 20 Colo. 178, 46 Am. St. Rep. 279, 37 Pac. 721 (child was run over).

In *Corona Coal & I. Co. v. White* (1909) 158 Ala. 627, 20 L.R.A.(N.S.) 958, 48 So. 362, the evidence showed that the defendant's wagon and team were left by the driver while he went into the house to get a trunk owned by the defendant's shipping clerk, with a view to take it to a railway station, and that, while the driver was absent, the team ran away and came in collision with the plaintiff. Held, that the trial judge had properly left it to the jury to determine whether or not the driver, in attending to the conveyance of the trunk to the station, was acting in accordance with the usual custom in the use of the team, and with the acquiescence of his master.

See also the following cases in which the master was held liable in spite of a deviation by the servant: *Whatman v. Pearson* (1868) L. R. 3 C. P. 422, 37 L. J. C. P. N. S. 156, 18 L. T. N. S. 290, 16 Week. Rep. 649; *Ritchie v. Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; *Loomis v. Hollister* (1903) 75 Conn. 718, 55 Atl. 561; *Williams v. Koehler* (1899) 41 App. Div. 426, 58 N. Y. Supp. 863. In *Berman v. Schultz* (1903) 40 Misc. 212, 81 N. Y. Supp. 647, s. c. on subsequent appeal (1903) 84 N. Y. Supp. 292, where a child started an automobile left in the street, and was injured, the only question disputed was whether the chauffeur had acted negligently.

In an action for injuries caused by a runaway team, evidence of a servant's long-continued and notorious habit of leaving his horse unhitched in the street was held to be admissible as tending

firmed, although the servant had left it in order to do something which concerned himself only;² where a driver or other servant doing work upon a wagon caused a child to fall from it;³ where a wagon collapsed owing to its having been overloaded by the servant

to show that it was done with the master's knowledge and permission, and also that it was done within the scope of his employment. *Schulte v. Holliday* (1884) 54 Mich. 73, 19 N. W. 752. It is apprehended, however, that such evidence was wholly superfluous under the given circumstances, as, even apart from it, the driver might have been properly found to have been acting within the scope of his employment.

If the servant's omission in this respect constituted a breach of a duty imposed by a statute or a municipal ordinance, the master's liability will, under the doctrine accepted in most jurisdictions with regard to defaults of that description, be inferred as a matter of law. See *Healy v. Johnson* (1905) 127 Iowa, 221, 103 N. W. 92, (where the fact that the master had provided the servant with the means of securing the horse, and that the running was the result of the servant's having disobeyed the master's instructions to use those means, was held to be no defense to the action); *Sullivan v. Morton Draying & Warehouse Co.* (1910) 13 Cal. App. 35, 108 Pac. 895 (wheels of dray not secured).

² *Hayes v. Wilkins* (1907) 194 Mass. 223, 9 L.R.A.(N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449. Discussing the facts, the court said: "He was on the way to the defendant's stable after having completed the regular work for the day by delivering some merchandise at a freight house. While the route that he took was not the shortest, it was but little longer than the other, and the jury might have found that he chose it because the other was blocked by teams, and that therefore he was within the scope of his employment up to the time when he left the horse. He went into a pool room to get some tobacco, and this movement, treated as an independent act, was not for the master's benefit, nor within the scope of his employment as a servant. But his custody of the horse up to the time that he left him was in the performance of the defendant's business, and any negligence in maintaining that custody was negli-

gence for the consequences of which the defendant is liable. While he had the horse in custody for his master, and was charged with the duty of continuing this custody as a servant, he negligently omitted to continue it, and as a consequence the horse ran away. His purpose on going into the pool room is immaterial. His negligence occurred while he was directly engaged in his master's business, by the mere omission of that which he should have done in the business. If the attempt were to charge the master for negligence in the performance of the act of going to buy tobacco, the case would be different. If the driver had carelessly injured property in the pool room, the defendant would not be liable, because his going into the pool room, considered as a positive act, was not within the scope of his employment. But the omission and failure to continue the proper custody of his horse when he had him in custody for the master was an omission to perform his duty as a servant while he was acting for his master. This omission, quite apart from the purpose which accompanied it, was a direct and proximate cause of the plaintiff's injury. The case is different from *McCarthy v. Timmins* (1901) 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038 [see § 2295, note 1, *post*], in which the driver, for his own purposes, had driven the team away from the streets on which he should have driven it for his master, and had ceased to act within the scope of his employment before the negligent omission that caused the accident."

In *Karstendiek v. Jackson Brewing Co.* (1909) 123 La. 346, 48 So. 958, the defendant was held liable where the driver had gone into a restaurant to get his lunch, and his team was frightened by a Shrove Tuesday procession.

³ In *Brennan v. Merchant & Co.* (1903) 205 Pa. 258, 54 Atl. 891, where a boy eight years old climbed on the side of a moving truck wagon and sustained himself by holding to a standard, and the driver turned and without warning struck him with a whip on the hand with which he held the standard, and

in charge of it;⁴ where a vehicle, or something which it was being used to transport, was left in such a position as to be dangerous to members of the public;⁵ where a servant performed so unskilfully the work of repairing a cart while it stood in a street, that a person

caused him to lose his grip and fall under the wheels, it was held to be for the jury to say whether the act was within the line of the driver's duty and the scope of his employment. The court said: "At the time of the accident, Larkins had the custody and management of the wagon, and was driving it for the owner, the defendant company. The driver's control of the wagon carried with it the employer's authority to protect it and prevent persons from getting on it, as well as to remove persons from it. It was not only the right of the driver to remove trespassers from the wagon, but also his duty to his employer to do so. He therefore was authorized to eject the boy from the wagon and could use the necessary force for that purpose. If his act in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer, for which the latter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him, to gratify the ill-will of the driver, the defendant company is not responsible for the wrongful or tortious act. It would not be an act done by the employee in the execution of his employer's business, although it was performed while he was in the service of the employer. It would be an act of the employee directed against the boy independently of the driver's contract of service, and in no way connected with or necessary for the accomplishment of the purpose for which the driver was employed. The negligent performance of the act, therefore, would impose no liability on the employer."

In *Hyman v. Tilton* (1904) 208 Pa. 641, 57 Atl. 1124, where a boy who had climbed onto a loaded dray was struck at by the driver's whip and fell off, a verdict in favor of the defendant was upheld, the only matter really contested being whether the driver was in point of fact negligent.

In *Weinacker Ice & Fuel Co. v. Ott* (1909) 163 Ala. 230, 50 So. 901, the question whether or not a certain negro

boy who was alleged to have caused the injury was the defendant's agent, and, if he was such agent, whether or not he was acting within the scope of his authority or employment when he caused the injury, was held to be for the jury upon evidence which showed that the driver of the wagon was defendant's agent or servant; that the negro boy had for about a year been attending this particular wagon and assisting in the defendant's business of delivering ice; that the plaintiff's mother, a customer of defendant, had sent plaintiff to the wagon to buy ice; that the negro boy, instead of selling and delivering the ice, as it was his habit and custom, if not his duty, to do, refused the offer of plaintiff, and answered by rudely pushing him off the step of the wagon; and that all this happened in the presence of the driver himself.

In *Tier v. Miller* (1911) 80 N. J. L. 691, 79 Atl. 417, the driver of a truck ordered a boy to jump off it, and without waiting for him to do so, struck the horses with his whip, so they suddenly started forward, and the boy was thrown off and run over. It was held that, as there was an entire absence of testimony indicative of a wanton intent upon the part of the servant in whipping up the horses, and the case was tried and submitted to the jury upon the other alternative, involving only the question of the prosecution of the master's business, the trial court had properly excluded, as being immaterial, testimony given by the defendant to the effect that he did not allow his driver to use a whip upon the team. The court said that if the driver "was allowed to carry a whip, we must assume that he was carrying it in the prosecution of the master's business, for the proper manipulation of the team, and the question therefore necessarily arises: Did he on this occasion use it in the prosecution of the business of the master, or upon a task entirely *ab extra* thereto?"

⁴ *Glover v. Richardson & E. Co.* (1911) 64 Wash. 403, 116 Pac. 861.

⁵ *Powell v. Deveney* (1849) 3

Cush. 300, 50 Am. Dec. 738. There the shafts of a truck left in the street were thrown against the plaintiff by another truck not belonging to the defendant. The driver of a truck left it in the street at night, instead of complying with the directions he had received to place it in a certain yard. The court sustained a verdict for the plaintiff, saying: "The servant was rightfully in possession of the truck, and being thus rightfully in possession and about his master's business, the master must be responsible for his neglect in improperly leaving the truck in the street. The defendant can no more be exempted from liability because his servant disobeyed his orders in not placing his truck on the lot provided for it, than a master can be exempted from liability for damage done by his servant in driving carelessly against a carriage when he has been ordered to drive carefully, and to avoid coming in contact with any carriage. The servant being about the business of his master, the master must be responsible for his acts, and cannot exempt himself by any order he may give the servant."

In *Monumental Brewing Co. v. Larimore* (1909) 109 Md. 682, 72 Atl. 596, the conductor of a street car who, while on the running board, was struck by the opened end gate of a stationary wagon near the track, was held entitled to recover damages from the driver's employer.

In *Phelon v. Stiles* (1876) 43 Conn. 426 (verdict for plaintiff sustained) the driver of a delivery wagon, after having laid down several sacks at the side of a main highway, went up a side road to deliver a quantity of flour, intending to take up the sacks on his return, his object being to save an unnecessary transportation of the bran, and thus to finish the delivery sooner and get time to attend to some private business of his own. While he was absent, the plaintiff's horse was frightened by the sacks, and ran away, causing the injury complained of. Held, that his master was liable. Discussing the contention of the defendant that the servant's acts were done on his account, the court said: "But what business of his own was he then doing? He was not then attending to private business in going to Hartford. That was to be undertaken later in the day. He left the bags to expedite the delivery. Did it make

the business his own because he dispatched it more speedily than it would naturally have been done? He was sent by the defendant to deliver the flour and bran. Did he do anything else than deliver them? His whole object in leaving the bran by the side of the road was to gain time. Suppose he had driven the horse with such speed as amounted to carelessness in order to gain time, and had injured a person by so doing, would he be transacting his own business while driving so rapidly, so that the defendant would not be liable? Suppose he had left the bran out of consideration for his horse, and the same result had followed, would the defendant be excused? He was under the necessity of taking the bran to Mr. King's, or of leaving it by the side of the road until his return; suppose he had taken the latter course without any special object in view, would it make any difference in the case? We think all that can be said of the matter is that Babcock performed the defendant's business in delivering the bran in a shorter time than he would have done had he not intended to go to Hartford later in the day; and certainly the rapidity with which the business was transacted cannot operate to excuse the defendant." Referring to a further contention on the part of the defendant that the bags, left as they were by the side of the road, became a public nuisance, and that he could not be liable for a public offense committed by his servant, the court observed that the servant "did not intend to create a nuisance. The case does not find that he intended any harm. All that can be said is that he negligently left them while performing the business of the defendant, and for such negligence the defendant is, of course, liable. We think there is nothing in this claim." But the theory apparently here entertained by the court, *viz.*, that the master's liability is necessarily and invariably negated if it appears that the servant's misconduct amounted to a crime, is clearly untenable. See chap. CVI., *post*.

In *Cain v. Hugh Nawn Contracting Co.* (1909) 202 Mass. 237, 88 N. E. 842, the defendant was held to be liable for injuries caused by the collision of plaintiff's carriage with a pile of earth left by his servant in a street while he was hauling dirt along it to a scow where it was to be unloaded. The court said:

walking along the adjoining sidewalk was injured;⁶ and where an unguarded opening was left in a footpath.⁷

If the given injury was inflicted while the servant was engaged in the performance of his duties, the mere fact that the particular conduct which caused it was incidental to the pursuit of some secondary object which concerned only the servant himself, or a third person, will not absolve the master from responsibility. Under such circumstances liability may still be imputed, if it appears that, at the time when the accident occurred, the secondary object of the servant was being pursued concurrently and simultaneously with the discharge of his appointed functions.⁸ But for an injury caused by a horse belonging to the servant himself, while it was being led

"The company, in using the public ways for the prosecution of its business, could not render them dangerous and unsafe without being liable in damages to travelers who were injured. It undoubtedly was the duty of Beckwith, to whom the transportation had been intrusted, to proceed to the place of destination, and not to leave the earth in the street, yet his failure, while in transit, to obey the order, does not exonerate the defendant. *George v. Gobe* (1880) 128 Mass. 289, 35 Am. Rep. 376; *Grant v. Singer Mfg. Co.* (1906) 190 Mass. 489, 6 L.R.A. (N.S.) 567, 77 N. E. 480. In leaving a portion of the earth where it had fallen, when the whole could have been removed, he was still about the defendant's affairs and acting within the limits of his employment, whether the load had been deposited through the accidental loss of the pin causing the cart automatically to unload, or because he dumped its contents. *Hayes v. Wilkins* (1907) 194 Mass. 223, 9 L.R.A. (N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449."

⁶ *Hollidge v. Duncan* (1908) 199 Mass. 121, 17 L.R.A. (N.S.) 982, 85 N. E. 186.

⁷ See cases cited in § 2311, note 6, post.

⁸ In *Gracey v. Belfast Tramway Co.* [1901] 2 I. R. 322, two servants of the defendant company, having taken two horses out of its stables to ride them to a neighboring forge to be shod, raced the animals furiously along the public road, and frightened the plaintiff's horse, the consequence being that the plaintiff was thrown out of her trap

and injured. Held, that the defendant was liable for the negligence of its servants. Palles, C. B., said: "If we eliminate what has been called 'the purpose of running a race,' admittedly they [the masters] would be liable. In such a case, the act of bringing the horses to the forge would undoubtedly have been one in the course of their employment. No doubt in that case the sole purpose for which the act would have been done would have been a purpose of the masters. But the ground of the masters' liability in such a case would not have been based on any such subtlety as that of a single purpose, as distinguished from several purposes, but because the servants would have been doing their masters' business. *Storey v. Ashton* (1869) 10 Best & S. 340, L. R. 4 Q. B. 476, 38 L. J. Q. B. N. S. 223, 17 Week. Rep. 722. The act would have been done for the master. What then is the effect of the servants' being actuated by the second purpose,—that of riding a race? This second purpose was consistent with the first. Although each servant urged the horse he was riding to go faster than the other horse, both were riding to the forge to have the horses shod. The act, then, which caused the injury, was an act for the benefit of the masters, but also, I will assume, for the purpose of the servants. So far as the act was for the benefit of the masters, the act of the servants was, in law, that of the masters; and I cannot see that it ceased to be the masters' act because, for another purpose, it was an act of the servants. The act of going was the masters' act; but for their own purpose the serv-

behind a vehicle which he was using in the course of his employment, the master clearly cannot be held responsible.⁹

A mere passenger in a vehicle is not entitled to maintain an action to recover for damage done to it through the negligence of a servant in respect of the management of another vehicle belonging to or hired by his master. But in the case where this rule was laid down, it was held that persons who had hired the damaged vehicle for the day, and also appointed the driver and furnished the horses, might, for the purposes of the action, be considered as the owners and proprietors of the vehicle.¹⁰

Where the facts are such that the question whether the defendant's servant was acting within the scope of his employment resolves itself into the question whether, in respect of the given work, he was acting as the servant of his regular employer, or of some other person to whose control he had been temporarily transferred, the right of action is determinable with reference to the various elements discussed in §§ 52 *et seq.*, *ante*.¹¹

2294. Liability as affected by the servant's deviation from a prescribed route. Generally.—If the journey during which the tortfeasor did the act which caused the injury in question was commenced in the course of the servant's employment, the mere circumstance that the act was done at a place where he was not authorized to be is not sufficient to preclude the aggrieved party from recovering damages.¹ This doctrine is merely an application of the

ants performed that act more rapidly than they would otherwise have done,—that is, in a negligent manner. In other words, whilst, by reason of the continuance of the masters' purpose, the act retains the quality of that of the masters, the servant's own purpose qualifies the manner of doing it, and renders such manner negligent. But this is the very state of facts in which a master is responsible. If the second purpose had been that of a third party, as, for instance, if a third party had asked the servant to carry a parcel for him to the forge, surely its effect could not have been to make the continuing purpose of taking the horses to the forge any less the purpose of the defendants."

⁹ In *Kwiecher v. Holmes & H. Co.* (1908) 106 Minn. 148, 19 L.R.A. (N.S.) 255, 118 N. W. 668, A, a man employed by a coal company to deliver coal at a certain price per ton, furnished his own

team, the company furnishing the sleds, boxes, shovels, and chutes. A also owned another horse which he hired to a third party who was delivering coal for the company. This horse having been returned to A at the coal company's yard, he carelessly tied it by a long rope to one of the sleds, and while passing along the street the led horse became excited, and kicked a person standing on the sidewalk. Held, that, as the horse was not used in the company's business, but in the private business of A, the company was not liable.

¹⁰ *Croft v. Alison* (1821) 4 Barn. & Ald. 590, 23 Revised Rep. 407.

¹¹ See, for example, *Freibaum v. Brady* (1911) 143 App. Div. 220, 128 N. Y. Supp. 121, where the action was held not to be maintainable because the defendant's automobile was, at the time of the accident, being used by his chauffeur in the business of his brother.

¹ In *Joel v. Morison* (1834) 6 Car. &

general principle that a tortious act done in the course of the servant's employment is none the less imputable to his master because it was done in violation of the master's orders. See § 2285, *ante*.

2295. Same subject. Effect of servant's deviation from a prescribed route for his own purposes.—From the conclusions arrived at, and the language used, in several cases, it seems scarcely possible to draw any other deductions than that the courts by which they were decided were proceeding upon the broad ground that the master's non-liability should be inferred as a matter of law, whenever it appears that the given deviation was made for the purpose of doing something which had no connection with the servant's duties.¹

In this point of view, the relationship of master and servant is:

P. 501, a portion of the remarks made by Parke, B., in directing the jury were as follows: "If the servant, being on the master's business, took a detour to call upon a friend, the master will be responsible. . . . If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable." Cited with approval by Bovill, Ch. J., in *Whatman v. Pearson* (1868) L. R. 3 C. P. 422, 37 L. J. C. P. N. S. 156, 18 L. T. N. S. 290, 16 Week. Rep. 649.

"No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him." Jervis, Ch. J., in *Mitchell v. Crassweller* (1853) 13 C. B. 237, 17 Eng. Rul. Cas. 252.

In *Storey v. Ashton* (1869) L. R. 4 Q. B. 476, Cockburn, Ch. J., said: "I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability." But see § 2295, note 1, *post*, as to this passage.

In *Long v. Nute* (1907) 123 Mo. App. 204, 100 S. W. 511, it was laid down that the presumption which is entertained that a person employed for the purpose of operating a vehicle is, while operating it, acting within the scope of his authority about his employer's business, is not changed by the fact that he was making a detour when the injury

was inflicted. In that case the accident occurred while a chauffeur was, by the order of defendant's wife, bringing an automobile from a garage to his house.

In *Chandler v. Gloyd* (1909) 217 Mo. 394, 116 S. W. 1073, defendants directed K., their servant, to go to a gas company's grounds and get a load of cinders. K., instead of complying with the instructions of the company's foreman to get them from the dump, took them from a place under the car track used in taking the cinders from the gas works to the dump, and thus made an excavation into which an employee of the gas company fell, while operating a cinder car. Held, that the trial court had erred in setting aside a verdict for the plaintiff. The court said: "The jury would have been justified in finding that his said act was within the general scope of his employment, and, although not necessary or required of him by defendants, it was so connected with the business which they had intrusted to him, they were liable therefor."

The rule in the text has also been recognized in *Geraty v. National Ice Co.* (1897) 16 App. Div. 174, 44 N. Y. Supp. 659 (affirmed without opinion in (1899) 160 N. Y. 658, 55 N. E. 1095), and *McCarthy v. Timmins* (1901) 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038.

¹In *Mitchell v. Crassweller* (1853) 13 C. B. 237, 17 Eng. Rul. Cas. 252, the defendants' carman, having finished the business of the day, returned to their shop in W. street, with their horse and car, and obtained the key of the stable, which was close at hand; but, instead

presumed to be temporarily suspended from the moment that the deviation is commenced, and the object of the deviation is the only

of going there at once, and putting up the horse, as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow workman to E. square; and, on his way back, ran over and injured the plaintiff and his wife. Held, that the defendants were not responsible for the consequences of the unauthorized act of the carman. Jervis Ch. J., said: "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance." Maule, J., said: "At the time of the accident, he was not going a roundabout way to the stable, or, as one of the cases expresses it, making a detour. He was not engaged in the business of his employers. But, in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connection whatever with his employers' service. The servant only is liable, and not the employers. All the cases are reconcilable with that. The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But, where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." Cresswell, J., said: "No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But here the man was doing something which he knew to be contrary to his duty and a violation of the trust reposed in him. The expression used by him at the time he started upon the unauthorized journey showed that he was aware that he was doing that which was inconsistent with his duty. I think it would be a great hardship upon the employers to hold them to be responsible under such circum-

stances." This case was followed in *Sheridan v. Charlick* (1872) 4 Daly, 338, where the facts were quite similar.

In *Storey v. Ashton* (1869) L. R. 4 Q. B. 476, 10 Best & S. 337, 38 L. J. Q. B. N. S. 223, a wine merchant sent his clerk with his horse and cart under the care of his carman to deliver wine and bring back empty bottles. On their return, when within a quarter of a mile from his master's stable, the carman, at the request of the clerk and for his business, drove the horse and cart in another direction, and when 2 miles from the stable injured a person by negligent driving. Held, that the master was not liable, as the act of the servant was not done in the course of his employment, but on a new and an independent journey. Cockburn, Ch. J., said: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. *I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey.* Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in *Mitchell v. Crassweller* (1853) 13 C. B. 237, 22 L. J. C. P. N. S. 100, 17 Jur. 716, 1 Week. Rep. 153, 17 Eng. Rul. Cas. 252, the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey, entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable." Mellor, J., said: "Here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's

question of fact with regard to which it is necessary or proper to obtain the finding of a jury.

office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary every step he drove was away from his duty." Lush, J., said: "Here the employment was to deliver the wine and carry the empty bottles home; and if he had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment." It is worthy of observation that, in 10 Best & S., the italicized sentence, *supra*, in the judgment of Cockburn, Ch. J., is reported thus: "I am far from saying that if the servant, while on his master's business, made a deviation from it for his own purposes, he might not be liable." In the Law Journal the corresponding passage is given as follows: "I think that, if a driver, while acting in his master's business, were to make a slight deviation in order to carry some business of his own into effect, in such a case the master might be liable, and that the question would be one of degree as regards the extent of the deviation." The words concerning the servant's own business which are inserted in these two versions obviously modify in a very important manner the language of the Law Reports. If the official version is correct, it will amount merely to a recognition of the doctrine stated in the preceding section, and, as this seems to be clearly the meaning of the remark of Lush, J., as to the effect of "going a roundabout way home," it would not be unreasonable to infer that this was the state of facts adverted to by the chief justice. On the other hand, if the words are correctly set out in the Law Journal, they can hardly be construed in any other sense than as the expression of the view that a court is not justified in setting aside a verdict in favor of the aggrieved party unless the deviation was very considerable in point of space. The variations are a striking commentary upon the loose manner in which many English cases have been reported even in very recent times.

In *Hatch v. London & N. W. R. Co.* (1899) 15 Times L. R. (C. A.) 246, an action was brought by a widow, to recover damages for the death of her husband owing to the alleged negligence of the defendants' carman in leaving his horse and van without proper control, so that the horse ran away and ran over and killed the plaintiff's husband. It appeared that the van which caused the accident left a railway station at 11 A. M. in charge of a carman and a boy to deliver goods. His last parcel was delivered at about 12 o'clock. From there he drove to his own house for the purpose of getting some money to enable him to buy his dinner. While he was in his own house the horse and van were left in charge of the boy, under a railway arch, and the horse ran away, and ran over the plaintiff's husband. It was proved that the carman's instructions were that, after having finished the delivery of the goods, he was to go back to the railway station, and that the route taken by him was $2\frac{1}{2}$ miles out of his way. There was evidence that the carman would have had to go with the van to a market in another part of the city at about 3 P. M. to collect goods. It was proved that the defendants' carmen frequently went back to the railway station for dinner, but that it was not necessary for them to do so, provided that they entered in the time sheet where they had dinner. A printed notice giving directions to carmen was put in evidence, to the effect that under no circumstances were carmen allowed to stop at coffee shops or public houses to get their meals. The trial judge ruled that there was no evidence that the carman was acting within the scope of his employment when the accident happened, and directed judgment to be entered for the defendants. The court of appeal dismissed an application for a new trial. A. L. Smith, L. J., said that at first he thought that the van was sent out on a job which would not be finished until the van had gone to the market in the afternoon. He was now satisfied, however, by the evidence, that the job upon which the van was sent out in the morning was to go to the places specified, and then to return to the station.

The theory apparently adopted in other cases is that a plaintiff's right to recover is not necessarily excluded by the fact that the pur-

He agreed with the trial judge, that the evidence was all one way, and that the journey of the carman to his own house was a separate one undertaken by him for his own purposes, and not for the business of his employers. The evidence showed that the intended journey to the market was a separate job and a separate journey. There was no evidence, therefore, to go to the jury. Collins, L. J., concurred, remarking that these questions were generally for the jury, but there might be cases in which the act complained of was, beyond all doubt, outside the scope of the servant's employment. The carman here had done all he had to do when he delivered the goods. If the accident had happened while he was returning to the station, he would have been acting within the scope of his employment. But here the carman was not returning to the station, but went $2\frac{1}{2}$ miles in another direction upon his own account in order to get some money for his dinner. What he did was entirely outside any possible view of the scope of his employment.

In *McCarthy v. Timmins* (1901) 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038, the driver of a carriage was ordered to take it to the stable, and he started to do so, but before reaching the stable left his course and went in the opposite direction for the sole purpose of getting a drink. Held, that his master was, in point of law, not liable for injuries caused by the running away of the team, which he negligently left unattended in the street outside the saloon. The court said: "Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables, and there can be no doubt that so long as he drove the team with that end in view, and for that purpose and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston street rather than Commonwealth avenue, but when he reached Massachusetts avenue it is plain that his only purpose in turning southward instead

of northward, and going 758 feet to Dundee street, was not only to deviate from the regular way of reaching the stable, but was for a purpose of his own; namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables even by a circuitous route, or, to use the language of Hoar, J., in *Howe v. Newmarch* (1866) 12 Allen, 49, 57, he was doing an act wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by his act to execute it, and not within the scope of his employment. In such case the defendant should not be held answerable."

In *Perlstein v. American Exp. Co.* (1901) 177 Mass. 530, 52 L.R.A. 959, 59 N. E. 194, an action against an express company for an injury alleged to have been caused by the negligence of the driver of one of its wagons, it was held that the defendant might show where each of its drivers was authorized to go on the day of the accident, for the purpose of proving that no driver of the defendant had a right to drive his wagon on that day on the street where the accident occurred, and that such driver, if there, was not acting within the scope of his employment. The court said: "If the routes prescribed for the defendant's servants were such that at this time none of them could be driving through that part of Harrison avenue, without, for the time, abandoning the service in which he was engaged and going off for some purpose of his own, the defendant would not be liable, even if the team which is said to have caused the collision was one of its teams and was driven by a person who was regularly employed in its service. The question for the jury was not whether the defendant owned the team, but whether the person who was driving it negligently was then acting for the defendant in doing the work which he was directed to do. If the servant was not then acting in the course of his employment, but was off 'on a frolic of his own,' the master would not be liable."

In *Fleischner v. Durgin* (1911) 207 Mass. 435, 436, 437, 33 L.R.A. (N.S.) 79,

pose of the deviation was the accomplishment of something which concerned only the servant or a third party. Under this theory the

93 N. E. 801, 20 Ann. Cas. 1291, it was held that the owner of an automobile who engaged a man to drive it less than a mile within a town for an express purpose was not liable for an injury caused by him while he was deviating several miles from his prescribed route, and driving through a crowded city, on a personal errand, without the owner's knowledge. The court said: "The employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment, and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. *Hayes v. Wilkins* (1907) 194 Mass. 223, 9 L.R.A. (N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449. The employment of Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city on an errand wholly of his own, and had only just commenced to return at the time the injury to the plaintiff occurred, for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation even remote to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable."

In *Cavanagh v. Dinsmore* (1878) 12 Hun, 465, the driver of a truck belonging to defendant, after having delivered some merchandise at his office, had been directed to take the truck to the stable in C. street and put it up. While on his way to the stable he met another of defendant's drivers, and, at his request and as a personal favor to him, drove to H. street, about 1 mile distant,

and took a trunk, belonging to the other driver, to deliver it in F. street. The accident occurred while he was going to the latter place. Held, that the complaint had been properly dismissed. The court said: "The departure of the driver from the ordinary route to the stables for the purpose of doing a favor to his coservant, as stated in the evidence, was clearly an unauthorized deviation, and not within the scope of his duty. He cannot be said, within the authorities, to have been acting in the service of the defendants while engaged in going for the trunk and valise of his coservant and in taking them to their destination. The act was not only without the authority, but without the knowledge or consent, of the defendant or of any superior officer of the driver. It is well settled that the master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act, beyond the scope and duty of his employment, for his own or another's purposes, although the servant is using the implements or property of the master in such unauthorized act."

In *Stone v. Hills* (1877) 45 Conn. 47, 29 Am. Rep. 635, H. sent his servant and team to deliver a load of paper to T., 4 miles distant, directing him to return thence by a particular route, getting a load of wood on his way. When he arrived, T. requested him to go on with the paper to a station 4 miles farther, and there get some freight, pay the freight bill, and bring the freight to him. The servant, having driven to the station, left his horses unhitched, and they ran away and injured the property of S. Held, that the servant was not to be regarded as at the time in the employment of H., and that H. was not liable. The court said: "In the case before us the servant left the employers' premises under precise instructions as to the place to which their team was to be driven and as to the merchandise to be transported; and under instructions equally precise as to the route to be taken in returning and as to what he should bring home. These, therefore, covered the entire period of his contemplated absence; nothing was left to his option or dis-

effect of the evidence as a whole is primarily a question for the jury, and the findings are conclusive, unless the circumstances are such that only a single inference can reasonably be drawn from them.² The position taken is that the quality of the deviation is "always a

cretion; nothing to chance; and in fact the deviation was not occasioned or even suggested by any unforeseen event in connection with the employers' business; the record shows no obligation, express or implied, upon them to deliver the paper elsewhere than in North Glastonbury, nor that the journey thence to Hartford, even if successfully accomplished, would have been for their advantage or profit; it was not connected with, did not grow out of, did not contribute to, the successful completion of their business. When therefore the servant accepted instructions from Taylor and became a carrier of merchandise for him to and from a railroad station in an adjoining town he temporarily threw off his employers' authority, abandoned their business, and left their service."

In *Patterson v. Kates* (1907) 152 Fed. 481, defendant's automobile broke down while he was on a journey from A. to P., and was left in charge of his driver, with directions to repair it and bring it on to P. While waiting for the ferry at a river, he consented to convey a third person to a place about a mile back on the road, and while making this trip negligently ran the machine into a vehicle, a horse and buggy on the highway, by which plaintiffs were injured. Held, that the defendant was not liable, as "the driver had temporarily abandoned his employment, and had gone off upon an expedition of his own, for a purpose in no way connected with his duty, but, on the contrary, opposed thereto."

In *Wills v. Belle Ewart Ice Co.* (1905) 12 Ont. L. Rep. 526, the driver of the defendants' ice wagon, after having delivered their ice along his prescribed route, instead of returning to the company's barns, got drunk, and some hours after he was due to return, and while driving out of his homeward course, ran over the plaintiff. Held, by Boyd, Ch., that the defendants were not liable.

In *Johnson v. Pritchard* (1887) 8 New South Wales L. R. 6, the defendant, a contractor engaged upon certain

works, kept a horse and buggy for his private convenience, and not for use in the course of his employment. While he was temporarily absent, his manager, whom he left in charge of the works, used the vehicle without the contractor's knowledge or consent. One evening after calling at the works he was on his way home, and, meeting a friend, drove with him to a public house. While they were in the house, the horse bolted and injured the plaintiff. Held: (1) That the horse and buggy had not been intrusted to the manager in pursuance of the defendant's business, or for the execution of the defendant's orders; and (2) that assuming that they had been so intrusted, the defendant was not liable, for the reason that, when the accident occurred, the manager was not acting in the course of defendant's employment, but was pursuing his own private ends.

² In *Sleath v. Wilson* (1839) 9 Car. P. 607, where a servant who had been sent to put up his master's horses at certain stables made a detour for the purpose of delivering a parcel of his own, and, while making that detour, drove over the plaintiff, Erskine, J., thus directed the jury: "It is quite clear that, if a servant, without his master's knowledge, takes his master's carriage out of the coach house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But, whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that, if the master directs his servant to drive slowly, and servant disobeys his orders, and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master in such a case will be liable; and the ground is that he has put it in the servant's power to mismanage the carriage, by intrusting him with it. And in this case I am of opinion that the servant was acting in the

course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle street, in Leicester Square, the defendant was liable for any injury which might be committed through his negligence." This statement of the law has been approved in the following cases, among others: *Mitchell v. Crassweller* (1853) 13 C. B. 237, 22 L. J. C. P. N. S. 100, 17 Jur. 716, 1 Week. Rep. 153, 17 Eng. Rul. Cas. 252; *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 486, 14 L. ed. 509; *Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392. But in *Storey v. Ashton* (1869) L. R. 4 Q. B. 476, Mellor and Lush JJ., declined to adopt the unqualified proposition of Erskine, J., that "whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it." It was considered that this proposition held good only in respect of acts done in the course of the servant's employment. This criticism was clearly well founded. But, with all deference, it may be suggested that the circumstance of the learned judge's having wrongly explained the *rationale* of a master's liability for the negligence of a driver does not entirely nullify the value, such as it is, of his ruling as a precedent. The essence of that ruling was simply that the driver was to be regarded as being engaged in the appointed duty until the horses should have been lodged in the stables, and that his master could not escape liability on the mere ground of his not having performed that duty in the manner prescribed. This is one possible view regarding the legal effect of such circumstances as those under consideration, and its adoption does not necessarily involve, or depend upon, the acceptance of the erroneous notion which was disapproved.

In *Whatman v. Pearson* (1868) L. R. 3 C. P. 422, the defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away

and damaged certain railings belonging to the plaintiff. Held, that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was. *Bovill, Ch. J.*, said: "In the present case, the servant had charge of the horse and cart, and it was through his negligence and want of care, whilst acting in the course of his employment, that the accident occurred. The jury were quite at liberty to come to the conclusion they did; and I cannot doubt its accuracy." *Byles, J.*, said: "When the defendant's servant left the horse at his own door without any person in charge of it, he was clearly acting within the general scope of his authority to conduct the horse and cart during the day." *Keating, J.*, said: "Mr. Chambers's contention in substance is that there was such an amount of deviation by the defendant's servant from the line of his duty, that he ceased to be acting in the course of the employment of his master. It is always, however, a question of degree."

In *Williams v. H. Koehler & Co.* (1899) 41 App. Div. 426, 58 N. Y. Supp. 863, it appeared that the driver of one of the defendant's trucks, when returning to the brewery with a load of empty kegs, deviated a couple of blocks from his direct route in order to visit a friend; that in his absence, the horses, which he had left unattended in the street, started, but after going a few yards were stopped by a stranger, who, in attempting to drive them back to the place where the driver had left them, drove the truck against a pushcart standing in the street, and overturned it, precipitating the plaintiff, who was standing on the sidewalk, against a coal box. Held, that the driver's deviation from the direct route to the brewery did not relieve the defendant from liability for his negligence in leaving the horses unattended in the street. The court said: "The duty of the driver's employment required him to drive the truck back to the brewery. Though he deviated from his direct road, still the conduct and management of the team on the course he took were none the less services in the course of his employment. At most his acts constituted misconduct in his employment, not an abandonment of it. The case is not at all similar to one where the servant takes

his master's team for a purpose unauthorized and solely his own. In such a case the driver would not be acting in the service of his master. But here the driver did not take the truck as a vehicle or means of transporting himself the two blocks he went out of his way, but intending to go to see his friend and at the same time intending to return the truck to the brewery, as was his duty, he drove the truck over the route adopted for the very purpose of continuing his service, in taking charge of the team and truck, and not for his own purposes."

In *Jones v. Weigand* (1909) 134 App. Div. 644, 119 N. Y. Supp. 441, a coach driver, after having finished the duty intrusted to him of attending a funeral under the direction of an undertaker, started from the undertaker's to return to his master's stable, but took a circuitous route, and stopped at a friend's house. He then resumed his return journey, and while completing it, ran over a child. Held, that the complaint had been improperly dismissed. The court said: "The point is very nice and the discrimination between some of the cases very fine, though the general rule is well settled. The master is liable only for acts done by the servant in the course of his employment as such, but mere disregard of instructions or deviation from the line of his duty does not relieve the master of responsibility. Wrongful acts are usually in violation of orders or in deviation from the strict line of duty. The test is whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions. If the servant, for purposes of his own, departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable; but to constitute an abandonment of the service the servant must be serving his own or some other person's purposes, wholly independent of his master's business. It seems to me that the taking of the circuitous route to the stable was at most a deviation, not an abandonment, of the service. While the servant deviated from the direct route, he was nevertheless engaged in taking the coach back to the stable. He combined his own with his master's purposes, but did not wholly abandon his service, ex-

cept during the time when he was absent from the coach to make his call."

In *Lovejoy v. Campbell* (1902) 16 S. D. 231, 92 N. W. 24, where a servant employed to drive a water tank for a threshing machine deviated at the request of a fellow servant from his usual course to obtain oil to be used on the threshing machine, one of his horses, while standing near a tree, gnawed it so that it died. Held, that the deviation was not such as would authorize the court to determine, as a matter of law, that the servant was not engaged in his master's business at the time when the injury was inflicted. The court said: "Evidently Subling was not acting in obedience to the express orders and directions of his employer when he left the latter's team standing in front of the plaintiff's residence to get oil sent for by a person who is not shown to have been authorized by Campbell to send for it on his behalf. But was he not then in the execution of his master's business, within the scope of his employment? Whether the act of a servant for which it is sought in a particular case to hold the master responsible was done in the execution of the master's business within the scope of the employment, or not, must, from the nature of things, in most cases, be a question of fact for the jury. Where, as in the present case, the question of the master's responsibility turns principally upon the extent of the servant's deviation from the strict course of his employment or duty, it has generally been held to be one of fact, and not of law."

In *Riordan v. Gas Consumers' Asso.* (1907) 4 Cal. App. 639, 88 Pac. 809, a corporation hired a horse and buggy from a livery stable for the use of its superintendent about the city in the discharge of his duties. The superintendent's regular hours of employment did not include one hour after 12 o'clock each day, and this hour was at his own disposal. He was told by the livery-stable keeper that the horse might run away unless hitched when standing. The superintendent drove to his home in order to take lunch, and, while the horse was there, between 12 and 1 o'clock, it ran away, as the superintendent was about to feed it, owing to his negligence in failing to hitch it. Held, that the corporation was liable for injuries caused to a person in the street from

the runaway. The court said: "The defendant took the exclusive charge of the horse from the time it left the stable until it was returned at night. The stable keepers had intrusted the defendant with its care and safe-keeping. They had instructed defendant's servants to be careful with the horse, and not to take the bridle off when feeding it. It was, therefore, the duty of defendant to take such care of the horse as a reasonably prudent person would do under similar circumstances. It being the duty of defendant to care for the horse, that duty could only be performed by some person in defendant's employ. It was the duty of defendant to take care of the horse, during the noon hour. Fagan could have delegated this duty to anyone in the employ of defendant, or perhaps he could have left the horse in the stable during the noon hour, but he did not do either, but took charge of the horse himself. He, being the superintendent of defendant, took upon himself the care of the horse during the noon hour. If he had employed Arnold, or any other person, to take charge of the horse during such hour, and the negligent act had been done by such person, the defendant would be responsible. It is none the less so because done by the superintendent. It was the duty of Fagan, in the line of this employment, to care for the horse and feed it. He was the superintendent of defendant during the noon hour as well as during business hours. He could not depart from his duty of caring for the horse during the noon hour. He had not departed from his employment. He had not gone off on an independent mission of his own, but in feeding the horse was in the performance of a duty in the line of his employment. To hold otherwise would be to hold that, if the acts had occurred in precisely the same manner they did a minute before 12 o'clock, or a minute after 1 o'clock, the defendant would be liable, but would not be liable between 12 o'clock M. and 1 o'clock P. M."

In *Chicago Consol. Bottling Co. v. McGinnis* (1899) 86 Ill. App. 38, a verdict for the plaintiff was sustained where a servant, who had driven a few blocks out of his proper route to see his wife, injured a boy just as he was starting again from the house to resume his duties. On the first appeal, 51 Ill. App. 325, the court argued thus: "The act of

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so leaving it [i. e., the wagon] was performed while the wagon was diverted from the business of the appellant, and used to promote the pleasure of the driver. If we assume that, notwithstanding his departure from his route, injuries inflicted by him while driving, resulting from his manner of driving, would have charged the appellant, as being within the scope of the employment of the driver or his discretion as to route, no such assumption can be made as to the act of abandoning temporarily the service of the appellant and leaving the property of the appellant without care." The distinction thus taken between injuries caused by the manner of driving and those which result from leaving a team unattended is not countenanced by any other case, so far as the writer is aware, and seems to be quite illogical. It is also impliedly discredited by some of the decisions above cited.

In *Weber v. Lockman* (1903) 66 Neb. 469, 60 L.R.A. 313, 92 N. W. 591, a servant on horseback drove the cattle of his master to a pasture, and instead of returning at once waited until nightfall, and paid a visit to some friends. While he was returning home, his horse ran away and ran over plaintiff. Held, that the master might properly be found liable for the resulting injuries. The court said: "The boy was a minor, riding his father's horse. It was his duty, after having executed his mission, to return the animal to his father's stables. Whatever negligence there was in departing from the direct route, or in delaying his return until after nightfall, or in the management of the horse at the time of the accident, was committed in the performance of this duty and service. And, besides, it does not appear that his departure from the direct route was in itself negligent, or that this visit to the young people in any way contributed to an accident which did not occur until after the visit had ended and he had resumed his homeward journey, and thus returned to the strict line of his employment. If the fact of delay until after nightfall contributed to the mishap, it was that mere fact, and not the occasion for it, which did so. If it was negligent for the boy to ride after dark, it is immaterial what induced him to incur the risk."

In *Rahn v. Singer Mfg. Co.* (1885) 26

question of degree.”³ In one of the cases decided from this standpoint it was remarked: “In cases where the deviation is slight, and not unusual, the court may and often will, as matter of law, determine that the servant was still executing his master’s business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master’s business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions.”⁴ The essential matter to be determined is whether the servant’s departure from his master’s instructions is to be taken as indicating merely disobedient or unfaithful conduct in respect of the master’s affairs, or a total abandonment of those affairs.⁵

Fed. 912, affirmed in (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175, it was left to the jury to say whether the servant was acting in the scope of his employment; but the precise facts involved are not shown by the report.

³ Keating J., in *Whatman v. Pearson*, note 2, *supra*.

⁴ *Ritchie v. Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29, see § 2297, note 1, *post*. So far as regards the direction of verdicts against defendants, the lack of explicit authority is readily accounted for by the fact that all the judicial declarations which have been made regarding the liability of masters have been merely expressions of opinion as to the correctness of verdicts under the given circumstances. In *Sleath v. Wilson*, note 2, *supra*, Erskine, J., may possibly have intended to affirm the right of recovery as a matter of law. But in considering the effect of his ruling it is advisable to bear in mind the warning of the English Privy Council, that “summaries composed by the reporters of trials at nisi prius may not always convey the exact ruling of the presiding judge. It is difficult, also, to determine whether the words quoted in the reports represent words of advice or absolute direction.” *Clouston & Co. v. Corry* [1906] A. C. 122. With respect to the direction of verdicts in favor of defendants, it should be pointed out that, as the cases cited in note 1, *supra*, if their true *rationale* has been correctly explained by the writer, proceeded upon a doctrine essentially different from the

one adopted by the Connecticut court, they cannot properly be treated as authorities sustaining the statement quoted in the text. That statement was approved in *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 503, 45 L.R.A. 527, 43 Atl. 940.

⁵ In *Loomis v. Hollister* (1903) 75 Conn. 718, 55 Atl. 561, the servant was employed to deliver ice over a specific and defined route covering several miles, and drive back to the stables. While returning to the stables he drove out of the prescribed route to the extent of about half a mile to get his letters at the postoffice. The team, being left unfastened and unattended while he was in the office, started for the stables and ran against the wagon of plaintiff, injuring her. Held, that the trial judge had correctly instructed the jury that for all acts done by a servant in the execution of his master’s business within the scope of the employment, and for acts warranted by the authority conferred on him, the master was liable, while for other acts the servant alone was responsible; that a mere departure by the servant from the strict course of duty, though for a purpose of his own, was not of itself such a departure from the master’s business as to relieve him from liability, but that where there was a total departure, so that the servant might be said to be on a frolic of his own, the master would not be liable, and that the jury, in determining whether there was such a deviation as would relieve defendant, should consider all the circumstances of the case. The court rejected the contention of

2296. Same subject. General remarks as to the conflict of doctrine.—

If the effect of the two groups of cases reviewed in the preceding section, and the footing upon which they were decided, have been correctly explained by the present writer, it is obvious that they must be regarded as reflecting an essential difference of opinion, not only with respect to the absolute evidential significance of the element of a deviation for a purpose disconnected from the servant's duties, but also with respect to the appropriate provinces of courts and juries in determining the import of that element.

The *rationale* of one group seems to be, broadly speaking, the conception that it should be presumed, as a matter of law, that from the moment when a servant has, for the purpose of accomplishing an extraneous purpose, begun to make a deviation along a route upon which he has no work to perform, he ceases to be in the employment of his master, even in respect of the function of managing the vehicle or horse intrusted to him. The effect of this conception is that whatever acts the servant may do in respect of that function, after the deviation has been commenced, are, so far as regards the master's liability, placed upon the same footing as acts of a like description, when done in the course of a journey undertaken *ab initio* for the accomplishment of objects which have no connection

counsel that the part of the instruction referring to a "frolic" was erroneous, as leading the jury to believe that the judge meant that no deviation on business of the servant could become a total departure unless that business was of a hilarious nature. The following remarks were made: "Where a servant's employment includes the daily or occasional driving, use, and management of his master's horses and wagon for the purposes of that employment, and the servant, while thus employed, is guilty of negligence in the management of the team, whether by reason of reckless driving or of recklessly leaving the horses unhitched and unattended, that negligence is done in the execution of his master's business within the scope of his employment; and this is true although the master may have forbidden such negligent acts, and although the immediate occasion of the negligence is the accomplishment of some purpose purely personal to the servant, as the overtaking of someone he wishes to speak with on his own business, or stopping to enter a house on an errand

of his own, or disobedience of orders as to the precise route he shall follow; that is to say, the servant may be engaged in the execution of his master's business within the scope of his employment, although, in conducting that business, he is negligent, disobedient, and unfaithful. On the other hand, if the servant takes his master's team without authority and goes off on an errand of his own, he is not engaged in his master's business, and the master is not liable for his negligence. Likewise, when the servant has taken his master's team in pursuance of his employment, and, abandoning the purpose for which he started, goes off on some business of his own, he may thus take his master's team into his own possession without authority, for the transaction of his own business, and in such case his acts are not in the execution of his master's business, and his master is not liable for his negligence." The court observed that these propositions might be regarded as statements of law. See also the language of Erskine, J., in *Sleath v. Wilson*, note 2, *supra*.

with his duties. See § 2299, *post*. In fact the conception explicitly relied upon in several cases in which the right of recovery was denied was that the deviations were of such a character that they constituted "separate" or "independent" journeys.¹

With regard to the decisions in the other group it would appear that they must, in the final analysis, be explained upon the theory that, except in those instances where the evidence is clearly indicative of a different conclusion, a jury is warranted in inferring that, in spite of the deviation, the servant's duty in regard to the management of the vehicle or horse under his control still subsisted and continued to be performed on the master's behalf. Under this theory it is assumed to be ordinarily a possible inference from the circumstances, that the servant was performing his contractual functions concurrently with extraneous acts, and the master's liability is regarded as being predicable on the same ground as in cases where a journey is professedly undertaken *ab initio*, partly in the interest of the master, and partly for purposes which do not concern him. See § 2300, *post*. This notion of the simultaneous pursuit of two objects emerges distinctly in the language used in some of the cases.² Logically such a notion would seem to be unexceptionable; and if it were accepted as the criterion of the right of recovery in every instance, the somewhat unsatisfactory consequences which may often result from treating the master's liability as a question determinable, not with reference to the essential quality of the servant's act, but with reference to the locality where it was done, would be largely obviated.

Having regard to the facts presented in the English cases, they

¹ See especially *Storey v. Ashton*; *Hatch v. London & N. W. R. Co.* and *Meischner v. Durgin*,—all cited in note 1 to the preceding section.

² In *Garcey v. Belfast Tramway Co.* [1901] 2 I. R. 322, Palles, C. B., expressed the opinion that the apparently conflicting decisions in *Storey v. Ashton* and in *Whatman v. Pearson* (see § 2295, notes 1, 2, *ante*) were to be distinguished on the ground that, in the former case, the master's business had not been completed as it had been in the latter. Accordingly in the one case, the performance of the servant's duties continued in spite of the deviation, while in the other the servant was using the vehicle solely for his own purposes. The manifest objection to this

explanation, as applied to the facts in *Storey v. Ashton*, is that that deviation, occurred while the servant was returning to his master's premises with certain articles which it was his duty to bring back. This work, therefore, was not completed. But the comment of the learned judge is pertinent in the present connection.

For other cases in which the continuity of the servant's duty in respect of the management of the vehicle intrusted to him is also clearly adverted to, see *Williams v. Koehler* (1899) 41 App. Div. 426, 58 N. Y. Supp. 863; *Chicago Consol. Bottling Co. v. McGinnis* (1899) 86 Ill. App. 38. See § 2295, note 2, *ante*.

apparently cannot be reconciled upon any other footing than that of predicating a distinction between a deviation made while the work appointed to be performed by means of the vehicle is still in progress, and a journey undertaken after that work has been completed, but before the vehicle has been restored to the repository where it is kept when not in use.³ In order to support such a distinction it must also be assumed that there is an essential difference between work done by means of a vehicle and work done with relation to the instrumentality itself. But this hypothesis would seem to be in the highest degree forced and arbitrary. The American decisions cannot be harmonized even upon this basis.

2297. Deviation as an element in cases where the servant is not required to follow a definite route.—Where a servant is ordered to go with a vehicle or riding horse to a certain place, and, after having performed the work appointed for him at that place, to return to his master's premises, the understanding is that he is to go and return by the most direct route. If he diverges from that route, the question whether his master shall be held responsible for his negligence during the journey is determinable upon the same footing as in the class of cases discussed in the preceding section.¹

³The importance ascribed by some English judges to this distinction is indicated by the circumstances that in *Hatch v. London & N. W. R. Co.* § 2295, note 1, *ante*, it was plainly intimated by A. L. Smith, L. J., that the nonliability of the defendant could not properly have been determined as a matter of law, if it had been satisfactorily shown that the work assigned to the servant would not have been fully performed until he had made a trip to the market specified.

¹In *Ritchie v. Waller* (1893) 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29 (verdict for plaintiff sustained), the fact that a servant sent by the master with the latter's team and wagon to a certain place to procure a load of manure had deviated from the most direct course home, for the purpose of seeing about the repair of his own shoes, was held not of itself sufficient to show that he had so far departed from the execution of the master's business as to relieve the master from liability for his negligent management of the team. One of the findings was that the servant drove around to the shoemaker's shop, and

there left his team and went into the shop, and that "his purpose and object in so doing was to see the shoemaker about soling or mending his shoes." The court observed that the question whether the phrase "in so doing," referred to the entire conduct of the servant from the time he left the brewery till the horses ran away, or only to his act in leaving them and going into the shoemaker's shop, was not free from doubt; but it was assumed, in accordance with the claim of the defendant, that this phrase referred to the entire conduct. Another finding was that the servant "was in the service of the defendant at the time of the accident." The court remarked that this might mean simply that at the time of the accident his term of service had not expired, and that he had not been discharged, or it might mean that in making the detour he was, and continued to be, in the execution of the master's business, within the scope of his employment. For the purpose of the discussion, it was assumed that the former meaning was the correct one. Having settled these preliminary points, and formulated the rule stated in the text,

An essentially different situation is presented where the occupation of the servant is of such a character that he may reasonably be assumed to be invested with a more or less complete discretion with regard to the lines which he shall follow while he is engaged in the discharge of his duties. Under such circumstances it would seem to be a necessary deduction that a deviation can never, in any proper sense of the word, be predicable in respect of his presence at any particular point within the area covered by his contract, and that the only ground upon which the master can escape liability for his

respecting the circumstances under which the liability of a master may be question for the court or the jury, the court proceeded thus: "In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. . . . In making the detour Blackwell was still in charge of his master's team, though on a roundabout way home, carting manure to his master's farm. That was his main purpose and object throughout the entire transaction. In the language of the case last cited [*Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392] even if the motive was some purpose of his own, he was still about his usual employment, although pursuing it in a way and manner to subserve such purpose also. Applying these principles to the case at bar, the question for the court below was whether or not Blackwell, for the time being, totally departed from the master's business and set out upon a separate journey and business of his own. If the rule of law were that any deviation by the servant 'to carry some business of his own into effect' was of itself such a departure, the above question would be of law. But this, as we have seen, is not the rule of law. To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it. Without spending

more time upon this point, we think the above question is one of fact in the ordinary sense, and that the case at bar clearly falls within the class of cases where such question is strictly one of fact to be decided by the trier. As such we think the court below decided it. . . . If, however, we should hold the question raised upon this point to be one of law, we have no hesitation in saying that the court below reached the correct conclusion on the facts found. In either point of view, then, there is no error."

In *Krzikowsky v. Sperring* (1903) 107 Ill. App. 493, where a servant was sent to purchase and bring home material for the master's business, and was given no specific directions as to route, the fact that he deviated one block from the direct route in returning was held not to constitute such a "turning away from the master's service" as would absolve the master from liability. The court said: "It is not shown what was the ordinary route, if, in fact, there was an ordinary route, for appellant's driver. For anything that appears, Randolph street may have been as expeditious and satisfactory a route as Lake street. The character or desirability of the street is not determined by the purpose or intention of appellant's son. The proof shows that the son was in the employment of his father, and that he had been to purchase material for his father, and was, pursuant to his father's order, driving his father's horse and wagon, so that at the time of the accident he was in fact in his employment and had not yet carried out the intention, which he says he entertained, of departing from the work of his employment, and in fact did subsequently go directly from the place of the accident to his father's shop."

negligence is that the tortious act in question had no relation to his employment. With this conception the few cases which bear upon the subject are quite consistent, but they do not lay down any general rule in the terms suggested.²

²In *Venables v. Smith* (1877) L. R. 2 Q. B. Div. 279, the arrangement between the proprietor and the driver of a cab was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16s. for the cab; all that he made above that sum was his perquisite for his labor, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when plaintiff was run over by the cab, the driver was on his way back with the cab to the stables of the proprietor, intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's, a little way off, and purchased some snuff, and on his way back to the stables the accident happened. A verdict against the proprietor was sustained. Cockburn, Ch. J., said: "It is contended that the liability of the master only exists with respect to acts done by the driver within the scope of his employment, and that the driver here was not acting within the scope of his employment. To determine whether the driver was so acting or not, it is necessary to consider what the terms were upon which the cab was intrusted to the driver. If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public. But it appears that the cab was intrusted to the driver to use entirely at his discretion, provided that he used it properly and returned it to the proprietor's stables when the day's work was over, paying the sum agreed upon between them for the hire of it. I cannot see that the driver did anything wrongful, or contrary to the terms of

the bailment as between himself and the proprietor, in using the vehicle for the purpose of going to the tobacconist to get snuff." Mellor, L., said: "With regard to the question whether the driver was acting within the scope of his employment, it seems to me that by the terms of the arrangement between the proprietor and the driver the fullest discretion was vested in the latter as to how he should earn money. He was to return the cab when he had done with it, but he was not bound to return at any particular moment, or to take any particular route. We must look at the matter from a reasonable point of view. If the driver were to take the cab on an independent journey, altogether out of the scope of the purposes for which it was intrusted to him, no doubt the proprietor could not be rendered responsible for acts done by him in the course of such journey, but I do not think the driver was in this case going on any such independent journey so as to relieve the master." (As to the other point decided in this case, see § 75a, *ante*.)

In *Mulvehill v. Bates* (1884) 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959, it was shown that a horse and express wagon were intrusted, generally, to the servant, with authority to secure such business as he could, make his own contracts, and drive wherever it might be necessary to go, in order either to receive or deliver any articles which he might be employed to transport. Having delivered a trunk, he got a load of poles for himself, and while carrying them home on the wagon negligently ran over and injured the plaintiff's child. Held, that the defendant was liable. The court argued thus: "Had someone employed him to transport a load of poles, it seems to us that there would have been no doubt but that, in going for them and in conveying them to their destination, he would have been acting within the scope of his employment, for that was just the kind of business he was employed to perform, as much as in transporting trunks or any other kind of property. The fact

2298. Liability as to acts done by the servant after having accomplished the extraneous purpose of his deviation.—According to several decisions, both English and American, any acts of negligence of which a servant may be guilty in managing a vehicle or horse, after the personal or other extraneous affairs which constituted the object of his deviation have been disposed of, and he has begun to return to his master's premises or to the point where he took his de-

that it was his own property which he was carrying on this occasion seems to us immaterial. If he had any articles which he himself desired conveyed by an express, there was no reason why he might not transport them in his master's wagon as well as that of third parties, being liable, of course, if he did so, to account to his employer for the usual price for such services, the same as if performed for someone else. He was intrusted, generally, with the wagon to hunt up just such work wherever he could find it, and with authority to carry articles for whomsoever he saw fit. Whether he accounted to the master for the value of the time occupied in transporting his own property is immaterial, that being a matter entirely between themselves." Commenting upon the contention of the defendant's counsel that the case was controlled by those cases in which it has been held that, where the driver of the master's vehicle turns wholly aside from the master's employment and engages in an independent journey, wholly foreign to his employment, and for a purpose exclusively his own, the master is not liable for his acts, the court said: "This class of cases is clearly distinguishable from the present. There the servant had specific orders as to the mode of dealing with the vehicle, and was obliged to attend to the specific errand on which he was sent and then return to his master. If, under these circumstances, he employed the vehicle on some purpose wholly independent of his orders, of course he was not within the scope of his employment, and the master is not liable. But here the wagon was intrusted, generally, to the driver, to be used entirely at his discretion. . . . In this case, if the driver had taken the wagon on an independent journey of his own, altogether out of the scope of the purposes for which it was intrusted to him, and an injury had then occurred,

the defendant would probably not have been liable. But such was not the fact. The trip in which the servant was using the wagon was within the scope of the purposes for which it was intrusted to him."

The last cited case was followed in *Rudd v. Fox* (1910) 112 Minn. 477, 128 N. W. 675, where an instruction importing that the defendant was, as matter of law, not liable, was held to have been properly refused, the evidence being that he carried on a business of delivering articles by automobiles; that he employed B. as a driver, and furnished him with a machine with which to go upon the streets of M. and seek business, paying him a weekly salary and a commission on the amount earned; that he left a street stand one evening, taking his brother-in-law in the machine, and went to supper, some 3 miles away, and, after having remained there some hours, returned to the business portion of the city, where he ran the machine against the plaintiff. It was contended that this trip was on B.'s own account, since his companion paid no fare. But the court said: "Defendant employed the driver, and gave him a roving commission, under which he was to seek employment upon the city streets; and, while defendant testified that he had requested Barnett not to go to supper to the part of the city he testified he visited the night in question, it must be remembered the accident happened after his return to the business district. Barnett's reason for being upon the street where the collision occurred does not clearly appear from the evidence. He testified he was going north towards Hennepin avenue; but whether proceeding to his stand, which was in that vicinity, or returning to the garage, is not shown by the record. In any event, Barnett had possession of the machine by virtue of his employment."

parture from the prescribed route, may warrantably be found to have been done within the scope of his employment.¹

¹This doctrine was distinctly recognized by Collins, L. J., in *Hatch v. London & N. W. R. Co.* § 2295, note 1, *ante*.

In *Merritt v. Hepenstal* (1895) 25 Can. S. C. 150, affirming (1895) 33 N. B. 91, where it was held that a teamster, in starting out to finish his work after going to his home for a meal, was engaged in the performance of his duties as fully as if he had returned to the employer's store and made a fresh start, the court professed to follow *Whatman v. Pearson*, § 2295, note 2, *ante*,—but there the element of a resumption of duty was not involved.

In *Geraty v. National Ice Co.* (1897) 16 App. Div. 174, 44 N. Y. Supp. 659, affirmed without opinion in (1899) 160 N. Y. 658, 55 N. E. 1095, the servants of an ice company engaged in carrying ice from one storehouse to another had deviated from the direct route, and stopped for a time to dispose of part of the ice for their own purposes; it was held that the company might properly be found liable for an injury caused by the fall of a cake of ice, after they had started again to carry the ice to the storehouse. The defendant requested the judge to charge that, if the jury believed that the servants were unloading ice from the truck at the time of the accident, outside of any duty on their part to the defendant, they must find for the defendant; and also that, if they believed that for the purpose of unloading ice or making a delivery at any place other than one appointed by the master, they went to the place of the accident and while there so conducted themselves that the accident happened, the defendant was not responsible for such acts. The judge refused to charge in accordance with these requests and several others involving similar propositions. But he instructed the jury that, if this accident happened while the driver was actually handling ice and taking it out of the wagon at that particular point, the plaintiff could not recover, because there was no evidence of any negligent handling at that time. Discussing the contention of the defendant that it was entitled to a more particular charge upon this subject, the court said: "It is the rule, no doubt, that a master is not necessarily

relieved from responsibility for an injury resulting from the negligence of his servant, simply because the servant is at the time acting in disobedience to the master's order. The question in every case is whether the act he was doing was one in prosecution of his master's business, not whether it was done in accordance with his instructions. If the act was one which continued until the termination would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, but yet with the intention at the same time of pursuing his master's business. *Quinn v. Power* (1882) 87 N. Y. 535. The rule, as laid down by the latest cases in the English courts, is that a master is responsible for an injury resulting from the negligence of his servant while driving his cart, provided the servant is at the time engaged in his master's business, even though the accident happens in a place to which his master's business did not call him. But if the journey upon which the servant starts be wholly for his own purposes, and without the knowledge and consent of the master, the latter will not be liable. . . . In this particular case, so long as Sweeney and McQuade were engaged in taking this ice to the Grand Central Station, they were engaged in the prosecution of the master's business, and it was liable for their acts. The liability ceased, if at all, only when they were not engaged in taking the ice to the place where they were directed to take it. According to the evidence of the defendant's witness, they stopped near the corner of Forty-third street and Third avenue for the purpose of unloading some of this ice. Up to that time they had been proceeding in the business in which they were engaged. While they stood there unloading the ice, if they did do so, they were undoubtedly not engaged in the master's business and were acting in their own behalf, and at that time it is

But, so far as the United Kingdom is concerned, this doctrine seems to have been very seriously shaken, to say the least, by a re-

quite clear that the master was not liable for the unloading in which they were engaged. The jury were so instructed by the court. They were told that if the accident happened while these men were unloading the ice the defendant was not responsible. It is true that the reason given by the court was not the one insisted upon by the defendant, but that was a matter of no importance. The material fact was that, if the jury found that the accident was caused by unloading the ice, that was the end of the liability so far as the defendant was concerned, and if the defendant had the benefit of that instruction, it had no right to complain with regard to the reasons which were given for it. But the request for a charge on the part of the defendant went further than that. It was that, if the accident happened at that place, the defendant was not responsible, without regard to the question whether Sweeney was unloading ice or not. This request, we think, went too far. There could have been but two ways, under the testimony, in which this accident occurred. One was by the slipping of the ice from the tongs while it was unloading, and the other was because it slipped off of the wagon after Sweeney had started on his way to the Grand Central Station. The defendant was sufficiently protected by the charge, if the jury found that the accident was caused in the way first mentioned. We think that the defendant was not entitled to be relieved from liability if the accident happened after Sweeney had taken his place upon the wagon and resumed his course toward the Grand Central Station, and the accident was caused by the slipping of the ice off from the wagon. At that time Sweeney, whatever may have been his object in deviating from the direct route, was again proceeding to deliver the ice. He had accomplished whatever purpose he intended to accomplish by the deviation, and had resumed the execution of the work which the defendant had entrusted him to do. The essential conditions at that time were the same as they would have been had he gone on the direct route. . . . At the time when Sweeney resumed his journey, at

the corner of Third avenue and Forty-third street, the load was in the same defective condition as it was when he started, and there was the same reason to anticipate that an accident would happen as there was when he left the yard in the first place. No act of Sweeney's occurring during the deviation had operated in the slightest degree to increase the danger of harm from the negligent loading, and therefore when he again assumed to go on his master's business after the deviation, there had been no increase of danger arising from his negligent act by reason of which the probability of accident had been enhanced. The original defect, and that alone, was then, as before, the thing to be feared, and for all practical purposes the same conditions existed that existed when Sweeney had started from the yard. The ice was defectively loaded, and he was proceeding with it to the place where it was to be unloaded. If there had been a suspension of liability, that suspension had come to an end because he had assumed again the prosecution of his master's business."

In *Jones v. Weigand* (1909) 134 App. Div. 644, 119 N. Y. Supp. 441, where a coach driver who had finished his appointed work and was returning to his master's stables took a circuitous route in order to visit a friend's house, and injured the plaintiff after he had resumed his homeward journey, the court said that even if it were doubtful whether he was acting within the scope of his employment up to the time when he reached his friend's house, it was plain that when he returned to the coach for the purpose of taking it back to the stable, he re-entered upon his master's service. "It is no answer to this to say that the accident would not have happened if he had not made the call. His carelessness after he had resumed his master's business was the *causa causans* of the accident."

In *Patterson v. Kates* (1907) 152 Fed. 481, the negligent act for which the master was held liable was done while the servant was returning to the place from which he had diverged: but this element was not specifically ad-

cent case which was carried from the Irish courts to the House of Lords.² But owing to the peculiar footing upon which the appeal

verted to, and the decision was rendered independently of it.

In *Sleath v. Wilson* (1839) 9 Car. & P. 607, the injury for which the master was held liable was inflicted after the purpose of the deviation had been accomplished. But this aspect of the evidence was not specifically adverted to by Erskine, J., in his summing up. See § 2295, note 2, *ante*.

In *Weber v. Lockman* (1903) 66 Neb. 469, 60 L.R.A. 313, 92 N. W. 591, the circumstance that the injury was inflicted after the servant finished attending to his personal affairs, and was on his way back to his master's premises, was adverted to. But the court obviously considered the action to be maintainable irrespective of this factor. See § 2295, note 2, *ante*.

The above cases may be compared with *Barmore v. Vicksburg, S. & P. R. Co.* (1905) 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594.

² *O'Reilly v. McCall* [1910] 2 I. R. 42, an action to recover for the death of the plaintiff's husband who was killed by a motor car, the property of the defendant, and driven at the time by W., who was defendant's chauffeur. With regard to the question whether W. was, at the time of the fatal occurrence, acting within the scope of his employment as the defendant's chauffeur, he himself was the only witness produced, the defendant himself being then abroad. W.'s evidence was to the effect that on the day in question, while driving the defendant from the races at L. to a restaurant in Dublin, they met a broken-down car, and took its occupants to Dublin. At the restaurant the defendant directed W. to take these persons to their home at Ratoath, and then to drive to defendant's place at C. On leaving Ratoath, instead of going to C. as ordered, W. drove in the car to visit his wife at Ringsend, where he stopped for five minutes, and returned to C. in the course of which return the accident happened. There was nothing, on cross-examination or otherwise, to throw doubt on W.'s veracity, and there was no evidence to contradict him. The judge at the trial refused to allow the pleadings to be amended so as to specially raise the question whether W. was

acting within the scope of his duty when the accident occurred; but he left that question to the jury, who found in the affirmative. The judge reported that one of the jurors appeared to have formed an opinion in the course of the trial very favorable to the plaintiff. The jury found for the plaintiff on all the questions submitted to them. The King's Bench division having set aside the verdict, and directed a new trial, on the ground that the trial was unsatisfactory, the court of appeal directed a verdict and judgment to be entered for the defendant. The House of Lords reversed the decision of the court of appeal, and restored that of the King's Bench division, directing a new trial. In the King's Bench division, Lord O'Brien, Ch. J., said that, in his view, "the weight of evidence is that, instead of obeying his master's instructions to go home, he went to Ringsend to see his wife, and in so doing he was not acting in the scope of his duty." Gibson, J., observed that, if the chauffeur "went the whole way to see his wife, and for no other purpose, he would have been plainly acting outside the scope of his duty. But it is suggested (and I think that is the best suggestion that could be put forward) that the chauffeur, having got no specific directions from his employer, went back to Jammet's [the *restaurateur*] to take him up; and, finding that his master did not want him, he went to see his wife at Ringsend or somewhere else. The difficulty is to fit in that theory (which is mere speculation) with the other facts of the case. Of course, if that view is correct, and if he went to Jammet's for his master, and from Jammet's went on to his wife at Ringsend, and, after this detour, was returning home at the time of the accident, he might then be considered as acting within the scope of his master's business; whether he did or did not actually see his wife, or whether he visited Ringsend at all, would be immaterial; he would have been on his way from the restaurant after making the detour." In the court of appeal, Fitz-Gibbon, L. J., argued thus: "The case depends, in my opinion, on the question, whether it is proved with nothing to contradict it, that Whittaker had

was taken, the decision, as it stands, can scarcely be said to have settled the law definitively in a sense adverse to the right of recovery.

2299. Vehicle used on an independent journey for a purpose not connected with the master's affairs.—*a. Instrumentality used without the master's consent.*—It is fully settled that a master cannot be held responsible for negligent acts committed by his servant while using his vehicle or horse on a distinct and independent journey undertaken without his authority, and for some purpose that has no connection with his business or his domestic affairs.¹ This rule, as is

gone to see his wife at Ringsend, and was returning from the visit when the accident occurred. Could any reasonable jury find that the entire statement made by Whittaker was false, in which he described the whole course of his proceedings on that evening, when he seems to have acted with perfect sobriety, except in so far as he diverged from his duty to his employer, and went off to Ringsend on his own private business? If we consider the position geographically, and ask what brought Whittaker to Wood Quay between 11 and 12 o'clock on that night, it is impossible to account for his being where he was at that hour, except that he was on his way back from Ringsend. He could not have been at Wood Quay on his way back from Ratoath to Castleknock; his own uncontradicted evidence is that, after leaving Ratoath, he came back by Blanchardstown and Castleknock, but instead of stopping at Castleknock, he came on through Dublin to Ringsend. From the moment he passed Castleknock, he had diverged from his master's business, and was going on business of his own. Positive, detailed, and persuasive evidence has been given on behalf of the defendant on the real point at issue; this evidence is uncontradicted, and it is not suggested that it could be contradicted on a second trial; and, under the circumstances, I agree that there is no evidence to sustain a finding that Whittaker was acting within the scope of his employment, and, therefore, that judgment should be entered for the defendant." In the House of Lords Lord Loreburn thus stated his conclusions: "There was evidence *prima facie* that the driver was acting within the scope of his authority, driving, as he was, the car of

the defendant in the public street, going towards the defendant's house, while he was in the service of the defendant. It was sought to rebut this by the testimony of Whittaker, who said that, while he was driving this car on the present occasion, he was engaged for his own amusement, and not on the service of his master. The question is whether the jury were entitled to disbelieve Whittaker upon this subject. . . . There are certainly circumstances connected with the trial, with the pleadings, and with the way in which the evidence was presented, which make it desirable that this matter should be again investigated." It will be observed that O'Brien, Ch. J., FitzGibbon, L. J., and Lord Loreburn, all seem to have assumed that the liability of the defendant would be negatived if the deviation in question was in point of fact made for a personal purpose, and that they did not advert to the theory reflected in the remarks of Gibson, J., *viz*: that the defendant might be found liable if the chauffeur was returning home after he had paid his visit.

¹ In *Maher v. Benedict* (1908) 123 App. Div. 579, 108 N. Y. Supp. 228, it was held that defendant was not liable for injuries resulting from the negligent driving of his motor car by his minor son, where the son at the time was engaged in delivering presents on his own account, and had taken the car out without defendant's knowledge or consent. The court said: "Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so, or because the driver was his son."

In *Joel v. Morison* (1834) 6 Car. &

shown by the cases cited, precludes recovery whether the object of the journey was the personal enjoyment of the servant himself, or

P. 501, Parke, B., directed the jury as follows: "If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the car surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

In *Fiske v. Enders* (1900) 73 Conn. 338, 47 Atl. 681, the defendant was held not to be liable for the negligence of her coachman in running down the plaintiff, while he was driving her horses into an adjoining city, solely for his own pleasure, and not for exercise, which they did not then need,—the evidence being that he had general instructions to exercise them only when it should be necessary, and, when exercising them, to drive them only in the country, and that he had no authority to use them for his own pleasure.

In *Bard v. Yohn* (1856) 26 Pa. 482, a horse which the son of the defendant, who was also his servant, had without, so far as appeared, the defendant's consent, borrowed to take himself and some other persons to a fair in an adjoining village, was hitched by too long a chain, and springing back kicked the plaintiff. Held, that the defendant was not liable.

In *Maddox v. Brown* (1880) 71 Me. 432, 36 Am. Rep. 336, the defendant's wagon and horses were taken, without his knowledge or assent, by a son who was in his employ as a servant, and driven to a neighboring village, for the purpose of depositing money received by him as treasurer of a Sunday school, and he left the team unfastened on the street. Held, that the father was not liable for injuries caused by the horses running away.

In *Way v. Powers* (1884) 57 Vt. 135, the jury found that the defendant, J. P. Powers, was the owner of two horses,

and that the defendant, A. P. Powers, his son and hired man, drove them as often as he had occasion for private driving, without special permission of his father. On the day in question A. P. Powers, who was expecting a friend to make him a visit at his father's home, took one of said horses and a wagon, without the permission of his father, and drove them to the depot at W. to meet his friend. His father did not know he had gone until he had been absent some time; but expected and was willing he should take the team to bring his friend from the depot, when he should need it for that purpose. The horse broke loose at the depot and ran into the team of the plaintiff. Held, that no recovery could be had against the father, for the reason that his son was not in his employment, nor upon his business, at the time of the accident. No license to take the horse could be inferred from the fact that he had used him upon his own business upon previous occasions without leave.

In *Fish v. Coolidge* (1900) 47 App. Div. 159, 62 N. Y. Supp. 238, where the plaintiff was struck and injured owing to the negligence of a teamster employed by defendant, the evidence showed that, at the time of the accident, the teamster was driving solely for his own pleasure; and defendant testified that the driver had no authority to exercise the horse on Sunday. Held, that there was not sufficient evidence to go to the jury on the question whether the driver was at the time of the accident acting within the scope of his employment, and a non-suit was warranted.

In *Thorp v. Minor* (1891) 109 N. C. 152, 13 S. E. 702, the owner of a horse, having rented a warehouse to a certain firm, left the horse with them and used the horse in common with them. A clerk of the firm obtained the horse from the firm without the knowledge of the owner, to drive to a picnic, the firm telling him to send the horse back if he had opportunity. This he did through a boy not in the employ of the firm or the owner of the horse. The boy left the horse standing in the street, and it ran away and killed plaintiff's horse. Held, that the firm were not liable because the boy was not in their employ,

the transacting of some business in which only he himself or a fellow servant of a third person was concerned. It is merely one particular

and the clerk, in respect of the use of the horse, was not acting in the scope of his employment. The court said: "The mere request to the clerk to send the horse back would not have made the firm responsible for the pay of the person who brought the horse back if he charged for such service, and, of course, would not therefore have made them responsible for his negligence. Whether the clerk borrowed or hired the horse, it was an implied part of the hiring or borrowing that he should return the horse, and, if he chose to send him back by another, such other was his servant, and not the servant of the firm. If the clerk had driven the horse back, himself, the firm would not have been responsible for his negligence, nor can they be made liable because he chose to send him back by a substitute."

In *Evans v. A. L. Dyke Automobile Supply Co.* (1907) 121 Mo. App. 266, 101 S. W. 1132, plaintiff, who was the owner of an automobile which he desired to sell, was about to deliver it to defendant for sale on commission when the defendant's servant, L., directed plaintiff's servant to retain the machine until the succeeding day, which was Sunday, in order that L. might show it to a prospective buyer; defendant's garage being closed on Sunday. This was agreed to, and on Sunday L. took the machine, and while using it on a pleasure trip of his own, it was struck by an electric car and destroyed. Held, that L. while so using the machine was not acting in the course of defendant's business, and that the latter was therefore not responsible for the loss of the machine.

In *Clark v. Buckmobile Co.* (1905) 107 App. Div. 120, 94 N. Y. Supp. 771, the general manager of an automobile company took a day off from business and went to another city on his own affairs, where at the request of a co-employee, he purchased for him some goods, which he charged to the company as a means of paying for them. On his return he telephoned for another employee to come to the station for him with an automobile, and on the way from the station, plaintiff was injured, owing to the negligence of the manager and the other employee in the

management of the machine. A verdict for the plaintiff was set aside. The court said: "These two men were in charge of the machine when the accident occurred. Davis was running it, and Birdsall was giving more or less directions with reference to its movements. Neither of them was engaged in defendant's business, however. They did not represent the defendant, and it was not and is not liable for any negligence they were guilty of, which caused plaintiff's injuries. Suppose they had taken a day off, for pleasure, and had borrowed or leased the machine from the defendant to enable them to enjoy their outing, would the defendant be liable for any injuries resulting from their negligence in operating the machine while they were out upon the road? Suppose, after business hours, any day, they had borrowed or leased the machine from the defendant to enjoy a few hours run across the country for their own pleasure, would the defendant be liable for any injuries caused by their negligent operating of the machine while they were out? It is quite apparent that in the cases suggested no liability of the defendant would result. The reason is that, in order to establish liability, the persons must not only be generally employees of the defendant, but must be employed in the defendant's business, and not merely in their own recreation and pleasure, at the time the injuries are caused. This defendant is a corporation, and not an individual, and its agents cannot render it liable by merely helping themselves to its machine and using it outside its business, and purely for their own private purposes, whether of business or pleasure." The contention that the manager, in charging to the company the price of the clothes purchased by him, was engaged in its business, was rejected.

In *Reynolds v. Buck* (1905) 127 Iowa, 601, 103 N. W. 946, the defendant was a dealer in agricultural implements, automobiles, etc., and had decorated one of the automobiles for the use of his daughter in a parade. After the parade, defendant directed that the automobile, which stood in front of the store, should be taken inside. His son, who was in his employ as a clerk, took

application of the more general principle that "the master is not liable for injuries occasioned to a third person by the negligence of his

the machine and invited a lady to take a ride with him. While the son was operating the machine for that purpose, plaintiff's horse was frightened thereby and he was injured. Held, that the defendant was not liable. The court said: "The direct evidence all shows that his use of the electric automobile was solely for the pleasure and convenience of the young lady and himself [defendant's son], and that it was in no way or sense connected with his employment or with the defendant's business. The mere fact that the automobile still wore the decorations, and that it might on account thereof attract attention, and incidentally advertise the defendant's business, would not have justified the jury in finding that the son was about his father's business at the time. An inference so farfetched should not be permitted to control and destroy direct and positive testimony to the contrary. *Meyer v. Houck* (1892) 85 Iowa, 319, 52 N. W. 235. The son had been given a holiday, and was master of his own time on that day. This is conclusively shown. The defendant had ordered the machine put away, and did not know that his son wished or intended to use it. It was taken and used for the son's own pleasure, and we think the verdict was very properly directed for defendant."

In *Quigley v. Thompson* (1905) 211 Pa. 107, 60 Atl. 506, an action against the owner of an automobile, it was held that where the chauffeur of the defendant was called as a witness by the plaintiff to show that he was in the employ of the defendant, and to identify the car, it was competent for the defendant, on cross-examination, to develop by the witness the fact, which qualified his testimony, that at the time of the accident he was using the machine in the prosecution of his own business, and not in the business of his employer, and that in so doing he was acting contrary to the orders of his employer.

In *Danforth v. Fisher* (1908) 75 N. H. 111, 21 L.R.A. (N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535, the defendant's chauffeur took his automobile from the place where it was kept, drove to the defendant's store, and awaited orders. He was told to get his supper and to be

at the N. Hotel with the automobile at a certain time. After he had eaten supper, instead of taking the car to the hotel according to the defendant's order, he drove for the purpose of calling on a friend, to W., a point distant about 2 miles from his boarding place and in an opposite direction from the hotel. At the time when he caused the injury complained of, he had finished his call and was on his way to the hotel. Held that a nonsuit had properly been ordered. The court said: "Although the evidence shows that McCauley was the defendant's servant, and that he drove the automobile against the plaintiff's horse and caused the animal to run away, it also shows that he took the automobile without the defendant's permission, and went with it on an errand of his own; that he was acting for himself, and not for the defendant, at that time. As it cannot be found from the evidence that McCauley was doing what he was employed to do at the time the plaintiff was injured . . . the case does not stand exactly as it would if the defendant had employed McCauley to care for his horse, and the latter had driven the animal to West Manchester, and left it unhitched in the street while he made a call upon his friend. In such case, if the horse ran away and injured a third person, there would be a basis for the argument that McCauley's wrongful act in driving the horse to West Manchester was the occasion, and his leaving it unhitched was the cause of the injury." (As to the situation thus supposed, see § 2293a, note 2, *ante*.)

In *Durham v. Strauss* (1909) 38 Pa. Super. Ct. 620, it was held that the plaintiff had properly been nonsuited, where the evidence showed that the defendant's chauffeur and another person, a stranger to the master, were in the machine at the time of the accident; that the stranger was operating the machine; that the chauffeur had taken the machine out contrary to the defendant's general order not to take it out without defendant's consent; and that the chauffeur's taking out the machine to adjust the carbureter was met by proof that it was not his duty to fix the carbureter, and that it was not necessary

servant while the latter is engaged in some act beyond the scope of his employment, for his own or the purposes of another, although he may be using the instrumentalities furnished by the master with which to perform his duties as servant."² Liability cannot be im-

to take the machine out of the garage for that purpose.

In *Douglass v. Hewson* (1911) 142 App. Div. 166, 127 N. Y. Supp. 220, defendant's chauffeur was told that his automobile was not to be used without express orders, but he was permitted to use the automobile to go to his meals. On the occasion when plaintiff was injured by the chauffeur's alleged negligence, he was using the machine to take his clothing to a laundry. Held, that an instruction that, if defendant consented "that the chauffeur might use the car," he was liable for his negligence, was held to be improper, because there was no evidence on which to base it. But some courts may prefer the view of Houghton, J., who, in a dissenting opinion, thus stated his views: "It was a fair question for the jury whether or not it was the business of the master for the chauffeur to take the machine to go to Plattsburg for the purpose of getting his apparel laundered. It does not appear that there was any way of his obtaining clean linen at the Hotel Champlain, but, whether there was or not, the master could permit him to patronize a public laundry. The defendant was upon a tour through the Adirondacks with his family. He was paying his chauffeur small wages and all of his expenses. In order to present a proper appearance it was necessary that he have clean linen. The defendant does not deny that he was to pay such an expense. On the contrary, he virtually concedes that he was. It was also a fair question for the jury upon the proof as to whether the defendant consented that his chauffeur take the machine to go to Plattsburg for the purpose indicated."

In *Bourne v. Whitman* (1911) 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, where the injury was caused by the negligence of the defendant's son in operating an automobile, in which he was conveying some friend to or from a dance, evidence that he was the regularly employed chauffeur of his father, living in the family, that the persons he brought to a dance in the evening and

carried home again were in the presence of the father and his family at the dance, and that his father told him to light the headlight, was held to be admissible for the consideration of the jury, with regard to the question whether he represented his father in using the machine at the time of the accident.

In *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 339, a declaration was held to be demurrable which was founded on the theory that the defendant had, by leaving his automobile at a garage, furnished the opportunity which enabled a boy about nineteen years old, whose negligence caused the injury, to get possession of it.

For other cases in which negligent acts committed by servants who were using vehicles for their own pleasure or business without the consent of their masters were held not to be imputable to their masters, see *McIntire v. Hartfelder-Garbutt Co.* (1911) 9 Ga. App. 327, 71 S. E. 492; *Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351 (automobile); *Howe v. Leighton* (1910) 75 N. H. 601, 75 Atl. 102 (automobile); *Power v. Arnold Engineering Co.* (1911) 142 App. Div. 401, 126 N. Y. Supp. 839 (automobile); *Sarver v. Mitchell* (1907) 35 Pa. Super. Ct. 69, (automobile); *Campbell v. Providence* (1869) 9 R. I. 262 (hack); *Jones v. Hoge* (1907) 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433 (automobile); *Bellhouse v. Laviolette* (1883) 7 Legal News (Montr. Ct. of Rev.) 84 (sleigh).

² So laid down in the syllabus written by the court for *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133. There the defendant was a Michigan corporation engaged in the manufacture and sale of farm implements. Gregory was its general manager for the Northwest, with headquarters at Minneapolis, this state, and Nichols was its general agent for the state of North Dakota, and resided at Fargo, in that state. Defendant furnished its agent at Fargo an automobile to facilitate in the performance of the duties of his agency, which

puted to the master on the mere ground that while the servant was making a journey for a purpose extraneous to his contractual functions, he performed some acts similar to those which he might, by possibility, have occasion to perform in the ordinary course of his employment.³

he used whenever necessary. After business hours on the day of the injury complained of in this action, the two agents, Gregory and Nichols, took the automobile so furnished Nichols by defendant, and started for Moorhead, in Minnesota, just across the river from Fargo, on a mission purely personal to themselves and wholly independent from the affairs and business of defendant. While so engaged a team of horses belonging to plaintiff became frightened by the manner in which the agents operated the automobile, and ran away, injuring the plaintiff and damaging his buggy. A verdict for the plaintiff was set aside.

³ In *Rayner v. Mitchell* (1877) L. R. 2 C. P. Div. 357, a carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his way home negligently ran against a cab and damaged it. The course of the employment of the carman was that, with the horse and cart, he took out beer to his master's customers, who was a brewer, and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from his master a gratuity of one penny each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public house which his master supplied, and for which he afterwards received the customary gratuity. Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. Coleridge, Ch. J., said: "The sole question is whether having started out on a journey for his own purposes in the way described, did the fact that, in returning home, the servant took up some empty casks, constitute a re-entering upon his ordinary duties, as the learned judge phrases it; or, in other words, did it convert the journey into a journey made in the ordinary course of his employ-

ment, so as to make his master responsible for his negligence? In substance and good sense I think it did not. I cannot, therefore, agree with the conclusion of the learned judge that, at the time the damage complained of was done, the man was engaged in his master's employment. I think the judgment should be reversed." Lindley, J., said: "The question is whether, upon that distinct statement [*i. e.*, by the trial judge] of the servant's employment, the master is responsible for an accident happening in the manner stated. I think he is not. Treating it either as a question purely of fact, or a mixed question of law and fact, when did the man enter upon the course of his employment? If the accident had happened whilst the servant was returning home, not having collected the empties, it is plain that the defendant would not have been liable; the man clearly could not then have been said to have been in his master's employ. Does it alter the case that, while going back, he picks up a cask or two? The inference I draw from the facts found in the case is that the servant was engaged, as well on his return as on his outward journey, upon his own private business; and that that journey cannot, by the mere fact of the man making a pretense of duty by stopping on his way, be converted into a journey made in the course of his employment."

In *Lotz v. Hanlon* (1907) 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731, it was held that a verdict for the defendant had been properly directed where the only evidence adduced by the plaintiff, who had been run down by an automobile, was that the vehicle belonged to the defendant, and that at the time of the accident it was being driven by a man regularly employed by the defendant as a chauffeur; while, on the other hand, the testimony of the defendant showed it had been taken from his garage without his permission, in pursuance of an arrangement made by the

b. Instrumentality used with the master's consent.—There is adequate authority for the doctrine that, where the vehicle or horse by means of which the alleged injury was inflicted was being used for a purpose in which the master had no interest, the latter cannot be held liable on the mere ground that he had consented to the use.⁴ His freedom from liability in this instance is a consequence which

chauffeur to give some friends of his a drive. Discussing the evident significance of the fact that the chauffeur intended to procure, during the excursion, some spark plugs for use in connection with the automobile, the court said: "It is clear that this purpose was simply incidental to the evening's trip, and was suggested by consideration of the driver's own convenience. The main purpose of the drive was for the pleasure and enjoyment of the driver and his selected friends. The persons invited by him resided quite a distance from each other, and, in assembling them, the driver, at the start, was obliged to go a considerable distance in the opposite direction from where the supply store was. It was after all were in the machine that the accident happened, but it was while he was at a point further from the supply store than was his starting point. But had it happened while on the direct route to the store, even though the obtaining of sparks was the main purpose of the drive, this would not have made it an errand on the master's business, without some evidence that it was taken with the knowledge and approval of the master. There was not a particle of evidence in the case that the use of the machine for such purpose had ever been allowed by the master. The most that appeared was that the driver had been allowed, on some occasions, to purchase the necessary supplies for the machine at this store on the master's credit; but none that he had ever used the machine in going to the store to get them, or that he ever employed it in any way except as ordered by the master in connection with each particular occasion. So far as appears, the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and therefore entirely apart from his master's business."

In *Carl Corper Brewing & Malting Co. v. Huggins* (1901) 96 Ill. App. 144, a

servant engaged to solicit customers for defendant's beer used a conveyance of his own performing this service. On the day that plaintiff was injured the servant had obtained a release from work until the next day. He was requested by a bookkeeper of the defendant to get beer stamps, and bring them with him the next morning. Having purchased the stamps, he went to a saloon, where he remained until he became intoxicated, and on his way home ran against plaintiff. Held, that these facts were insufficient to show that such employee, at the time of the collision, was so far engaged in defendant's employment as to make the latter liable for his negligent act.

⁴In *Doran v. Thomsen* (1908; Err. & App.) 76 N. J. L. 754, 19 L.R.A. (N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, the defendant's daughter about nineteen years of age, was accustomed to drive an automobile which he kept on his premises, and did so whenever she felt so disposed, asking permission to use it when the father was at home, but sometimes, when he was not at home, taking it without permission. There was no proof that she was actually employed by him to operate the machine. Where she was using the machine for her own pleasure in driving her personal friends, she negligently injured a person on the highway. Held, that such proof was not sufficient to constitute her the servant or agent of her father, and that a motion for a direction of a verdict for the defendant should have been granted. The jury were instructed as follows: "If she took that machine out at that time in pursuance of a general authority of her father to take it whenever she pleased for the pleasure of the family, and for her own pleasure, for the purpose for which the master bought it, for the purpose for which her father owned it, for the purpose for which he expected her to operate it, then she was the servant of the father. Under those circum-

necessarily follows from the consideration that, in all cases of the type now under discussion, the essential point to be determined is simply whether the negligent act in respect of which damages are claimed was or was not an incident of the discharge of his appointed duties. The fact of the master's consent, however, may be material as an element which tends to show that, during the journey in question, the servant still remained under the control of the defendant in respect of the management of the vehicle or horse of which he had charge.⁵

It may be that a plaintiff is entitled to recover, if he can show

stances, that was the business for which the father bought the machine." Held, that the instruction was erroneous. The doctrine which it embodied "would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and by permitting them to be used by his children for their appropriate purposes injury occurred. It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of and not apart from the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she *ipso facto* became a servant. So that the charge thus in fact left the legal relationship of master and servant out of account, and raised it in name only, because the daughter was allowed to drive the machine. In this there was also error."

In *Cunningham v. Castle* (1908) 127 App. Div. 580, 111 N. Y. Supp. 1057, evidence which showed that the plaintiff was run over by the defendant's automobile, while the chauffeur was using it upon a private pleasure trip

with the defendant's permission, was held to be sufficient to require the submission of the case to the jury. The conclusions of the majority of the court were thus stated: "I do not think that the question of the ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent had probative force upon the proposition as to whether or not the servant was engaged in the master's business, and was acting within the scope of his employment. The question is whether he was or not. If, without the knowledge of his master, he took the car from the garage to a machine shop to have it fixed, and an accident occurred, the fact of the want of knowledge on the master's part would not affect the liability, because the act would be within the scope of the servant's employment and in the prosecution of the master's business. If the chauffeur were granted a two weeks' vacation, and the master said to him: 'I am going off on a trip and will not need the machine, you may take it and use it for your own pleasure while I am gone.' I cannot think that he would be responsible for any negligence of the chauffeur during that period."

In *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 339, a court count was held to be demurrable which alleged that "defendants permitted P. to take and run said automobile," and that "said P. was, by said act, created the agent of said defendants."

⁵ As bearing upon this aspect of matter, the following passage on the dissenting opinion of Houghton, J., in *Cunningham v. Castle*, note 4, *supra*, is worth quoting: "To my mind the element of consent to the use of the instru-

that the journey was made by the servant in the exercise of a general "permissive privilege" of which he availed himself in order to promote his master's interests. But in the case cited below the circumstances were not deemed to be proper for the application of such a theory.⁶

mentality is important and controlling in the present case. It had been the habit of the defendant to allow his chauffeur to use the automobile to go to his meals, presumably to save time and expense. On the night in question the chauffeur had taken the defendant to his apartments. It was a part of his remaining duty to take the machine to the garage, for it could not be left in the street or kept in an apartment house. The chauffeur requested permission to deviate from the direct route to the garage to go uptown on some business for himself. The defendant told him that he might do that, 'but to hurry back; only be gone a short while; come right back.' The testimony of the chauffeur is to the same effect, but a little more specific in that he says that the defendant told him to be careful, and if anything happened to be sure and notify the defendant at once. The chauffeur was still in the pay of the defendant, and his duty was to properly care for the machine and to properly house it for the night. Even while he was gone on business of his own, this duty remained with him, and he was being paid for the performance of that duty by the defendant. It does not seem to me that the chauffeur was emancipated during the trip, notwithstanding it was for his own pleasure. . . . In the present case the relation of master and servant is admitted, and the taking of the instrumentality by which the accident was caused was with the express consent of the master, and it was a part of the duty of the servant to care for the very instrumentality which produced the injury. . . . I appreciate that the case is on the border line, but it seems to me that the chauffeur was engaged in the business of the master, and deviated from the direct course to house the machine by the master's express consent, and that, therefore, the relation of master and servant still continued, and that the court was justified in refusing to charge as requested, or, under the proofs, to

submit to the jury the question as to whether or not that relation had been severed."

⁶ In *Steffen v. McNaughton* (1910) 142 Wis. 49, 26 L.R.A. (N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227, a chauffeur's contract with the owner of an automobile provided that he was to care for and operate it at the request of the owner and his family during the day; but the owner did not furnish him his meals, and for the midday meal he was allowed to go to his home, about a mile distant. The owner did not authorize him to use the automobile to go for his meals, and he had no knowledge that it was being used for such a purpose. While he was so using it, he injured a person in the highway. Held, that a verdict for the defendant had been properly directed. The court said: "It is obvious, from the conditions of the contract of employment, that it did not embrace the use of the automobile by the chauffeur for going to his meals; and the question, therefore, is: Do the facts warrant the inference that this use of it by the chauffeur was, under the circumstances of the case, 'a permissive privilege granted to [him] of which he availed himself to facilitate his labor and service, and . . . equally connected with it and the relation of master and servant, *Ewald v. Chicago & N. W. R. Co.* (1888) 70 Wis. 420, 428, 5 Am. St. Rep. 178, 36 N. W. 15. It is strenuously urged that the evidence on this subject permits of such an inference. This contention is made on the grounds that the chauffeur used this machine to further his master's interest; that he thereby reduced the time for getting his meals and thus was able to devote more time to the service of the defendant; that the defendant gave him the control of the machine for the day without restrictions, thereby enabling him to use it for this purpose; and that these and all the other conditions of his employment and service make the use of the machine on these occasions one within the privileges of

2300. Injury inflicted on a journey undertaken partly on behalf of the master, and partly for the servant's own purposes.— Where a servant receives permission to use his master's vehicle or horse on a journey which he desires to make for his own purpose, and at the same time agrees to perform, during the journey, some act on behalf of the master, the responsibility of the master for the negligence of the servant in respect of the management of the vehicle or horse during the journey is ordinarily a matter to be determined by the jury upon a consideration of the whole evidence.¹

his service for facilitating his labor and service, thus bringing it within the scope and course of his employment. We are of opinion that the facts of the case do not permit of this inference. The conditions of the contract of employment, under which the chauffeur was to provide himself with meals, carried with it the further condition that he was to have the required time at noonday, and might leave the service for such a period of time as was required, under the circumstances, for this personal and private purpose. While he was so engaged, his employment and the relation of master and servant were suspended for the time being, unless the facts of the case show that the defendant consented to the chauffeur availing himself of this use of the machine to facilitate his labor and service, and in furtherance of the defendant's interests. The evidence will not support this inference. It is reasonably clear and certain that the defendant by his words, acts, and conduct never gave consent or permission to, nor did the contract of employment authorize, such a use of the machine by the servant. The facts and circumstances fail to show that the chauffeur was performing an act in obedience to an order or direction of the defendant or a member of his family, or that he was doing something with the implied consent of the defendant."

¹ In *Cormack v. Digby* (1876) Ir. Rep. 9, C. L. 557, a herd got leave from his master to go for the day to a neighboring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the master assented, that he should bring home some

meat from the town for the master. He drove the horse and tax-cart so negligently that he injured the plaintiff. Held, that upon the evidence it could not be held as a matter of law, that the master was responsible for the negligence of the servant. Palles, C. B., said: "Either of two inferences can be drawn from these facts: viz. (1st), that the services of Conlan as herd were dispensed with for the day, upon the terms of his bringing the meat from Mullingar, or (d), that by the arrangement the scope of his employment as herd was, for this day extended, so as to include the act of carrying the meat, although his other services were not required for the day. In the one case, the obligation to bring the meat would have been independent of the service; in the other the scope of the employment would be extended so as to include the act. If the jury adopted the first view, the act in question would not have been the act of Conlan as servant of the defendants; if they arrived at the second conclusion, the contrary result would follow, and the defendant would be liable. In my opinion it was for the jury to determine, as an inference of fact, the true effect to be attributed to the new arrangement as affecting the previous employment of Conlan."

In *Haywood v. Hamm* (1904) 77 Conn. 158, 58 Atl. 695, testimony given by the defendant that on the day in question his son was in charge of the horse which caused the injury, and was using it to attend to some of his business, and probably some of his father's also, was held to be prima facie proof of his agency.

2301. Dangerous character of vehicle.—It has been argued in some cases, but without success, that an automobile should be regarded as an instrumentality which falls within the scope of the general doctrine by which an absolute liability in respect of injuries caused by certain abnormally dangerous things is imposed upon the persons who own or control them.¹

B. SERVANTS WORKING ON RAILWAYS.

2302. Servants whose work has reference to the operation of trains.—

a. Conductors.—The negligent acts of a conductor are deemed to be within the scope of his employment whenever they relate, directly or indirectly, to the regulation of the movement of the train under his control,¹ or to the determination of the question whether

¹ *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Cunningham v. Castile* (1908) 127 App. Div. 580, 111 N. Y. Supp. 1057; *Jones v. Hoge* (1907) 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433.

In *Danforth v. Fisher* (1908) 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535, the court said: "Nor is there any force in the plaintiff's contention that the owner of an automobile is liable to strangers in the same way and to the same extent he would be if it were a wild animal. If it were the law of this state that one who has a dangerous element or a wild animal on his premises is liable for all the damage it does after escaping from his control, that rule would have no application to the facts here presented. In this case the automobile did not escape from the defendant's control; it was taken from him by McCauley. There is nothing inherently dangerous about an automobile, any more than about an ax. Both are harmless so long as no one attempts to use them, and both are likely to injure those who come in contact with them when they are used for the purpose for which they were intended."

In *Steffen v. McNaughton* (1910) 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227, the court said: "We discover nothing in the construction, operation, and use of the automobile requiring that it be placed in the category with the locomotive,

ferocious animals, dynamite, and other dangerous contrivances and agencies. When properly handled and used, automobiles are as readily and effectually regulated and controlled as other vehicles in common use, and when so used they are reasonably free from dangers. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles."

In *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 339, the court said: "It is insisted, in the argument, that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While, by reason of the rate of pay allotted to judges in this state, few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like."

¹ In *Rauch v. Lloyd* (1858) 31 Pa.

358, 72 Am. Dec. 747, the conductor of a train permitted it to stand on the crossing of a public street, and during his absence the teamster of the man who furnished horses to haul the train attached them to it and moved it, thus causing the injury complained of. It was held that his employers were liable. The court said: "So far as concerned this plaintiff, the causes of his injury were not separable. They constituted together a mismanagement of the train, and that was one thing, the responsibility of which the law lays on the conductor and his employers. The hitching of the horse by Green (McFadden's driver), and the starting of the cars at that unpropitious moment, was as much the act of the conductor, in pursuit of his appropriate business and for the benefit of his employers, as if he had stood by and expressly ordered it. If he was not actually present to see that it was done properly, he should have been. The cars were still in his legal possession, the trip not being completed. The breakfast was no excuse for his absence, no substitute being left in charge of the train. His powers and duties in respect to it were continuing and exclusive. The stopping of the train was no more truly his act than the starting it. McFadden's horse, on which, if we indulge in refinements, the responsibility of the proximate cause will at last fall, was not, in point of law, more completely under the control of Green, than both horses and Green, and all others concerned in the transportation, were under the control of Hays, the accredited agent of the defendants. . . . Hays undertook to conduct the defendants' train from the starting point to their storehouse; he had a right to cross intersecting highways, but not so as to injure people lawfully traveling them. He executed his duty so negligently as to injure the plaintiff."

In *Chicago, B. & Q. R. Co. v. Sykes* (1880) 96 Ill. 175, the conductor of a freight train left it standing in such a way as to obstruct access to a station, and upon the plaintiff's decedent approaching it to go to the station, directed him to pass under the train. In attempting to do so the plaintiff's decedent was killed by the starting of the train. Held, that the company was liable. The court observed that while it was true that he was acting outside of

the scope of his authority in directing a person to pass under the train, yet he had wrongfully obstructed the pass-way to the depot, and it was his duty to have opened his train. He did not do this, but undertook to perform his duty in another mode by directing deceased to pass under the end of the car. Although the injury resulted from an act he was not required by the company to perform, it was connected with the business of the company in the performance of which he was engaged.

In *Terre Haute & I. R. Co. v. Chicago, P. & St. L. R. Co.* (1893) 53 Ill. App. 41, a railroad company over whose road an engine was run by another company, in charge of the conductor of the former, was held to be liable for damages to such engine from a collision caused by the negligence of such conductor in ordering the train to start when another train was due. The case turned on the meaning of the contract under which the train was run. The court construed it as giving the conductor entire control of the train, and was of opinion that the engineer and fireman furnished by the plaintiff company were, in the absence of information as to the time-table, justified in obeying the conductor's order. The court considered that their duties were merely mechanical, and that they had no authority to say when the engine should start or stop, what time it should make, or at what stations trains should be allowed to pass it.

In *Snider v. Chicago & A. R. Co.* (1904) 108 Mo. App. 234, 83 S. W. 530, the court sustained a verdict in favor of a passenger on a street car with which a train had come into collision while it was crossing the track in pursuance of a signal given to the motor-man by the defendant's yard conductor. The following extract from the opinion may be quoted: "It shows that Rechter was yard conductor and had charge of this train; that he was at the crossing when the street car approached, and was the only employee of the Chicago & Alton Railway Company present who might speak or give signals in respect to the movements of the train towards the crossing. . . . It shows that Rechter had theretofore given signals or told people to stay back from the crossing. It shows that other employees of the Chicago & Alton Railway Company, occupying the same position as

a given person has a right to travel on that train, or to be in a particular place upon it,² or to the disposal of a person who has been so severely injured by it that he is incapable of caring for himself.³

Rechter, had given signals to travelers to cross these tracks at the street crossing, and it is in evidence that it was the duty of Rechter and other yard conductors to protect the trains and property when making street crossings; and, indeed, it would be an unreasonable restriction of the authority of these yard conductors who superintend the making up of trains and have control of them while in their yards, if they were not authorized to say to people about to cross the tracks at a street crossing, that it was or was not safe to cross, and we think there is substantial evidence tending to show that Rechter was acting within the scope of his employment when he signaled the motorman (if he did signal him) to cross the tracks, and the court did not err in directing the jury, by an appropriate instruction, to find whether or not he was acting within the scope of his employment at the time he gave the signal."

In *Pettit v. Great Northern R. Co.* (1895) 62 Minn. 530, 64 N. W. 1019 (trespasser run over), it was held that an instruction submitting to the jury the question of a conductor's power, authority, and right to check the speed of a train, was authorized by evidence of the engineer that the conductor was fully in control as to the movement of the train backward and forward, although the engineer and the brakeman were in fact controlling the movements of the engine at the time.

In *Rhinesmith v. Erie R. Co.* (1909) 76 N. J. L. 783, 72 Atl. 15, where the plaintiff was struck by a fragment of a torpedo placed upon the track by the conductor of a freight train, the contention that his act could not be imputed to the company because its rules expressly prohibited the placing of torpedoes at the spot in question was rejected.

² See cases cited in § 2352, *post*.

³ In *Northern C. R. Co. v. State* (1868) 29 Md. 420, 96 Am. Dec. 545, the plaintiff's decedent had been run over at a crossing, and, being erroneously supposed by them to be killed, had been deposited in a shed and locked up,

without anyone to look after him in the event of his being still alive. While lying in the shed, he recovered consciousness, but ultimately died from loss of blood. Held, that the plaintiff was entitled to recover damages for his death. The court said: "From whatever cause the collision occurred, after the train was stopped, the injured man was found upon the pilot of the defendant's engine, in a helpless and insensible condition, and it thereupon at once became the duty of the agents in charge of the train to remove him, and to do it with a proper regard to his safety and the laws of humanity. And if, in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby the death was caused, there is no principle of reason or justice upon which the defendant can be exonerated from responsibility. To contend that the agents were not acting in the course of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no farther than to have cast off by the wayside the helpless and apparently dead man without taking care to ascertain whether he was dead or alive, or, if alive, whether his life could be saved by reasonable assistance, timely rendered. For such a rule of restricted responsibility no authority has been produced, and we apprehend none can be found. On the contrary, it is the settled policy of the law, 'to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers.' 1 Redf. Railways, 510." The reasoning by which this decision was sustained seems to have been perfectly satisfactory. It would certainly have been most deplorable if the court had failed to discover any juristic ground upon which the responsibility for conduct so inhuman could be imputed to some party who was financially capable of paying an adequate indemnity. In *St. Louis Southwestern R. Co. v. Mayfield* (1904) 35 Tex. Civ. App. 82, 79 S. W. 365, a

b. Brakemen.—A brakeman may justifiably be found to be acting within the scope of his employment when he misplaces a switch;⁴ or handles a piece of baggage in such a manner as to injure a person lawfully on a station platform;⁵ or runs against a person beside the track while he is hastening back from a restaurant to resume his place on a train;⁶ or throws from a moving train something which he might have occasion to remove from the car in the course of his employment.⁷

c. Porters on cars.—In one case the trial judge was held to have properly ruled, as a matter of law, that a sleeping car company was not liable for the injuries of a person who had been struck by a bundle of personal effects which a porter had thrown out of one of its cars.⁸

d. Baggage masters.—It has been held that a baggage master is

different conclusion was reached under circumstances somewhat similar, and, if possible, more atrocious, the company being held not liable for the acts of trainmen in carrying off an injured trespasser, against his will, to a place where he had no friends, and there leaving him on a station platform. The *ratio decidendi* was that no facts were pleaded which, if proved, would have showed that the acts complained of were within the scope of the employment of the tort-feasors. Those acts were viewed by the court as being presumptively wilful and malicious in such a sense as to negative the company's liability. The Maryland case was apparently not brought to the attention of the court.

⁴ *Patterson v. Wabash, St. L. & P. R. Co.* (1884) 54 Mich. 91, 19 N. W. 761, (injury inflicted on passenger on a train operated by another company using same road as defendant).

⁵ In *Atchison, T. & S. F. R. Co. v. Johns* (1887) 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237, a brakeman and two section foremen, while engaged in moving a trunk to a baggage car, sent it sliding over an ice covered platform so as to strike the plaintiff, who had come to the station to see some friends off. They were performing this duty in the presence of other servants, and had performed similar services on previous occasions. Held, that it would be presumed that they were acting within the scope of their authority.

⁶ *Missouri, K. & T. R. Co. v. Edwards*

(1902) — Tex. Civ. App. —, 67 S. W. 891 (person run against was thrown under the train).

⁷ *Willis v. Maysville & B. S. R. Co.* (1907) 122 Ky. 658, 92 S. W. 604, 13 Ann. Cas. 74. There the plaintiff, a boy standing on a street crossing, was injured by a piece of ice which the brakeman had intended to give to a section man, but which slipped off the platform while he was pushing it with his foot. The evidence tended to show that it was his duty to look over the train and keep it in proper order, and that this duty embraced the removal of abandoned and refuse matter. Commenting upon this state of facts, the court said: "It appears from the testimony of the brakeman, Truett, that it was his duty to provide the train crew with ice water, and though without express authority to get the ice for that purpose from the refrigerator car, the fact that it had been abandoned, and left to melt and waste by the owner—if owned by another than appellee Chesapeake & Ohio Railway Company—did not make it improper for the brakeman to appropriate it to the use of the train crew, or remove the act of his doing so without the scope of his employment." The earlier appeal upon which a verdict directed for the defendant had been set aside is reported in (1905) 119 Ky. 949, 85 S. W. 716.

⁸ *Walton v. New York C. Sleeping Car Co.* (1885) 139 Mass. 556, 2 N. E. 101. A different rule is applicable if the employer is aware that servants are

not acting within the scope of his employment when he goes, at the invitation of an express messenger, into the latter's compartment, for the purpose of having some fun with a boy by frightening him;⁹ nor when he conveys an article upon a car, for the accommodation of a third person, gratuitously and without the knowledge of his employer;¹⁰ nor when he renders assistance in handling the tools

in the habit of doing acts of this kind, and sanctions the custom. See § 2223, note 3, *ante*.

⁹ *Louisville, N. O. & T. R. Co. v. Douglass* (1892) 69 Miss. 723, 30 Am. St. Rep. 582, 11 So. 933 (boy, being alarmed, jumped off the moving train). Certain instructions given for the plaintiff were held to be erroneous for the reason that they failed to indicate the distinction that if the baggage master was not about the company's business when he left his own compartment, the company could not be made responsible for his wrongful acts, but that such responsibility would be predicable if he went into the other compartment on his employer's business, and for the purpose of performing some duty in respect of the boy.

¹⁰ In *Walker v. Hannibal & St. J. R. Co.* (1894) 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360, where a railroad company was held not to be liable for injury to a person struck by a drill thrown from a car by a baggageman, the court stated its conclusions as follows: "The evidence shows that the baggageman in the case at bar was a special agent, having no general power, and that his duties were to look alone after the baggage of passengers. Carrying the drills which occasioned the injury was not within the line of his employment. It necessarily follows that the defendant cannot be held responsible for any injuries occasioned by the negligent handling of them, unless it was done by the direction of defendant's officers and agents, or with their knowledge and consent, and for the benefit of defendant corporation. . . . The evidence did not show that the officers of the defendant knew that the baggage man was in the habit of carrying the drills for the lime company, that they consented to it, or that it came within the line of his duty to do so, but it did show to the contrary. If it has been shown that the baggageman had been in the habit of

carrying the drills and putting them off at Bear Creek Station by and with the knowledge and consent of defendant's officers and its agents, authority to do so might be inferred therefrom. *Edwards v. Thomas*, 66 Mo. 468. But he was also, at the same time, agent for an express company, and his conduct in handling the drills was as consistent with the one service as the other. Moreover, he testified that he was not acting as baggageman in handling the drills; that he did so gratuitously, merely as an accommodation to the plaintiff, and the evidence of the plaintiff himself tended strongly to show that such was the case. The mere fact that the baggageman handled the drills was no evidence, of itself, that he was doing so in the capacity of baggageman, and was no notice to defendant. In order to make defendant liable for the act of the baggage man for acts of negligence committed not in the line of his employment, it must be shown that he either had express authority to transact the business connected with the injury, or that defendant, by its officers, knew that he, as its agent was so engaged for such a length of time as would justify the presumption that he was authorized to so act. It was not enough that the conductor, Hance, had knowledge that the baggage man was in the habit of carrying the drills from Withers' Mill and putting them off at Bear Creek Station for the lime company, for, as has been said, the conductor had no control whatever over him, and notice to him was not notice to the defendant company." A special point urged by plaintiff's counsel was that the defendant's ticket agent at the station where the drills were placed on the train had shipped them of his own accord, without any solicitation by the plaintiff, and with the acquiescence, if not permission, of the company; that in so shipping them he was in the line of his employment in such a sense as to render his act that of the company, and

of an independent contractor who, merely as a matter of convenience to himself, is permitted to carry them on a train to the places along the line where they are to be used.¹¹

e. Engineers.—An engineer is deemed to be acting within the scope of his duty when he fails to comply with a statute, municipal ordinance, or rule of his employer which requires him to reduce speed or sound his whistle at certain points on the line;¹² when he sounds his whistle or allows steam to blow off in such a manner as to frighten horses or other animals;¹³ when he permits sparks to escape so as to kindle a fire on the premises of the railway company

that it was estopped to deny that he had acted without its knowledge and authority. The court said: "That this position is correct with respect of the acts of a station agent clothed with the power to receive and forward freight, and who acts within the scope of his authority, seems to be well-settled law. *Harrison v. Missouri P. R. Co.* 74 Mo. 370, 41 Am. Rep. 318, and authorities cited. But there was not one scintilla of evidence which showed, or tended to show, that the drills were sent as freight, or that Stover had any authority to send them as such, or in any other way, on defendant's passenger trains."

¹¹ In *Cunningham v. Grand Trunk R. Co.* (1871) 31 U. C. Q. B. 350, the plaintiff was in the employment of one C., who had contracted with the defendants for fencing their right of way. On the day of the accident he was taking two crowbars to a point where his men were at work. As the train passed the spot, C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. C. testified that he himself had charge of the bars; that it was his business to put them on and take them off the car; that the baggageman had nothing to do with him, nor any right to meddle with his tools; and that he did ask him to put the bar out. Held, that the defendants were not liable for the injury, as the evidence showed that the baggage man was, in respect of the handling of the bar, either a volunteer, acting without any authority from his employers, or a servant *pro hac vice* of the contractor.

¹² *International & G. N. R. Co. v. Gray* (1885) 65 Tex. 32 (train ran

into a handcar on which the plaintiff was traveling with the defendant's permission).

¹³ *St. Louis & S. F. R. Co. v. Cavender* (1910) 170 Ala. 601, 54 So. 54; *Hahn v. Southern P. R. Co.* (1871) 51 Cal. 605; *Burton v. Philadelphia, W. & B. R. Co.* (1845) 4 Harr. (Del.) 252 (charge to jury); *Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 299, 95 Am. Dec. 489; *Chicago, B. & Q. R. Co. v. Dunn* (1869) 52 Ill. 451; *Indianapolis Union R. Co. v. Boëtcher* (1891) 131 Ind. 82, 28 N. E. 551; *Culp v. Atchison & N. R. Co.* (1877) 17 Kan. 475; *Illinois C. R. Co. v. Martin* (1908) 33 Ky. L. Rep. 666, 110 S. W. 815; *Stamm v. Southern R. Co.* (1876) 1 Abb. N. C. 438; *Philadelphia, W. & B. R. Co. v. Brannen* (1886) 1 Sadler (Pa.) 369, 17 W. N. C. 227, 2 Atl. 429; *Philadelphia, W. & B. R. Co. v. Stinger* (1875) 78 Pa. 219; *Pennsylvania R. Co. v. Barnett* (1868) 59 Pa. 259, 98 Am. Dec. 346; *Hargis v. St. Louis, A. & T. R. Co.* (1889) 75 Tex. 19, 12 S. W. 953; *Gulf, C. & S. F. R. Co. v. Box* (1891) 81 Tex. 671, 17 S. W. 375; *O'Dair v. Missouri, K. & T. R. Co.* (1896) 14 Tex. Civ. App. 541, 38 S. W. 242; *International & G. N. R. Co. v. Yarbrough* (1897) — Tex. Civ. App. —, 39 S. W. 1096; *Missouri, K. & T. R. Co. v. Traub* (1898) 19 Tex. Civ. App. 125, 47 S. W. 282 (writ of error denied by Supreme Court); *Texas & P. R. Co. v. Moseley* (1900) — Tex. Civ. App. —, 58 S. W. 48; *Adams v. International & G. N. R. Co.* (1909) — Tex. Civ. App. —, 122 S. W. 895.

As to the liability of a railway company in cases of this description, where the malice of the actual tort-feasor is an element, see § 2379, *post*.

or of some third person; ¹⁴ when he runs his engine against animals trespassing on the track; ¹⁵ when in an emergency he takes such steps as may seem advisable for the purpose of replenishing the water in the boiler; ¹⁶ and when, in accordance with a custom acquiesced in by his master, he uses his engine for the conveyance of other employees to the place where they take their meals.¹⁷

On the other hand, the company is not responsible for the conse-

¹⁴ *Haywood v. Hendrick* (1883) 94 Ind. 340 (fire spread from the right of way in this case); *St. Louis Southwestern R. Co. v. Miller* (1901) 27 Tex. Civ. App. 344, 66 S. W. 139 (cotton lying on railway platform was burnt).

¹⁵ *Vicksburg & J. R. Co. v. Patton* (1856) 31 Miss. 156, 66 Am. Dec. 552; *Cincinnati & Z. R. Co. v. Smith* (1871) 22 Ohio St. 227, 10 Am. Rep. 729; *Crawford v. Southern R. Co.* (1899) 56 S. C. 136, 34 S. E. 80.

In *Illinois C. R. Co. v. Middlesworth* (1868) 46 Ill. 494, a railroad company was held liable for the act of its engineer in running upon and killing some stock upon the track under circumstances which were deemed to show great negligence or even recklessness. The court said: "It is not unfrequent that . . . they [engineers] intentionally rush their machines into a crowd of animals with no other thought but to see how many they can kill, like a sportsman shooting into a flock of quails, and boast of their skill afterwards. . . . A spirit of recklessness seems to have been engendered among them. . . . It may be said these corporations must take men as they find them and none are perfect; yet there is a vast difference in the qualities of men engaged in the same pursuit, and all proper means should be used to provide the best. There is always a choice, and it ought to be incumbent on railroad companies to make the best choice without regard to compensation of men to whom the public are obliged to intrust their property and lives, and all that is dear to them." It is not clear why the court adverted to the duty of the defendant to hire careful employees. Its liability was obviously independent of this factor, whether the conduct of the engineer was

merely negligent, or, as under the evidence would apparently have been warrantable, was wilful and deliberate.

¹⁶ In *Gross v. Pennsylvania, P. & B. R. Co.* (1891) (Sup. Ct. Gen. Term) 42 N. Y. S. R. 808, 16 N. Y. Supp. 616, an engineer employed on a section of line which was operated on the "train-staff system," having found at a certain station that the supply of water in the locomotive was insufficient, received, in answer to a message sent by the station agent to the train despatcher, permission to run to the nearest place where water could be procured. In violation of the rules regarding the train staff, he started on the run without having it in his possession to give him the right of way, and was met by another train belonging to a different company. The engineer of that train, believing a collision to be unavoidable, reversed his locomotive and jumped off. Held, in an action by him for the injuries so received, that the trial judge had properly left it to the jury to say whether the defendant's engineer was within the scope of his duties in applying for leave to make the run.

¹⁷ *East St. Louis Connecting R. Co. v. Reames* (1898) 173 Ill. 582, 51 N. E. 68, affirming 75 Ill. App. 28 (*ratio decidendi* was that, under such circumstances, the car was not being used for a private purpose of the servants in which the defendant had no interest); *Reilly v. Hannibal & St. J. R. Co.* (1887) 94 Mo. 600, 7 S. W. 407 (acquiescence of company held to be inferable from evidence that the engine had been so used in an open and notorious manner from six weeks to three months, with the knowledge of the yard master, and that the superintendent had frequently seen it so used).

quences of his unauthorized use of the locomotive for the accommodation of a third person,¹⁸ or for his own amusement.¹⁹

f. Firemen.—Actions have been held to be maintainable in respect of the negligence of a fireman in frightening animals by letting off steam, while he is temporarily in charge of a locomotive;²⁰ in dropping upon a right of way covered with dry grass a blazing log of wood, found to be too large for the firebox of the locomotive;²¹ and in throwing out pieces of the fuel at places where persons may be expected to be standing or walking near the track.²²

g. Servants in yards.—The right of the plaintiff to recover damages has been affirmed where certain yard hands (description not specified) of the defendant allowed one of the cars in a train which they were making up to run against a car repairer in the employ of another company using the same yard;²³ where a switchman in the

¹⁸ In *New York, T. & M. R. Co. v. Sutherland* (1886) 3 Tex. App. Civ. Cas. (Willson) 177, where the engineer, after having been expressly directed not to take his engine out during the night, violated this order for the purpose of conveying the coffin of a person who had shortly before died at a place a few miles down the line.

¹⁹ In *International & G. N. R. Co. v. Cooper* (1895) 88 Tex. 607, 32 S. W. 517, reversing (1895) — Tex. Civ. App. —, 30 S. W. 470, it was held that the company was not liable for an injury to a boy riding on the tender of a freight train by the consent of the engineer and fireman, who, as a practical joke, turned hot water upon him through a hose inserted in his pocket, under the belief that cold water would be discharged.

²⁰ *Andrews v. Mason City & Ft. D. R. Co.* (1889) 77 Iowa, 669, 42 N. W. 513 (jury warranted in finding that the fireman was, by the general orders given him, authorized to use his judgment in taking care of the engine).

Compare cases cited in note 14, *supra*.

²¹ *Spaulding v. Chicago & N. W. R. Co.* (1873) 33 Wis. 582. In that case stress was laid upon the fact that firemen were in the habit of throwing out wood which was found to be too large for the fire boxes. But it is apprehended that the right of recovery under the given circumstances is not dependent upon the presence of this evidential

factor. Compare cases cited in note 15, *supra*.

²² In *Louisville & N. R. Co. v. Eaden* (1906) 122 Ky. 818, 6 L.R.A.(N.S.) 581, 93 S. W. 7, where a woman standing on a crossing was struck in the eye by ashes and embers out of the fire box, a verdict against the railway company was sustained.

In *Savannah, F. & W. R. Co. v. Slater* (1893) 92 Ga. 391, 17 S. E. 350, the plaintiff, while in his proper place on a crossing, had been injured by a stick of wood which either fell or was thrown from the tender of a passing locomotive on the defendant's railway, and there was no evidence tending to show that the stick was wilfully or maliciously thrown at him. Held, that the case was one resting on the doctrine of negligence, either in permitting the stick to fall, or in casting it from the tender without due caution and circumspection, and that an instruction covering, and not going beyond, these elements, was proper. That the negligence was chargeable to the company's employees while acting within the scope of their duties was held to be, under § 3033 of the Code, a necessary inference in the absence of any evidence to the contrary.

²³ *Rhodes v. New York C. & H. R. R. Co.* (1894) 8 Misc. 366, 59 N. Y. S. R. 596, 28 N. Y. Supp. 691, affirmed without opinion in (1896) 149 N. Y. 586, 44 N. E. 1128; *Murphy v. New York C. & H. R. R. Co.* (1887) 44 Hun, 242.

employ of one company so carelessly manipulated a switch as to cause one of its trains to run onto a siding then occupied by another company's train; ²⁴ where a switchman failed to prevent cars from striking a person whom he saw to be dangerously close to a track where switching was in progress; ²⁵ and where a yard master, while engaged in his appointed duty of inspecting freight cars in order to see that they were properly loaded and stoked, broke off one of the stakes of a flat car loaded with timber, and thus caused several heavy pieces to fall on a man in the employ of a shipper ²⁶

On the other hand, the liability of the defendant has been denied in a case where the injuries resulted from the attempt of a yard hand to stop a runaway horse. ²⁷

2303. Servants engaged in the construction or repair of the permanent way.—(See also next section.) A railway company is liable for injuries caused by the negligence of section men in respect of any acts which are incidental to their normal function of keeping the roadbed in a safe and proper condition for the passage of trains, ¹

²⁴ *Tierney v. Syracuse, B. & N. Y. R. Co.* (1895) 85 Hun, 146, 32 N. Y. Supp. 627.

²⁵ *Texas & N. O. R. Co. v. Scarborough* (1907) — Tex. Civ. App. —, 104 S. W. 408, affirmed in (1908) 101 Tex. 436, 108 S. W. 804 (only points of procedure discussed).

²⁶ *Pollard v. Maine C. R. Co.* (1894) 87 Me. 51, 32 Atl. 735. Commenting on an instruction requested, but denied, by which the jury would have been in effect told that the fact of the car's not having been formally reported as ready for shipment by the shipper, in accordance with a custom of the railroad company, would conclusively show that the yard master was not within the scope of his employment in testing one of the stakes, the court said: "Whether the plaintiff had intended to make a formal report of this car or not, it is a clear inference from all the evidence, including the entries in the shipping book and the conduct and statement of the parties at the time, that Howard understood that the car was to be ready to go on the morning of the accident. The work of loading the lumber on the car had in fact been completed. Howard had, in fact, inspected the car, condemned some of the stakes, and ordered new ones to be substituted for them, and the plaintiff had acquiesced in this de-

cision. There was no controversy that, to this extent at least, Howard had assumed control of the car. But it had not been definitely determined that all of the stakes on both sides should be removed as defective, and, for the purpose of confirming his suspicion and proving his assertion that the stake in the northwest corner was insufficient, Howard impulsively tested it in the manner stated. . . . With these facts and circumstances undisputed, the question whether the yard master, in thus testing the stake, was acting within the scope of his employment and the line of his duty, could not be properly determined by sole reference to the inquiry whether the car had been formally reported as ready for shipment. The nature of Howard's employment, the character of the service required, the character of the act done, the circumstances under which it was done, and the ends and purposes sought to be attained, were all material considerations and constituted the real test of liability."

²⁷ *San Antonio & A. P. R. Co. v. Belt* (1898) — Tex. Civ. App. —, 46 S. W. 374 (buggy was overturned).

¹ In *Mobile & O. R. Co. v. Stinson* (1896) 74 Miss. 453, 21 So. 14, 522, where a fire lighted on the right of way to clear off grass and weeds spread

or to any occasional duties the performance of which is imposed upon them either by the standing regulations of the company,² or

to the plaintiff's premises, the court, in upholding a verdict in his favor, said that judicial notice would be taken of the fact that it is the duty of a section master to keep both the track and the right of way in proper condition. The above case was followed in *Baldwin v. Alabama & V. R. Co.* (1910) 96 Miss. 52, 52 So. 358, where the circumstances were different in this respect, that the fire which caused the damage originated in one which the section men had lighted for the purpose of cooking their food. It was held that the trial judge had properly refused to instruct the jury that, under such evidence, they should find for the defendant. The court said: "It was the duty of the section master to supervise the right of way, keep it in proper condition, so that fires would not extend from it to the property of others, and extinguish such fires when set out. The record in this case sufficiently shows such to be among his duties; and, if it did not, it is a matter of common knowledge, of which the court will take judicial notice. . . . So that, in setting out the fire and in failing to extinguish it, even though it was done for their own private purposes, the section foreman and hands were acting within the scope of their authority. They were engaged about the business of their master. They were required not to do the very thing they did do, if dangerous to the property of others." The court distinguished *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952 (see note 8, *infra*), on the ground that the decision was founded upon the consideration that there was no evidence of the imposition of any general duty upon the section men concerned to extinguish fires on the right of way.

In *Tinker v. New York, O. & W. R. Co.* (1893) 71 Hun. 431; 24 N. Y. Supp. 977, a railroad company was held to be liable for the act of employees who, after having repaired a cattle guard at a railroad crossing, left some of the weather-beaten timbers lying at the side of the highway in such a position as to be likely to frighten passing horses.

In *Forsythe v. Canadian P. R. Co.* (1905) 10 Ont. L. Rep. (C. A.) 73, a number of worn out ties were piled by a

highway crossing, the foreman of the section men, intending to take them to his house for firewood. It was the custom of the section men to get rid of worn-out ties, either by burning them beside the track, or by taking them home for firewood. The plaintiff's horse, while being driven along the highway, shied at the ties and the plaintiff was injured. Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men, and that the defendants were therefore prima facie responsible; but that, there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses generally, and this being an essential element of liability, a new trial was necessary. In delivering the judgment of the court, Garrow, J. A., observed that the employment or duty of the section men was to get rid of the ties which had ceased to be useful, and that by either of the methods suggested by the evidence the defendants' purpose would have been accomplished. Dealing with the contention based upon the intentions of the section boss as to the disposal of the ties, the learned judge observed: They "were the property of the defendants, and there is no evidence to shew that they had ceased to be their property when placed on the highway, even assuming what was certainly not proved, that Dunlop, who was not called, intended to afterwards remove them to his own house. The work was done by the defendants' workmen during their ordinary working hours, and under the superintendence of the section boss, and apparently in good faith. Under these circumstances, I think the plaintiff made out a prima facie case, and the issue was properly for the jury."

² In *Baxter v. Chicago, R. I. & P. R. Co.* (1893) 87 Iowa, 488, 54 N. W. 350, it was held that where the duties of section men are shown to include the removal of the carcasses of animals from the track (as is presumably the case on every line of railway), the company might be found liable for negligence in depositing a carcass near a highway in such a position as to frighten a passing horse. The fact that the

by the command of a superior employee having authority to give them directions with regard to the matter in question.³

On the other hand, the action was held not to be maintainable in cases where a section gang built a dam on a stream about 600 feet

laborers in question were not employed on the particular section where the steer was found dead on the railway track would not, it was considered, relieve the company from liability for such an act, since it was their duty to clear the track of obstructions at that point, if known to them. Such a duty would carry with it the obligation of properly discharging it; so far, at least, as to refrain from creating a nuisance.

In *Chapman v. New York C. R. Co.* (1865) 33 N. Y. 369, 88 Am. Dec. 392, affirming (1860) 31 Barb. 399, where a section hand took down some bars in the railway fence, after the close of his regular working hours, and for a purpose of his own, the result being that some of the plaintiff's horses went through the opening and were killed by a team, his employers were held liable on the ground that, under his contract of hiring as a day laborer, he might be called upon in case of accident to perform extra labor, and if at any time after his day's labor was over he saw anything amiss, was required to give necessary attention to it without being specially directed so to do. Under these circumstances his failure to replace the bars was a breach of a continuing duty, and therefore constituted negligence within the scope of his employment. The court said: "If the bars had been taken down by others, and Ryan, occupying the relation he did to the company, had seen them, or had been notified, there can be no doubt but it would have been his duty at once to have put them up. That he took them down himself can make no difference. The neglect of duty was in leaving them down."

³ In *Atchison, T. & S. F. R. Co. v. Randall* (1888) 40 Kan. 421, 19 Pac. 783, a cattle train had, through an unavoidable accident, been derailed, and in order to clear away the wreck it was necessary to release the cattle from two or three of the cars. Some of the cattle so released escaped from control and ran over the public highway and through adjoining fields. The railroad

company's claim agent, whose duty it was to look after the cattle and see that they were returned to the company for reloading, instructed the section foreman to get some men to collect the cattle and reload them. He employed a young man to assist in rounding up and driving back the cattle, and told him to get a horse, if he had one, to aid in their work. The young man took the horse of his father, without the latter's knowledge or consent, and while he was using it for the work assigned to him, it was severely gored by one of the cattle. Held, that as the section foreman and young man were acting in the company's business, although in taking and using the horse they were beyond their instructions, the company was liable for the injury thus inflicted. The court said: "There is no pretense that either Landry or Randall was endeavoring to do anything for himself. It is scarcely possible that young Randall could have used the mare as he did, in rounding up and driving the cattle, without being seen by Mr. Foulks, who had full authority to represent the company. The mare used by Randall was useful in recovering and driving the cattle, and all of the acts done by Landry and Randall were done by them in the prosecution of the business of the company. It is not to be relieved because Landry departed from his instructions in collecting and driving the cattle. The test of the master's responsibility for the act of his servant is not whether the act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do. It is true that Mr. Foulks instructed Landry to get men, not horses, to assist in driving and reloading the cattle; but young Randall did not know the limit of Landry's instructions. He acted upon the request of Landry, and his acts, as well as those of Landry, were in the furtherance of the company's business."

away from the track, and so caused the water to overflow the plaintiff's land; ⁴ where a young boy who had been taken out on the line by the foreman of a gravel train, and had expressed a wish to return home, was injured in attempting to follow his advice to get on a train which was just then approaching; ⁵ where a fire had been caused by the negligence of a member of a construction gang in a sleeping

⁴ *Axtell v. Northern P. R. Co.* (1903) 9 Idaho, 392, 74 Pac. 1075. Commenting upon an instruction to the effect that a master is liable for the wrongful acts of his servants, done in the course of their employment, though he did not know of their acts, or may have forbidden them, the court said: "We do not understand it to be the law, in such cases as this, that the master is liable for the wrongful acts of his servants when those acts have been expressly forbidden by the master. If, as contended by plaintiff, the persons who committed the wrong complained of in this action were the employees of the defendant, they were, according to plaintiff's theory, section hands, whose business it was to work on and about the defendant's railway track and right of way; and, if that be true, it must be conceded that they were out of and beyond the usual line of their employment when committing the acts complained of by the plaintiff." That the instruction criticized needed some qualification, and was misleading in the form in which it was given, may be conceded. But the writer ventures to express his dissent from the view which the language of the court seems to embody, *viz.*, that, under the evidence as stated, the company was, in point of law, not liable. That evidence, it is submitted, was susceptible of the construction that the section men were chargeable merely with an improper exercise of their appropriate function of keeping the track in a safe condition, and not with the undertaking of a function entirely outside the scope of their contract.

⁵ *Keating v. Michigan C. R. Co.* (1893) 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346. The court said: "Can it be said that Conners was in the line of his duty, or acting within the scope of his employment, in the direction which he gave? No act required of him as foreman or agent of the defendant, no act done or thing omitted by him, or by the other serv-

ants of the company in the prosecution of their work, caused plaintiff's injury. Neither the condition of the work, nor the manner of its doing, was the cause of the accident. To construct the side track was within the scope of Conners' employment, and doubtless any injury inflicted upon the plaintiff recklessly or negligently, in connection with any service which he was performing for the company, might be redressed in an action against the principal; but the principal is not responsible for bad advice by its roadmaster or servants, whose duties do not include the giving of counsel or advice generally, and when such advice relates to the conduct of another not connected with or relating to the business with which the servant is at the time connected. In this case the management of the train by the instrumentality of which plaintiff was injured was entirely foreign to the employment of the servant Conners. . . . In determining whether this was in the line of Conners' employment the fact that the reckless act induced by his advice was the boarding of a moving train of cars with which he had nothing to do, and with the control of which he had not been intrusted, puts no different phase on his act than would be present in case any equally reckless conduct had been advised, although such conduct had no relation to the trains of defendant. Suppose that Conners had advised plaintiff to grasp a live electric wire, or to embark in dangerous waters, in a frail skiff,—would the railroad company, because Conners was employed to grade this side track, and because the advice was given while the boy was on the company's grounds, be answerable for the wrong? We think not. The act was the act of Conners alone, outside of every requirement of his duty. If the plaintiff's testimony presents the true state of facts, Conners was guilty of surprising recklessness, little less blamable than would have been the act of pushing the boy toward or under the

car in which he was spending the night, after having returned from his day's work;⁶ where the foreman of a bridge gang had thrown from a moving construction train a water cooler belonging to him;⁷ where a fire made by section men on the right of way to warm their coffee had been allowed to spread onto the adjacent premises (a decision of dubious correctness);⁸ and where the child of the plain-

passing car; but, as the act was disconnected from any duty that he was performing for the railroad, there was no liability on its part for the resulting injury. See *Chillicothe ex rel. Matson v. Raynard* (1883) 80 Mo. 185. This case does not involve, as we view it, the same principle which has been applied in the class of cases, some of which are cited by plaintiff's counsel [Counsel cited *Lynch v. Nurdin* (1841) 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; *Powers v. Harlow* (1884) 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Birge v. Gardner* (1849) 19 Conn. 507, 50 Am. Dec. 261; *Keffe v. Milwaukee & St. P. R. Co.* (1875) 21 Minn. 207, 18 Am. Rep. 393; *Sioux City & P. R. Co. v. Stout* (1874) 17 Wall. 657, 21 L. ed. 745], where injury has resulted from leaving a dangerous substance exposed, or leaving a pitfall for others, or leaving dangerous machinery in a position where children, acting upon childish instincts, have attempted its use to their injury. These cases, of which *Powers v. Harlow* (1884) 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, is an illustration, are distinguishable. Here there was no fault in the management of the train. The passing of the train was a condition, Conners' wrongful advice the cause, of the injury. Nor do the cases which hold that the servant in charge of machinery, after the discovery of the presence of another, though he be a trespasser, is bound to use precautions to prevent any injury, apply, if we are correct in holding that the proximate cause of the injury was not any fault of the agents of the defendant in charge of the freight train, but the wrongful and negligent act of Conners, outside the scope of his employment."

⁶ *Southern R. Co. v. Power Fuel Co.* (1907) 12 L.R.A.(N.S.) 472, 82 C. C. A. 65, 152 Fed. 917 (kerosene lamp was overturned and caused fire which spread to plaintiff's property). The defendant's nonliability, as inferred from the

fact that the negligent servant was not, at the time when the fire was started, engaged in performing any duty as a servant (see 2288, *ante*), was held to be predicable both at common law and under the South Carolina statute (Code 1902, § 2135), which imposes liability upon railroad companies for damages caused by fires originating on their premises. See § 2262, *ante*.

⁷ *St. Louis Southwestern R. Co. v. Bryant* (1907) 81 Ark. 368, 99 S. W. 693. The decision was based on the ground that there was no evidence tending to show that it was in the line of the foreman's duty to provide appointments for the cars. Compare case cited in § 2302, *c. ante*.

⁸ *Morier v. St. Paul, M. & M. R. Co.* (1884) 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952. There was no evidence that the company was boarding the men, or that it was any part of its duty to prepare their meals, or that it either knew of or authorized the kindling of a fire for any such purpose as the one in question. Nor is there any evidence that it was the duty of these section men to exercise any supervision over the right of way, or to extinguish fires that might be ignited on it. The conclusion of the court, as stated in its syllabus, was "that, in kindling this fire to warm their meal, the men were not acting in the course of or within the scope of their employment in connection with the company's business, but, for the time being, were acting for themselves and as their own masters, and exclusively pursuing their own ends; and hence the act was their own personal act, and not that of the company. Neither was it material that the section foreman assisted in or directed the act. In doing so he was as much his own master and doing his own business as were the section men." In the opinion we find the following remarks: "For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in

tiff, a section foreman, was infected with smallpox by the child of another section foreman, whom he had brought into the section house after it had been near a person suffering from the disease.⁹

In one case the liability which was imputed to the defendant in respect of the act of a trackman in throwing from a moving train a piece of wood which he intended to make use of for his own purposes was predicated on the ground that, although this was disconnected from his duties, there was evidence tending to show that it was done in pursuance of a custom authorized by the defendant's agents.¹⁰

2304. Servants whose work involves the use of hand cars.—The liability of a railway company has been affirmed in cases where section men placed a hand car over a highway in such a position as to frighten a horse;¹ where a car under the control of a section foreman in the employ of the defendant company, was, for the purpose of avoiding an obstruction, transferred by him to the track of another company, and subsequently came into collision with a car operated by section men in the employ of the latter company;²

their own business, as much as they were when eating their dinner; and were, for the time being, their own masters, as much as when they ate their breakfast that morning, or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire, the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment, than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See *Williams v. Jones* (1864) 3 Hurlst. & C. 256, 33 L. J. Exch. N. S. 297. The fact that the section foreman assisted in or even directed the act does not alter the case. In doing so he was as much his own master and doing his own business as were the section men. Had it appeared that it was part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of *Chapman v. New York C. R. Co.* (1865) 33 N. Y. 369, 88 Am. Dec. 392 [see note 2 *supra*], be considered the negligence of the defendant. But nothing of the kind

appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability." But there seems to be no valid reason why judicial notice should not have been taken of facts so notorious as those adverted to. See note 1, *supra*. It would be difficult to find in the reports a more striking illustration of the singular perversity which has so often led courts to disclaim an acquaintance with matters that are perfectly well known to every reasonably intelligent "man in the street." But apart from this objection, the decision is open to the criticism that the negligent act complained of, even if it was not within the scope of the servants' employment, in the sense in which that phrase is ordinarily used, was certainly incident to their employment in the sense explained in the case cited in § 2316, note 3, *post*.

⁹ *Melody v. Missouri, K. & T. R. Co.* (1910) — Tex. Civ. App. —, 124 S. W. 702.

¹⁰ *Fletcher v. Baltimore & P. R. Co.* (1897) 168 U. S. 135, 42 L. ed. 411, 18 Sup. Ct. Rep. 35. See further as to this case, § 2223, note 3, *ante*.

¹ *Sherman, S. & S. R. Co. v. Bridges* (1897) 16 Tex. Civ. App. 64, 40 S. W. 536.

² *Pittsburgh, C. & St. L. R. Co. v. Kirk* (1885) 102 Ind. 399, 52 Am. Rep.

where, owing to the failure of a section foreman to apply the brakes of his car promptly, a person rightfully on the track was injured;³ where the injury complained of resulted from the misconduct of trackmen who, while on their way to the place of work, propelled a car at an excessive speed for their own amusement;⁴ and where a push car intrusted to the foreman of a gang of laborers engaged in burning up old ties along the line was lent by him to one of the laborers, to be used for carrying away some of the ties for his own use, and by him operated so carelessly, while he was on his way

675, 1 N. E. 849. The court thus dealt with these contentions: "The injury in hand embraces the following considerations: (1) Was the servant at the time engaged in prosecuting the business of the master, with authority, either express or implied, to accomplish in some manner an end then in view, and did the wrongful or injurious act have relation to the consummation of such end? (2) Was the manner chosen by the servant, resulting in the injury complained of, so far incident to the end in view as that it was reasonably, under the circumstances, designed for its attainment? Or was it for some purpose merely personal to the servant, having no relation to or fitness for the accomplishment of the business in which he was engaged? . . . It was part of the section foreman's duty to return with his car, tools, and crew over the defendant's track to the toolhouse near the depot, as well to observe the condition of the track as to have his car and tools there ready for use at 7 o'clock the next morning. The prescribed route was over the track of the railroad in whose service he was. He had no authority to go upon the other, but encountering an obstacle on the line of his employer, either for his own convenience or possibly to accommodate the other servants of the master, and thus make them better disposed toward it and its service, he judged it convenient or expedient, rather than wait until the appellant's line was cleared, to invade the neighboring line, and by that means he attained the end of delivering the car, tools, and crew at their destination. In all this, whatever his motive was, he was pursuing the master's service, that of returning the car, tools, and crew to their appointed place, as was his custom and duty; and

while he pursued the service, in an unauthorized and possibly forbidden way, he and those with him were, during the time, in the relation of servants to the appellant. Concede that, in going off the employer's line, he pursued a course which was beyond his authority, his purpose in doing so was nevertheless to accomplish an end within his employment, and reasonably, as he supposed, fitted to reach that end. . . . In this case it cannot be said that the servant had stepped aside from the master's service for a purpose of his own. The most that can be said of it is that, in accomplishing an end within the scope of his employment, he adopted a method wholly unauthorized, which was possibly resorted to to accommodate himself and those under him; but whatever the motive may have been, since the end aimed at was, as averred in the complaint, and as the judge must have found, within the line of service, it cannot be said upon the evidence that he was acting without authority in a matter not connected with his employment."

³ *Moore v. Central R. Co.* (1878) 47 Iowa, 689.

⁴ *Soderlund v. Chicago, M. & St. P. R. Co.* (1907) 102 Minn. 240, 13 L.R.A. (N.S.) 1193, 113 N. W. 449. The successful plaintiff in this case was one of the trackmen on the car itself, the action having been brought in a state where the doctrine of common employment has been abolished by statute, so far as railway servants are concerned (see § 1788, *ante*). But the maintenance of excessive speed under the given circumstances would clearly have been a breach of duty in respect of which a third person rightfully on the track would have been entitled to claim damages. For further information as to the case, see § 1642, *ante*.

back to return it, that a person who was crossing the track was run over.⁵

⁵ *Salisbury v. Erie R. Co.* (1901) 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117. The grounds upon which the decision was based were thus stated by the court: "The evidence showed that the company had instructed the foreman to run the push car with great caution, always looking out for trains; not to run it within twenty minutes before passenger trains were due; and not to permit it to be used unless accompanied by the foreman, nor run it after dark without special authority from the superintendent of the road. The injury in this case occurred while the Italian was running it after dark. At that time the employment of the Italian by the company was at an end, and he cannot be regarded as the servant of the company. If a master lends his wagon to his servant to carry the servant's property over an ordinary public highway, no one would seriously contend that, while the servant was engaged in his own business, the master would be liable for any injury which resulted from the negligence of the servant. It would not be an injury done in the service of the master, and the master would be under no duty to the public to maintain the safety of the highway. But the railroad company was under a duty to maintain its tracks and the appliances used upon them with reasonable care to protect from injury persons who were lawfully passing over the tracks, or who were being transported upon them. . . . In the case *sub judice* no responsibility of the defendant company can be predicated upon the relation of master and servant between the Italian and the company, as no such relation existed at the time of the alleged negligence. The judgment against the company must rest exclusively upon the failure of the company to perform a duty which it owed to all persons lawfully upon its track in the exercise of due care for their safety, which failure was due to the act of its servant and agent McNamara in loaning the push car to the Italian. The Italian had ceased to be the agent or servant of the company, but the foreman was still its agent and servant. When the company placed the push car in the hands of the foreman, it was the duty of the

foreman to use it with reasonable care to prevent injury to anyone lawfully on the tracks, and to keep it under his own supervision until it was returned to the company. For the performance of that duty by the foreman the company was bound, and the failure of the foreman to perform it was the failure of the company. The company cannot claim immunity on the ground that its servant violated the instructions given to him, any more than it could set up in defense that an engineer had violated the express instructions given to him to ring the bell at a public crossing. The twenty-ninth section of the railroad law (Gen. Stat. p. 2645) provides that the penalty for failing to ring the bell or sound the whistle shall be paid by the corporation owning the road. The obligation to see that the duty is performed is cast upon the owner of the road. The safety of the public demands that the company shall be strictly held to its performance. If the engineer in charge of a train of cars, after he reaches his destination, should lend his train to a friend to take a run upon the road, could it be questioned that for any injury which resulted from its negligent use the company would be responsible? The relation of master and servant would not exist between the borrower and the company upon which to base its liability, but the action would rest upon the responsibility of the company for the observance of due care in the use of the train by its engineer. . . . It is a general rule that where an injury is done by the omission of some act of care which the defendant is under a duty to see performed, the fact of the omission to perform it fixes the liability, and the relation between the defendant and the person who has failed in the due care is immaterial. . . . In this case the relation between the Italian and the defendant company is of no consequence. The question was whether there was an omission on the part of the company to discharge the duty which it owed to the plaintiff to see that reasonable care was observed in the use of the push car on its road." Essentially this decision seems to amount merely to a declaration that the case was governed by the rule that, where an absolute con-

On the other hand, the right of recovery has been denied in cases where the injury complained of was sustained at a time when section men were using a car for their own private business or amusement.⁶

In a case where an employee whose duty it was to operate a steam pump, and who was furnished with a railroad tricycle to procure the necessary fuel along the road, had departed from his employment by going on an errand of his own, beyond the point where he expected to secure fuel, it was held that he resumed his employment when he began to return to that point, and consequently that his employers were liable for his negligent act in running down a pedestrian between the point where he had turned about and the

tinuing duty towards a certain class of persons rests upon an employer, any individual member of that class is entitled to recover against him for injuries resulting from the nonperformance of the duty, even though the servant who started the train of events which ended in the infliction of the injuries may have been guilty of disobedience in doing the thing which rendered those events possible. The question whether the given circumstances were proper for the application of the rule is one of considerable difficulty, and the conclusion arrived at might not be approved by all courts. On the whole, however, the position of the court would seem to be correct.

⁶*Harrell v. Cleveland, C. C. & St. L. R. Co.* (1901) 27 Ind. App. 29, 60 N. E. 717 (plaintiff run over at a crossing); *Sammis v. Chicago, B. & Q. R. Co.* (1901) 97 Ill. App. 28 (section hand, having in his possession a key to a hand-car house and of a switch, took the hand car on the track for his personal pleasure, without any notice to the company, and left it on an open switch, the result being that the engineer, whose train ran in the open switch, was killed).

In *Gulf, C. & S. F. R. Co. v. Dawkins* (1890) 77 Tex. 228, 13 S. W. 982, where the plaintiff, a child, who had fallen from a car in which section men had allowed him to ride, was held not to be entitled to recover, the court remarked: "While the tender years of plaintiff would have excused him, if he had occupied the relation of a passenger to defendant, from the effects of his own

contributory negligence and all rules and regulations applicable to an adult, they cannot be allowed to have the effect of creating that relation."

In *Branch v. International & G. N. R. Co.* (1898) 92 Tex. 288, 71 Am. St. Rep. 844, 47 S. W. 974, the court made the following remarks: "While the law imposes upon a railroad company the duty of operating its road, and requires it to exercise a certain degree of care in such operation to prevent injuring persons at public crossings, it does not estop it from showing that a particular act, not done in its service or by its consent, was not in fact a part of its operation of the road. Whether such act be done by one who, in other matters, is the servant of the company, or by a mere stranger, is wholly immaterial. Whether the company is permitted by law to authorize the operation of its road in whole or in part by another, and, if not, whether it would not be estopped upon principles of public policy from denying that the running of the car by Maloney upon the occasion in question was a part of its operation of the road, in case the pleadings and evidence show, as contended by appellant, that Maloney was accustomed to run the car over the track upon private errands, and that the company knew, or, by the use of reasonable diligence, could have known, thereof, are questions upon which we express no opinion, as they are not included in those certified. For the same reason we express no opinion as to the effect upon defendant's liability of the fact of Maloney's untrustworthiness."

point where the fuel was to be obtained.⁷ This decision should be compared with those cited in § 2298, *ante*.

2305. Other classes of servants on steam railways.—a. Station agents.—Where a station agent, who had been instructed by the company to keep away from the station tramps, and other objectionable persons, found a man asleep in the station, and, after saturating his clothes with benzin, set them on fire, the company was held to be liable for the resulting injuries, although the agent's

⁷ *Barmore v. Vicksburg, S. & P. R. Co.* (1905) 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594. The court said: "In determining whether a particular act is committed by a servant within the scope of his employment, the decisive question is not whether the servant was acting in accordance with the instructions of the master, but, was he at the time doing any act in furtherance of his master's business? If a servant, having completed his duty to his master, then proceeds to prosecute some private purpose of his own, the master is not liable; but if the servant, while engaged about his master's business, merely deviates from the direct line of duty to accomplish some personal end, the master's responsibility may be suspended; but it is re-established when the servant resumes his duty. Even if, in violation of express orders, a deviation from is not an abandonment of the master's service. . . . In the instant case it was the duty of Watson to procure fuel. He was given control and custody of an appliance to be used for that purpose and in going to and from his work. On the occasion in question he went by the place where his duty called him, on an affair in no wise connected with the master's business or his own service. That moment he deviated from his duty and from the scope of his employment. It must be noted that the service of the day in which the servant was then engaged—the gathering of the fuel and operating of the pump—had not been discharged when Watson deviated from his service. But the testimony of the servant himself shows that he had not abandoned his duty. He still intended to gather the fuel on his return from his own errand, and to regain his post of duty at the pump. . . . His private affair was to carry a sick friend to the station; but when

that was completed and he begun to propel the railroad tricycle back over the route which he had previously traveled, with the intention and for the purpose of proceeding to the discharge of the duty which he was employed to perform, he then resumed his master's service, which had been suspended temporarily while he was engaged about his own affairs. The argument that Watson did not resume his duty until he actually reached the spot where he was to gather the fuel rests on no solid legal foundation. He was operating the appliance which it was his duty to operate. He was on the track at a place which he was compelled to pass over, and proceeding to the place where his duty called, for the purpose of performing that duty, and was, at the time of the injury, engaged about no affair of his own, but discharging in the usual and customary manner the business for which he was employed. Under such circumstances the master is answerable for the tort of the servant. We hold, in cases where the servant has made a temporary departure from the service of the master, that when the object of that departure has been accomplished and the servant re-engages in the discharge of his duty, the responsibility of the master instantly attaches. Any other conclusion would leave us without any definite rule, in cases of temporary abandonment of duty, to determine when the servant re-entered the scope of his employment. This conclusion is not antagonistic to any express decision in this state or in Louisiana, where the injury happened." The other phase of the case, which was concerned with the doctrine regarding the enlarged liability of a master who intrusts the control of a dangerous appliance to his servant, is referred to in § 2503, *post*.

motive in part was to amuse himself.¹ The right of recovery has also been affirmed in cases where a station agent who knew himself to have been infected with smallpox communicated the disease to a passenger by means of a ticket sold to him;² and where damages were caused to person and property by the burning of a station, set on fire by an explosion of cartridges, which had been stored in it with the knowledge of the station agent.³

On the other hand, a station agent is not deemed to be acting in the course of his employment when he places a torpedo upon the track at the station for the purpose, not of signaling a train, but of amusing himself.⁴

b. Train despatchers.—Where the negligence of a train despatcher in the employ of a railway company occasions a collision between one of its trains and a train operated over the same track by another company, a passenger on the latter train is entitled to recover against the employer of the tort-feasor for injuries resulting from the collision.⁵

c. Telegraph operators.—A railway company is, of course, liable for any personal injury or damage that may be occasioned to parties other than passengers, through the negligence of a telegraph

¹ *Meade v. Chicago, R. I. & P. R. Co.* (1896) 68 Mo. App. 92. Distinguishing a decision relied upon by the defendant (*International & G. N. R. Co. v. Cooper* [1895] 88 Tex. 607, 32 S. W. 517), where the injury in suit resulted from the wanton act of a fireman and engineer in placing the hose of a boiler against the plaintiff's person, and allowing the steam to scald him (see § 2302, note 19, *ante*), the court remarked that, if the employees there in question "had been required to perform the duty of keeping persons off the locomotive tender, and in the performance of that duty had employed hot water and steam to frighten the plaintiff away, it would have been analogous to this, and the plaintiff, no doubt, would have been entitled to recover."

² *Missouri, K. & T. R. Co. v. Raney* (1907) 44 Tex. Civ. App. 517, 99 S. W. 589. The court thus criticized *Long v. Chicago, K. & W. R. Co.* (1890) 48 Kan. 28, 15 L.R.A. 319, 30 Am. St. Rep. 271, 28 Pac. 977 (see § 2333, note 19, *post*): "In arriving at the conclusion upon which its holding is based, that court seems to have lost sight of the

distinction between an agency (through which an act is committed) devoid of reason by misfortune or by nature, and one possessed of reason so as to represent and act for the principal or master. In the cases of the insane agent and the vicious dog, both being devoid of reason, neither could represent the principal or master; but where the agent is sane and in the full possession of his mental faculties (which is presumed in every case unless the contrary is shown), he stands as the representative of his principal, and notice to him, while he is acting within the scope of his authority as agent, is notice to his principal. We do not think the doctrine announced in that case is supported either by principle or sound reason, and hence we decline to follow it."

³ *Denver, S. P. & P. R. Co. v. Conway* (1888) 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142.

⁴ *Smith v. New York C. & H. R. R. Co.* (1894) 78 Hun, 524, 61 N. Y. S. R. 235, 29 N. Y. Supp. 540.

⁵ *Grand Trunk R. Co. v. Huard* (1905) 36 Can. S. C. 655, affirming *Rap. Jud. Quebec*, 27 S. C. 227.

operator in forwarding messages pertaining to its business. But, so far as the author is aware, no case involving this situation has been reported. The negligence of such an employee is also imputable to the company, in so far as it has relation to any incidental duty which may be imposed upon him in addition to that of forwarding messages; as, for example, where he is required to open a siding for certain trains, and causes a collision by opening it for a wrong train.⁶

d. Servants handling passenger's baggage.—In one case a person who had taken his passage on a train operated by one of three companies which used the same station was held to be entitled to recover for an injury caused by a trunk which a porter in the employ of another of the companies allowed to fall from a moving truck while he was standing on the platform.⁷

e. Servants handling goods.—Any negligent acts of which a servant engaged in loading goods on cars, or unloading them therefrom, may be guilty, are imputable to the company.⁸

f. Servants at crossings.—A railway company is liable for any negligent acts of a gateman or flagman which have relation to their normal duty to see that no person shall attempt to cross the line at a time when trains are about to pass.⁹

In one case it was held that a flagman at a crossing whose duty

⁶ *Tierney v. Syracuse, B. & N. Y. R. Co.* (1895) 85 Hun, 146, 66 N. Y. S. R. 85, 32 N. Y. Supp. 627. The court said: "Clark was placed by the defendant in control of the switch, as he was given a key to it. For some purposes he was authorized to manipulate it, and if he exceeded his instructions, to the injury of a third party, the defendant, who furnished him the means and opportunity to cause the injury, should bear the loss, rather than an innocent party. Clark, according to his own evidence, thought he was furthering the interest of his employers. He supposed he was in the line of his duty."

⁷ *Tebbutt v. Bristol & E. R. Co.* (1870) L. R. 6 Q. B. 73, 40 L. J. Q. B. N. S. 78, 23 L. T. N. S. 772, 19 Week. Rep. 383. As to this case, see further § 2500, note 3, *post*.

⁸ *Toledo, W. & W. R. Co. v. Maine* (1873) 67 Ill. 298 (piece of timber thrown off without warning, struck person passing along platform); *Urbanneck v. Pennsylvania R. Co.* (1907) 74 N. J. L. 393, 65 Atl. 897, affirmed

without opinion in 75 N. J. L. 938, 72 Atl. 1119 (turntable which was being loaded by means of a derrick fell, owing to the negligence of a yard hand in allowing the hook of the derrick to be detached from the turntable).

⁹ In *Lunt v. London & N. W. R. Co.* (1866) L. R. 1 Q. B. 277, 35 L. J. Q. B. N. S. 105, 14 L. T. N. S. 225, 12 Jur. N. S. 409, 14 Week. Rep. 497, the defendant's line of railway was crossed by a public carriage road diagonally on a level, and there was also at the same spot, crossing the railway nearly at right angles, a private way leading to C.'s storeyard. There was a gate on C.'s side of the railway, opening into his yard, which was a private gate under C.'s control, but almost immediately opposite, on the other side of the railway, there was one gate across both the private way and the public carriage road, and this gate was under the control of the defendants, there being a gatekeeper stationed there by them, pursuant to § 47 of the railways clauses consolidation act. Anyone go-

it was to warn the public when the approach of a train was indicated by the ringing of a gong could not render the company liable

ing with a carriage, etc., to C.'s yard, passed through this gate across the railway, and in at the private gate opposite, and *vice versa* on leaving the yard. The plaintiff's carman, with his cart and horses, having unloaded in C.'s yard one evening after dark, was about to leave, and having opened C.'s gate, the gate opposite being nearly closed, hailed the defendants' gatekeeper on the opposite side of the railway to know if the line was clear, and he answered "Yes, come on." The cart and horses accordingly proceeded, and were run into by a train. Held, that though § 47 in terms imposed the duty on a railway company of merely keeping "the gates closed across a public carriage road, except when carriages, etc., shall have to cross the railway," yet the duty was implied of using proper caution in opening them; that, whatever might have been the consequence had the way which the plaintiff's carman was using been simply the private way, as he could not get across the railway without passing through the public gate, it was the gatekeeper's duty to open or refuse to open it for him; that what the gatekeeper said was equivalent to opening the gate, and he therefore was guilty of negligence in connection with his duty for which the defendants were liable.

In *Dolan v. Delaware & H. Canal Co.* (1877) 71 N. Y. 285, the court thus stated its conclusions: "Irrespective of the effect of an ordinance, negligence cannot be predicated of an omission to keep a flagman; but, when a flagman has been uniformly stationed at a crossing, the negligence of the flagman to give warning and properly discharge his duty, or in absenting himself from his post, is imputable to the company."

In *Sweeney v. Old Colony & N. R. Co.* (1865) 10 Allen, 368, 87 Am. Dec. 644, one of the contentions put forward was, "that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty

of preventing persons from passing at times when it was dangerous to do so." The court, however, refused to accept this theory, saying: "It seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged, among other things, with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing."

In *Peck v. Michigan C. R. Co.* (1885) 57 Mich. 3, 23 N. W. 466, the plaintiff called the flagman as a witness, but he testified positively that the company did not employ him to flag trains on the main line, and gave him no instructions to do so. He admitted that he had assumed to do so, and had for years warned people of the approach of trains on the main line to avoid accidents. The direction of a verdict for the defendants upon this evidence was held to be error. The court said: "The flagman was the servant of defendant. Although he may have had no positive instructions to perform any duties in connection with the main line, or to warn persons with teams and vehicles of the approach of trains on the main line, yet the fact that he had uniformly performed such duty for several years was competent evidence to be submitted to the jury as tending to prove that he was so acting by the express or implied assent of defendant; and if the jury should be satisfied from the evidence that the flagman was performing the duty of warning persons of the approach of trains on the main line by the direction of the defendant, then it would be liable if its servant so negligently discharged his duty in that respect as to lead the plaintiff into a place of danger from which she received an injury by reason of such negligence, her own want of care not concurring to produce such injury. The case should have

by giving a traveler erroneous information as to the time when trains would pass.¹⁰

g. Servants in mechanical departments.—The liability of the defendant company was denied in a case where the injuries were inflicted by the master of its roundhouse, while he was running an engine on the main track, for the purpose of procuring a doctor to attend a sick neighbor.¹¹

i. Civil engineers.—The responsibility of a railroad company for an error in a town plat whereon the location of its right of way is incorrectly represented, merely because the persons who prepared and filed the same were its chief engineer and its local agent, was in one case denied on the ground that no affirmative evidence had been offered that they were in that regard authorized to act for the company.¹²

2306. Servants of employers operating street railways.—It has been held that a street railway company may properly be found liable in cases where the evidence shows that a conductor started a car while a cripple was, to his knowledge, standing on the step, outside the locked door of the vestibule;¹ that the injured person was thrown off a car through the negligence of a driver or motorman in

been submitted to the jury under proper instructions from the court.²

A declaration is not sufficient unless it states facts which show *prima facie* that the particular employee who gave the signal to cross over the line had authority to do so. *Pittsburgh, C. C. & St. L. R. Co. v. Adams* (1900) 25 Ind. App. 164, 56 N. E. 101.

In *Clarke v. Midland R. Co.* (1880) 43 L. T. N. S. 381, it was left to the jury to say whether the defendant was liable for the act of its watchman at a footbridge over its track, who, by frightening boys away from the bridge with a stick, had caused one of the boys to attempt to cross the tracks on a level, by reason of which he was injured. The only question proposed for consideration was whether the watchman's conduct was negligent, the court taking it for granted that he was acting within the scope of his employment.

¹⁰ *Carnochan v. Erie R. Co.* (1911) 73 Misc. 131, 130 N. Y. Supp. 514 (plaintiff's automobile stopped on the track and could not be moved).

¹¹ *Cousins v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 572. This decision may be compared with those which proceed

upon the ground that a servant engaged to drive a vehicle is not acting within the scope of his employment when he takes it out without his master's consent, for purposes in which only he himself or a third person are concerned. See § 2299, *a, ante*. See also the decisions in § 2304, note 6, *ante*, regarding the unauthorized use of hand cars.

¹² *Hannibal & St. J. R. Co. v. Green* (1878) 68 Mo. 169 (action of ejectment).

¹ *Yancey v. Boston Elev. R. Co.* (1910) 205 Mass. 162, 26 L.R.A.(N.S.) 1217, 137 Am. St. Rep. 431, 91 N. E. 202. The verdict, however, was set aside, because it was rendered generally with reference to a complaint which contained counts with regard both to negligence and wilful misconduct, and the trial judge had, in his instructions, failed to distinguish between the remedial rights of the plaintiff in relation to each of these two descriptions of tortious conduct. The court said: "The jury, to the defendant's prejudice, having been improperly left to infer that the plaintiff, even if she was not in the exercise of due care or was a trespasser, could recover if the conductor

suddenly starting it,² or in accelerating its speed;³ that such an employee operated a car so carelessly as to bring it into collision with a person on the highway,⁴ or with some inanimate object;⁵ that he failed to take reasonable care to avoid frightening a horse, after discovering that there is danger of its being frightened;⁶ that he hung his coat upon a projection at the side of the water sprinkler, in such a position that a horse was frightened by its waving to and fro;⁷ or that the plaintiff was injured by a bundle of newspapers

was shown to have been merely negligent, the exceptions to the refusal to give these requests must be sustained."

² *Aiken v. Holyoke Street R. Co.* (1903) 184 Mass. 269, 274, 68 N. E. 238.

³ In *Day v. Brooklyn City R. Co.* (1877) 12 Hun, 435, affirmed without opinion in (1879) 76 N. Y. 593, a boy fourteen years old, when walking along a street with a can of water, was asked by a driver to give him a drink. The horses being then on a walk, the boy stepped on the front platform, gave the can to the driver, who drank therefrom, and returned it to the boy, telling him to hurry off quick. The request of the boy to stop the car was not heeded, and as he was stepping off, the driver whipped the horses into a trot. The boy fell and was run over. Held, that the acts of the driver were within the scope of his authority. The action was declared to be maintainable, irrespective of whether the plaintiff was or was not rightfully upon the car. See § 2500, *post*.

⁴ *Wahl v. St. Louis Transit Co.* (1907) 203 Mo. App. 261, 101 S. W. 1. Allegations that defendant was operating a car in charge of its motorman on a named public street, and that at a certain point the motorman negligently left his post on the car and negligently waived to plaintiff, who was a child of tender years, playing on a pile of loose earth beside the track, and thereby so frightened him as to cause him to start to run across the track in front of the car, were held to be sufficient to show that the act of the motorman was within the scope of his employment.

In *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119, the company was held liable for injuries to a boy over whose legs a horse car passed

after he had been thrown off by the driver.

See also *Baker v. Metropolitan Street R. Co.* (1910) 142 Mo. App. 354, 126 S. W. 764, note 11, *infra*.

⁵ *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170 (collision with wagon,—question whether act of car driver was negligence within scope of employment, or done wilfully, for his own purposes, was held to be for the jury); *Wood v. Detroit City Street R. Co.* (1884) 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124 (similar decision); *Garrett v. People's R. Co.* (1906) 6 Penn. (Del.) 29, 64 Atl. 254 (jury instructed that negligence of motorman was negligence of defendant); *Schmidt v. Steinway & H. P. R. Co.* (1889) 55 Hun, 496, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939 (prima facie case for jury where a car was driven against a pipe near the opening of a sewer excavation, the result of which was to throw the pipe into the excavation and injure a man working there). So far as the first two of the cases are concerned, it may be observed that the distinction which they predicate between negligent and wilful acts is now discredited by the great preponderance of authority. See § 2239, *ante*, and the cases cited *passim* in chapters CI. to CVI., *post*.

⁶ *Pioneer Fire-proof Constr. Co. v. Sunderland* (1900) 87 Ill. App. 213, affirmed in (1900) 188 Ill. 341, 58 N. E. 928 (a case in which a train of cars loaded with clay was being drawn along a track laid on one side of a public bridge).

⁷ *McCann v. Consolidated Traction Co.* (1896) 59 N. J. L. 481, 482, 38 L.R.A. 236, 36 Atl. 888. The court said: "The gravamen of the action was that the sprinkler was being operated by the employees whilst in a dangerous condition,—that is, in a condition calculated to frighten the horse.

thrown from a car in pursuance of an existing arrangement under which the defendant's conductors and motormen had, with its acquiescence, been delivering such parcels to the newspaper carriers.⁸

On the other hand, it has been laid down that a motorman was not acting within the scope of his employment when he dismounted from his car and undertook to move a vehicle which was obstructing the track;⁹ and that a street railway company's liability for damages caused by a team falling into a hole which extended under its track,

There is no evidence as to who hung the coats upon the projection, but the fact is well established that they had been hanging in this condition for some time previous to the time of the accident, and the car was being operated with them in this position. It would seem as if it was not material whether these coats were placed there by the defendant company, by its employees, or by a stranger, so long as the existence of them, in this position, created a dangerous situation, of which the employees of the defendant had knowledge, and still continued to operate the car. The fact is that they were upon a car sprinkler of the defendant company which was being operated by its employees, who were bound to the exercise of reasonable care in its operation and thus protect others from injury. It was conceded on this motion that a car with these coats swaying upon it was calculated to frighten a well trained horse of gentle disposition; but whether conceded or not on this motion to nonsuit, the fact must be considered, and it certainly remained for the jury to determine, whether reasonable care had been exercised in the operation of the sprinkler. Besides, the master is liable for all incidental acts of his employees in the course of his employment, and if the coats were worn by the motorman or other employees as necessary to be worn in the work of operation of the sprinkler, then the act of hanging them upon this projection was an act incidental to their employment, and would render the company responsible for such an act; and if such an act created a dangerous condition in its further operation, there is no known rule of law to be invoked to protect the defendant from the responsibility for the injurious results of such operation; and, generally speaking, the defendant com-

pany owed the duty to the plaintiff to exercise reasonable care to keep the sprinkler in a condition that injury should not arise to others; and if its employees used it when it was in a dangerous condition, or they themselves, in operating it, did that which rendered it dangerous, the defendant company became liable for the consequences."

⁸ *Bender v. Louisville R. Co.* (1911) 144 Ky. 166, 137 S. W. 1034.

⁹ *Murphey v. Philadelphia Rapid Transit Co.* (1906) 30 Pa. Super. Ct. 87 (driver of vehicle injured, owing to the negligent manner in which the motorman started the horses). As the reason assigned for the decision was that there was no affirmative evidence regarding the extent of the motorman's authority, the court must have assumed that the removal of obstructions from the track was not a function which could, in the absence of specific testimony, be treated as one of those incidental to the ordinary work of such a servant. This theory will possibly not meet with approval in all jurisdictions. The contrary view would seem to be strongly indicated by the consideration that it is of vital importance to the business of a street railway company that the strip of highway to which the movement of its cars is confined should be kept clear. It may be reasonably assumed that a motorman would be impliedly authorized to remove from the track such an obstruction as a rock. If so, it is difficult to see why a similar authority should not be predicated in the case of a vehicle. The decision finds some support in the analogy of the English case of *Lamb v. Palk* (1840) 9 Car. & P. 629 (see § 2293, note 1, *ante*), where a coachman undertook to move a van out of the way. But that case was overruled by *Page v. Defries* (1866) 7 Best & S. 137.

but was not excavated by it, was not established by evidence which merely showed that the employees on one of its cars attempted to prevent the accident by warning the driver, and assisted in securing the horse.¹⁰

In cases where a servant of a street railway company whose ordinary duties have nothing to do with the actual operation of its cars, has caused an injury by his negligence in respect of the management of a car, the question whether his default shall be imputed to the company must be determined by a consideration of the circumstances, in which he undertook that extraneous function.¹¹

C. SERVANTS ENGAGED IN OTHER KINDS OF TRANSPORTATION WORK.

2307. Servants working on ships.—*a. Generally.*—The right to maintain an action against a shipowner for the negligent acts of his

¹⁰ *New York Mail Co. v. Joline* (1908) 112 N. Y. Supp. 1067. The court said: "These efforts to assist the plaintiff's driver out of his distress were not part of the duty of the defendant's servants, and their failure did not bring them into connection with the accident."

¹¹ In *Madara v. Shamokin & M. C. Electric R. Co.* (1899) 192 Pa. 542, 43 Atl. 995, the liability of the defendant was held to be for the jury, under evidence which tended to show the existence of an emergency so great as to justify the temporary assumption of the extraneous function.

In *Baker v. Metropolitan Street R. Co.* (1910) 142 Mo. App. 354, 126 S. W. 764, two of the men in a car barn undertook to operate a car to which passengers had been transferred from another disabled one, and which had been kept waiting so long for a regular crew as to produce a blockade. Held, that it was for the jury to say whether they were within the scope of their employment, so as to charge the company with liability to a person on a sidewalk who was injured through the derailment of the car. The court said: "The evidence of defendant tends to show that the men who started with the car, though actuated by a desire to perform a meritorious service for their employer, acted without an order from their superior officer; but we find, as a matter of law, that defendant, by its own showing, is in no position to repudiate their

voluntary service. In five minutes after the car started on its round trip of 5 miles or more over the public streets of a large city, defendant knew that some of its employees were acting as the self-constituted crew of the car. This knowledge imposed on defendant the duty of making an election between suffering the car to make the round trip unmolested, or of making a reasonable exertion to recapture it. Defendant could not repudiate the acts of its servants and do nothing to stop them from running a dangerous vehicle through the public streets. By merely throwing a switch, it could have shut off the power and stopped the car, or it could have sent a crew in pursuit on another car. If the foreman, thinking the car was in competent hands, concluded to permit it to make the trip, that was a ratification of the act of its crew. If, on the other hand, he thought they were incompetent and did nothing to prevent them from endangering the safety of people rightfully on the streets, the car would travel, that was negligence for which defendant must answer. Thus, by its own evidence, defendant must land on one of the two horns of a dilemma. Either it ratified what was done and thereby became liable for the negligence of its servant, or it negligently failed to discharge its duty to employ reasonable care to protect the public against danger from the continued use, without authority, of its track and equipment. In either event,

servants within the scope of their employment has been affirmed in cases where the ship came into collision with another one;¹ where it capsized;² where a boat was capsized by a heavy swell raised by a passing steamer;³ where the anchor was allowed to drag so as to damage property;⁴ where the captain so conducted himself as to en-

defendant has failed to sustain its burden of showing that the derailment was due to a cause which, in the exercise of reasonable care, was unavoidable."

¹ *The Thames* (1805) 5 C. Rob. Adm. 345; *Scott v. Scott* (1818) 2 Starkie, 438, 20 Revised Rep. 711; *Fenton v. Dublin Steam Packet Co* (1838) 8 Ad. & El. 835, 1 Perry & D. 103, 8 L. J. Q. B. N. S. 28; *The Volant* (1842) 1 W. Rob. 387; *The Druid* (1842) 1 W. Rob. 391; *The Ticonderoga* (1857) Swabey, Adm. 215; *The Ida* (1860) Lush. 6; *The Ruby Queen* (1861) Lush. 266; *The Lemington* (1875) 23 Week. Rep. 421, 32 L. T. N. S. 69, 2 Asp. Mar. L. Cas. 475; *Waring v. Clarke* (1847) 5 How. 445, 12 L. ed. 228; *Stone v. Ketland* (1804) 1 Wash. C. C. 142, Fed. Cas. No. 13,483; *Cox v. Keahey* (1860) 36 Ala. 340, 76 Am. Dec. 325; *Duggins v. Watson* (1854) 15 Ark. 118, 60 Am. Dec. 560; *Martino v. Boggs* (1846) 1 La. Ann. 74; *Chesley v. Nantasket Beach S. B. Co.* (1901) 179 Mass. 469, 61 N. E. 50; *Hawkins v. Dutchess & O. S. B. Co.* (1829) 2 Wend. 452. See also Maude & P. Merchant Shipping, 2d ed. 612 *et seq.*

"The owner is responsible for damage resulting not only from want of care and attention on the part of those in charge of the vessel, but also from the want of proper knowledge and skill to enable them to manage her according to established nautical rules." *St. John v. Paine* (1850) 10 How. 557, 13 L. ed. 537.

In *Chamberlain v. Ward* (1859) 21 How. 548, 16 L. ed. 211, the conclusions of the court were thus stated: "That she [i. e., defendant's ship] was in fault because she did not have a competent and skilful officer in charge of her deck, and because it appears that his want of qualifications and unskilfulness contributed to the collision. Owners of vessels, and especially those who own and employ steamships, whether propellers or side-wheel steamers, must see to it that the master and other officers intrusted with their control and

management are skilful and competent to the discharge of their duties, as, in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill and negligence; and this remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck."

The liability of the shipowner in respect of a collision caused by the negligence of the crew of a chartered ship depends upon whether they are his servants or those of the charterer. See §§ 44 *et seq. ante*.

As a person who undertakes to tow a vessel upon the ordinary terms is an independent contractor, neither the owner of that vessel nor the vessel itself can be held liable for the negligence of the crew of the tug. But the contractor and his vessel must answer for the consequences of a collision or other accident caused solely or entirely by the defaults of the crew. *The Niagara* (1892) 3 C. C. A. 342, 1 U. S. App. 658, 663, 52 Fed. 890.

² *Todd v. The Tulchen* (1880) 2 Fed. 600 (journeyman carpenter injured).

³ In *Daniels v. Carney* (1906) 148 Ala. 81, 7 L.R.A.(N.S.) 920, 121 Am. St. Rep. 34, 42 So. 452, 12 Ann. Cas. 612, the liability of the defendant for such an accident was taken for granted; but the complaint was held to be defective as not showing that the crew of the steamer were negligent, and that their negligence was within the scope of their employment. Appended to the reported decision of the case in the L.R.A. is a note giving a number of other decisions in which the right of action for injuries occasioned to person or property this sort of faulty navigation was recognized; but the only question actually discussed was whether negligence had been proved.

⁴ In *Submarine Teleg. Co. v. Dickson* (1864) 15 C. B. N. S. 759, 38 L. J. C. P. N. S. 139, the declaration stated

able a slave to escape from his master; ⁵ where a barge was damaged by being moved away from a wharf and moored in another place; ⁶ where the injury was caused by the firing of a signal gun; ⁷ where the injury resulted from the explosion of a boiler on a steamship; ⁸ where

that the plaintiffs were possessed of a telegraph cable for the transmission of messages between Dover and Calais by means of electricity, part of which cable was by charter of the Crown lying at the bottom of the sea within 3 marine miles of the shore; that the defendants were possessed of a certain ship on the high seas, and so carelessly navigated the same that their anchor fouled and injured the cable. Plea, that the cable was lying in the high seas more than 3 marine miles from the shore, and out of and beyond the realms, dominion, sovereignty, and jurisdiction of the Queen; that the defendants were Swedes, and the vessel a Swedish vessel; that in the usual and ordinary course of navigation, she was proceeding on a voyage from Spain to a port in Sweden, and in the usual and ordinary course of navigation cast anchor; that, without any default of the defendants, the anchor dragged, and in being raised became entangled with and injured the telegraphic cable; that there was no buoy or mark to show the spot in which the telegraphic cable was lying, and that its position and existence were wholly unknown to the defendants and those having the management and direction of the vessel and anchor. Held, on demurrer, that the declaration was good, by reason of the imputation of negligence, and that the plea was good, as an argumentative traverse of the plea.

⁵ *Price v. Thornton* (1846) 10 Mo. 135 (slave had imposed on captain by counterfeit certificate of freedom, and was shipped as a passenger); *Pennsylvania, D. & M. Steam Nav. Co. v. Hungerford* (1834) 6 Gill & J. 291 (captain failed to make a search after having been informed that the slave was on board).

See also the following cases, decided with reference to the Louisiana Code, art. 2320 (2299): *Palfrey v. Keer* (1830) 8 Mart. N. S. 503; *Strawbridge v. Turner* (1835) 8 La. 537; *Buell v. New York Steamer* (1841) 17 La. 541; *Mouras v. The A. C. Brewer* (1865) 17 La. Ann. 82.

⁶ In *Page v. Defries* (1866) 7 Best & S. 137, a lighterman who was unable to

get up to a wharf in consequence of plaintiff's barge being in the way without anyone in charge of it was told by the foreman of the wharf to shove the barge away, as it had no business there, and to bring his alongside. He then moved the plaintiff's barge from the wharf, and made it fast to a pile in the river. When the tide went down, the barge settled upon a projection in the bed of the river, and was injured. Held, that the defendants were responsible. The court overruled *Lamb v. Palk* (1840) 9 Car. & P. 629, referred to in § 2293, note 1, *ante*.

⁷ *The Barracouta* (1889) 39 Fed. 428. In that case, where the libellant, while in the pilot house of a tug lying alongside a steamer, was injured in the ear by the concussion of a cannon fired aboard the steamship to indicate her departure for sea, the conclusions of the court were thus stated: "That the ship herself is liable to condemnation for the damage so caused I cannot doubt. The cannon was fired by the boatswain of the ship, in the ordinary routine of ship's duty. It may not have been necessary to the navigation of the ship to fire the cannon; but firing the cannon was incident to her navigation. It was the ship's notice of her departure with the mail on the voyage to sea. For negligence in ship's work the ship herself is liable."

In *Oliver v. North Pacific Transp. Co.* (1869) 3 Or. 84, a person in charge of a steamship leaving a port, whose duty it was to discharge a gun as a signal of departure while the vessel was headed across the stream, so that the wadding would be discharged down the channel of the river, delayed the firing, either by negligence or mismanagement, until the bow of the vessel was turned in such a direction that the gun pointed toward the wharf. Held, that the owner of the vessel was liable for injuries received by a person whom the wadding struck while he was standing on the wharf.

⁸ *Poree v. Cannon* (1859) 14 La. Ann. 506. A member of the crew of another ship was killed.

the engineer of a steamship suffered steam and hot water to escape into a boiler while it was being cleaned by the servant of a contractor;⁹ where an open hatchway was left unlighted and unguarded;¹⁰ where appliances used for the purpose of loading or unloading the ship were improperly dealt with;¹¹ and where a heavy object fell upon a laborer.¹²

The effect of some cases in which the liability of the employers was denied is stated in the subjoined note.¹³

⁹ *Keiley v. The Allianca* (1890) 44 Fed. 97.

¹⁰ *Ward v. Dampskibsselskabet Kjoebenhaven* (1905) 136 Fed. 502.

¹¹ In *Thompson v. Wright* (1899) 109 Ga. 466, 34 S. E. 560, the plaintiff was held to be prima facie entitled to recover under a petition which alleged in effect that the mate of the defendant's steamer had placed a gang plank from the steamer's deck to the rear end of petitioner's dray, for the purpose of transferring to it certain hides; that when the work was completed, petitioner went to his seat on the wagon, and started to drive off, when suddenly, and without any warning to him, the mate, having neglected to take in the gang plank, negligently caught hold of one of the rear wheels of the dray, and simultaneously uttered a loud shout which frightened petitioner's horse and caused him to back himself, hides, and dray, overboard into the water, carrying petitioner along with him; that the mate was, when discharging the cargo of said steamer, in the regular discharge of his duties within the scope of his employer's business, and the duty devolved upon him to take in and otherwise attend to the keeping of said gang plank; and that petitioner was in no way connected therewith. The court said: "A part of the business of the servant in this case was evidently to arrange to take care of and protect the gang plank belonging to his master when the same was being used for the purpose of loading or unloading the vessel. It is clearly inferable, from the charges in the petition, that at the time of the negligent acts of the servant which resulted in plaintiff's injury, he was engaged in an effort to save the master's property."

In *The Polaria* (1885) 25 Fed. 735, a lien upon a ship was declared in favor of a man injured by the fall of a skid
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which had been fastened to the rigging by a stevedore, and unlashd by a sailor for the purpose of tarring the rigging in pursuance of directions received from his employer.

¹² *Crawford v. The Wells City* (1889) 38 Fed. 47; *Ferguson v. The Terrier* (1896) 73 Fed. 265 (plank dropped upon stevedore's laborer); *Gerrity v. The Kate Cann* (1880) 2 Fed. 241, affirmed in (1881) 8 Fed. 719 (pile of dunnage fell on grain trimmer); *Carlson v. White Star S. S. Co.* (1905) 39 Wash. 394, 81 Pac. 838 (plaintiff injured by a heavy piece of timber which the ship's servants had, by direction of the third officer, heaved through a porthole onto a lighter, instead of lowering it by means of a winch).

In *Keith v. Lynch* (1886) 19 Ill. App. 574, where the captain of a ship had caused the injury in question by the manner in which he had handled a piece of timber used in repairing the ship, a verdict for the plaintiff was set aside on the ground that an instruction stating that the defendant would be liable if the captain was negligent had been given without any qualifying clause expressive of the doctrine that liability could not be imputed to the defendant, unless the tortious act was within the scope of the captain's employment.

¹³ In *Ayerigg v. New York & E. R. Co.* (1864) 30 N. J. L. 460, a master of a ferryboat left the wharf of the owners without the direction of their agent,—who alone possessed authority to start the boat upon each trip,—and took a burning barge in tow. After towing the barge some distance, he was obliged to cut it loose, and it drifted against a yacht and damaged it. Held, that the owners of the ferryboat were not liable for the injury to the yacht. The court said: "It does not appear that the Hudson was on her trip across the

b. Liability in cases of a deviation from the appointed course.—

Where the given injury was inflicted while the defendant's vessel was following a course different from that prescribed by him, the question of his responsibility is determined with reference to consid-

river and made a detour in pursuit of the barge, nor that any signal for starting had been giving. If no such order was given, the steamer was not then under the control of the captain by authority of the company. It was no more so than a coach and horses are under the control of the driver while in the stable or standing at the door awaiting orders. For aught that appears, the captain may, of his own will, and for his own purpose of benevolence or profit, have moved out of the slip and gone in pursuit of the barge. If so, upon the principles above stated, he was not on the business of his employers, but was as much a stranger to the company as to any third person. It may well be questioned whether, if the commander of the steamer was acting in the course of his employment and under the implied command of the company, the defendants are liable. The burning barge was moving under the forces of the wind and tide, towards the wharves and shipping below, threatening destruction to a large amount of property. The steamer, to prevent so great a calamity, seized the barge and towed her up the stream. When it was no longer safe to continue the connection, the hawser was severed, and the barge left to float. On the principle of inevitable necessity, the owners of the steamer would perhaps be exculpated from responsibility, in the absence of proof either of carelessness or wilfulness on the part of the commander. I can see no evidence sufficient to justify a recovery. Had it been left to the jury, and a verdict found for the plaintiffs, we would have been obliged to set it aside as a verdict without sufficient evidence."

In *Haack v. Fearing* (1867) 5 Robt. 528, 4 Abb. Pr. N. S. 297, 35 How. Pr. 459, the liability of the owner of a yacht for an injury caused by the wadding of a cannon discharged by its captain was denied on grounds thus stated: The firing of the gun "was not necessary in the course of its navigation, or as a matter of duty to other vessels, or in compliance with any

custom governing vessels in general in New York harbor or yachts belonging to the New York Yacht Club Squadron. (if the vessel in question belonged to that squadron, or was bound by the rules of that club, of which there does not seem to have been sufficient evidence. So that the ground of the defendant's liability is reduced to the question whether, by merely permitting the master of the vessel to have the possession and custody of the gun and ammunition with other equipments of the vessel, the defendant became responsible for their careless use." After referring to *Joel v. Morison* (1834) 6 Car. & P. 501, and *Sleath v. Wilson*, (1839) 9 Car. & P. 607, 2 Moody & R. 181 (see § 2295, note 2, *ante*), in which the responsibility of a master for injuries caused by the negligent driving of his servant during a deviation was made to rest on the fact that the master has enabled the servant to do the injury by the mismanagement of the carriage while intrusted with its use for the master's benefit, the court proceeded as follows: "That doctrine would have applied in this case, if the sailing master had injured a person or vessel by careless navigation of the vessel under his charge. But the mere possession and control of the gun and ammunition could not create or imply permission, much less authority or duty, to use them in the face of the positive orders of the defendant to the contrary. It could not be any part of the duty of sailing or taking care of the vessel to discharge signal guns or give salutes; and there was no evidence of a uniform custom on the part of the vessel in question or any other yachts, or of any regulation to that effect in the squadron to which it was supposed to belong, to make it part of the ordinary employment of the sailing master."

That the engineer and pilot of a steamer had no implied authority to operate an aerial railway owned by the owner of the steamer was held in *Biederman v. Brown* (1893) 49 Ill. App. 483 (unskilful management caused the

erations similar to those which are controlling in cases which involve the deviation of a vehicle. See §§ 2294 *et seq.*, *ante*. The particular point illustrated in the decision cited below is that an action will be against him if it appears that the object of the divergence was a matter connected with his business.¹⁴

The cases involving the contractual liability of a shipowner as a carrier are reviewed in §§ 2328 *et seq.*, *post*.

hook which supported the traveler's basket to straighten out and let the basket drop).

That the court could not infer, as a matter of law, the authority of the captain of a passenger steamer to charge the owner with the duty of delivering telegrams addressed to its passengers, was laid down in *Davies v. Eastern S. B. Co.* (1900) 94 Me. 379, 53 L.R.A. 239, 47 Atl. 896.

In *Central Consumers' Co. v. Booher* (1908) 32 Ky. L. Rep. 794, 107 S. W. 198, where the plaintiff fell through a cellar door which had been opened by the driver of a brewery wagon, he testified that, after having taken off of his wagon a keg of beer which he was delivering, he opened the door and threw the beer down, and then went down to tap it and to get the empty kegs which he was to take away. While he was looking for these, but before he had found them, the accident occurred. The court was of opinion that "although it may not have been directly in the line of the driver's duty to tap kegs of beer, or put the beer in the cellar [and the manager of the brewery testified that it was not] yet the driver for several years had been putting the beer down in the cellar, and it was a part of his duties to get the empty kegs, put them in the wagon, and haul them to the brewery."

In *Parramatta River Steamers Co. v. Hason* (1895) 16 New So. Wales, L. R. 105, a general verdict in favor of the plaintiff company was set aside on the ground that the jury had specially found that at the time when its steamer was run down by a government launch, the latter was being used to convey two private persons to a certain place before it started to take on board a government official.

In *Baccus v. The Manhanset* (1895) 69 Fed. 471, it was held that a stevedore's laborer working in the hold

could not recover against the ship for injuries occasioned by the fall of one of its officers upon him through carelessness in walking upon an unguarded beam while in the discharge of his duties. Brown, D. J., thus stated his position: "There is not sufficient evidence of any negligence of the duties of the ship. Libellant's injury arose from the personal carelessness and fault of the officer in walking along the beam. I find no case in which a ship has been held for such a secondary result from the fall of a careless officer or member of the crew." The reasoning of the learned judge seems to be scarcely satisfactory. It is difficult to see how an act done by a member of the crew while in the discharge of his duties can be treated as "personal" in such a sense as not to be imputable to his employer.

¹⁴In *Quinn v. Power* (1882) 87 N. Y. 535, 41 Am. Rep. 392, reversing (1879) 17 Hun, 102, defendant owned and ran a ferryboat upon a river. On a regular trip, the pilot took on a boatman without compensation, agreeing to put him on his boat, which was part of a tow passing up the river. Similar acts had occasionally been done before, but not to defendant's knowledge. The ferryboat diverged from its regular course to reach the tow, and ran into a canal boat attached thereto. Held, that defendant was liable for the death of a person killed by the collision. The court said: "At the most it appears to us a case where the servant, while acting in the master's business, and within the scope of his employment, deviated from the line of duty to his master and disobeyed his instructions. . . . The case is put, by the appellant, mainly on the ground that the officers of the ferryboat, in transferring the passenger to the canal boat, were simply doing the latter a personal favor, and so carrying out a separate and independent purpose of

2308. Servants working on canals.—A canal company may properly be found liable for injuries caused by the act of the keeper of a drawbridge in raising it without warning while the plaintiff was crossing it.¹ In a *nisi prius* case where the closing of a sluice in a culvert by the servant of such a company had aggravated the damages which were inflicted on the plaintiff's land by the escape of water from a trench in the towpath, it was left to the jury to say whether the servant had any duty to perform with relation to the sluice.²

On the other hand, where a bargee in the service of one person

their own. That is not, in all respects, a correct view of the transaction. The passenger appears to have been an entire stranger. There was no individual or personal motive to induce the pilot to invite him on board or promise to land him at the tow; what operated to lead to the act was plainly a motive connected with the master's business. The ferryboat, in previous years, had done a very considerable business in towing to Athens or Hudson boats taken from the tows, or placing them in, for which services compensation was paid. The defendant finally built or procured a separate boat to be used in that business. The canal boats arriving in tows were more or less his customers, and their captains or owners were naturally to be treated with consideration as a matter of business. When the pilot saw this boatman standing on the dock and anxious to reach his tow, the pilot did what he thought the master would very probably have done if present,—promised to put the boatman on the tow. In doing so he had no individual or personal purpose of his own, separate from his master's business and interest. On the contrary it must have been that business and interest, a disposition to gain and keep the good will of the boatman as a class, from among whom came the master's customers, which prompted the invitation and the act. The facts disclose no other possible motive; certainly none which was personal to the pilot and entirely independent of his master's business. Even if unwisely or mistakenly done, the act was done by the pilot in the interest and for the supposed benefit of the master. Whatever of good will or good disposition was likely to flow from this and similar acts of favor to the boatmen would re-

dound not so much to the personal benefit of the pilot, but to the ferryboat and its owner. Unless this motive influenced the act, it is unexplainable except upon the idea of general good nature and disposition to accommodate. But even that was in the master's business, and amounted only to a disposition to conduct it as far as possible so as to please and favor all kinds of passengers. It is difficult, therefore, to trace in the action of the pilot, any separate and independent purpose, disconnected from the master's business. What he did was in the natural line of his employment, might well have been regarded by him as a duty due to his master, and an act which would benefit rather than injure his business. It was an act within the general scope of that employment; it was the transportation of a passenger; if not across the river, at least partly across; and none the less so because no compensation or fare was demanded. To hold that in this trip across the river the officers of the boat were acting as the owner's servants and in his business only at the beginning and end of the passage, and not in the middle, because stopping to put a passenger on a tow instead of taking him across to Hudson, seems to us an unwarranted conclusion. The motive which prompted the act, and the purpose sought by it, if originating with the pilot and in some sense personal to him, were, at least, not independent or outside of his employment, or disconnected with the master's business." Contrast the *Ay-crigg Case*, cited in note 13, *supra*.

¹*Hunter v. Edinburgh G. Union Canal Co.* (1836) 14 Sc. Sess. Cas. 1st series, 717, 11 Fac. Appx. 19.

²*Higgins v. Chesapeake & D. Canal Co.* (1842) 3 Harr. (Del.) 411.

was drowned in consequence of the negligent manner in which one of the sluices in a lock gate was opened at his request by a bargee in the service of another person, it was held that an action could not be maintained by the decedent's widow against the master of the tortfeasor.³

2309. Servants working on stagecoaches.—The owner of a stagecoach is liable for any injury that results from the negligence of the conductor or the driver in respect of its management.¹

2310. Servants of wharfingers and dock owners.—In one case under this head, where a laborer engaged in loading bales of cotton from a wharf onto a cart was injured by a bale of cotton which the wharfinger's delivery clerk had pushed over so that it fell upon him, it was held that the plaintiff had been improperly nonsuited, because the jury would have been justified in inferring that the act complained of was within the scope of the clerk's employment, as being incidental to the performance of his duty to see that the cotton was properly delivered.¹ In another case it was held that the harbor master of a dock, in permitting the captain of a ship to use the entrance

³ *Gallagher v. Russell* (1883) 11 Sc. Sess. Cas. 4th series, 53. Discussing the evidence, Lord Moncreiff said: "If Monteith did what he says he did, he was plainly acting not for his employers, but as a friend helping his friend who was in charge of the lighter in the lock. He certainly had no duty to do so. It is said, however, that in helping his friend through the lock, he was acting for the benefit of his masters, because that would allow his own lighter to pass through sooner. But Monteith says he was in no hurry, and, besides, that advantage is so consequential and shadowy that I think it cannot be taken into account. In short, this was a friendly volunteer, and one who acts in that way is not doing his master's work. If a horse falls in the street, and the footman from another carriage comes to the assistance of the servants who are in charge of the horse, it is quite plain that in volunteering friendly assistance he is not doing his masters' work, and will not make his masters responsible for any consequences that may arise from his interference."

¹ In cases decided before the abolition of slavery in the United States, it was held that an action against the proprietor of a stagecoach might be maintained by the master of a slave

who had escaped in consequence of his having been negligently permitted by the defendant's servants to travel upon the coach. *Lowe v. Stockton* (1835) 4 Cranch, C. C. 537, Fed. Cas. No. 8,567; *Mandeville v. Cookendorfer* (1828) 3 Cranch, C. C. 397, Fed. Cas. No. 9,010 (false certificate of freedom was shown by slave); *Harriss v. Mabry* (1840) 23 N. C. (1 Ired. L.) 240; (evidence was that the defendant's drivers and stage agents were guilty of gross negligence in taking the slave beyond the point to which she held a counterfeit pass, and permitting her to travel on to another state).

In *Barlow v. Emmert* (1872) 10 Kan. 358, a declaration which averred in substance that the owners of a stagecoach started the horses at a gallop, and that the driver cracked his whip very loud and often, at the same "yelling, whooping, screaming, and swearing," and so frightened the plaintiff's team that it ran away, was held to state a good cause of action.

¹ *Courtney v. Baker* (1875) 60 N. Y. 1, reversing (1874) 5 Jones & S. 249. The account given of the occurrence by the clerk was that in walking round the wharf, he saw the row of bales in question, and pushed over one of them, because he wanted to see beyond it and

lock for the purposes of a dry-dock, and in informing him that the floor of the lock was sufficiently level to afford a safe bearing surface for the ship, was acting within the scope of his authority; that he was guilty of a breach of duty in giving that permission, and making the representations that he did, when he knew, or ought to have known, of the existence of a sill which projected several inches above the floor; and that the owners of the dock were consequently liable for the damage caused by the sill, when the water was drawn off and the ship took ground.²

On the other hand, where a stevedore's laborer fell on a quay from

pass through,—the motive assigned by him for the act being that some cotton had been stolen from the bales on the preceding day, and "his natural curiosity led him to look at the loaders in their performance while on the bulk-head." The court said: "This, the defendants claim, was beyond the scope of Hand's duties, as they had a watchman whose duty it was to look out for stealing, and that it was no part of the duty of the delivery clerk. But the difficulties in the way of nonsuiting on that ground are that neither the court or the jury were bound to accept Mr. Hand's statement as to his motive. He was testifying in the interest of his employers, and the jury would have had the right to take this fact into consideration. There was evidence in the case tending to show that it was Mr. Hand's duty to watch the carts while loading and see that the proper bales were put on. If this were so, his proper position was near the cart, or at least where he could observe the loading, and the jury might have come to the conclusion that he threw down the bale for the purpose of observing or approaching the cart and performing his ordinary duty in seeing to the proper delivery of the cotton. Furthermore, the jury might have inferred from the whole evidence that Hand was walking round the wharf in the performance of his duties, the business of delivery being then going on, and that, finding this row of bales in his way, he threw one down, as he testified, to make a passage for himself. But if his statement as to his motive were true, it is difficult to say that a delivery clerk, whose function it was to see that the proper goods were delivered to the proper parties, was traveling outside

of the scope of his duty in observing whether the goods were being stolen, when he suspected that they were, and in removing a screen which, according to his own testimony, he suspected had been erected for the purpose of concealment, and which was, as he termed it, 'an old trick.' Such an act can hardly be attributable to idle curiosity. If it was his duty to see that the goods were delivered to the parties entitled, and to obtain vouchers for them, he can hardly be said to have been transcending his powers in endeavoring to prevent their being carried off by thieves, when he suspected this was being done. It may be that he was not bound to watch for thieves, there being a watchman charged with that duty, but if, casually, suspicious signs came to his notice, we think his general duty to his employers justified him in endeavoring to ascertain what was being done."

² *The Apollo* [1891] A. C. 499. The dock was regulated by a statute which empowered the owners to take tolls for ships entering the dock, and required persons in command of vessels within the dock to place them as the harbor master should direct, under penalties. Vessels had on previous occasions been grounded in the lock under similar circumstances. The permission had been given on the occasion in question by the acting harbor master. Lord Halsbury said: "It is contended that even if Fitzmaurice [the harbor master] had given the orders or permission which were given, the company would not be liable, because the thing done or permitted to be done was, in the language of the lords justices, abnormal and extraordinary, and beyond the scope of Fitzmaurice's authority to permit. . . . I cannot think that it is

a gangway ladder which had been unfastened without his knowledge by an employee of the dock company, whose duties consisted in clearing the line of rails upon which a crane was moved to and fro, the liability of the company was denied on the ground that, in unfastening the ladder, the employee in question had transcended the range of his authorized functions.³

an unusual or extraordinary operation that a vessel should be grounded. In this particular case it was the fouling of the screw, necessitating investigation and repair below the level of the water; but there are many things which may require a vessel to be grounded, and which, I should think, must be in the contemplation of everybody dealing with vessels. An injury may not uncommonly take place below the level of the water of a kind that may necessitate the vessel being grounded. . . . Speaking generally, I should think that in the nature of such a construction as a dock, and the use to which it is ordinarily put, there would be involved the ordinary accommodation, if it could be safely got, of allowing vessels to ground for the purpose of undergoing repair. Now, that Johns [the acting harbor master] at least permitted this to be done, and in respect of this particular place, there can be no doubt, and a dock company, I think, must be taken to hold out their harbor master, or the person who fills that character for the moment, as possessing sufficient authority to inform ships where they may safely ground." Lord Herschell reasoned thus: "It is said, however, that even if Johns was guilty of negligence, the respondents are under no liability; that to sanction such a use of the lock was to permit an abnormal use of it, which he had no authority to do, and which was an act beyond the scope of his employment. I cannot think so. The lock had not unfrequently been employed for the same purpose before. It was one of the conveniences of the port that a disabled vessel could thus enjoy some of the advantages of a dry-dock. For a vessel of somewhat smaller dimensions than the Apollo, and perhaps even for one of her size if unladen, the lock was quite a suitable place to take the ground in. That an accident might happen to a vessel, which should temporarily disable her and render it necessary to obtain

access to a part of her which could not be reached whilst she was waterborne, was one of the ordinary incidents of navigation which must have been in the contemplation of the owners of the dock. And I do not think that it can be beyond the authority of their harbor master, intrusted as he is with the statutory power to which I have drawn attention, to permit the use by a disabled vessel of such conveniences as the harbor possesses for the purpose of repairing or ascertaining the extent of the damage. I think it must be within the scope of his authority to point out in what part of the harbor the vessel may ground, and the lock was within the ambit of the port and harbor, and just as much a part of it as any other, and it had, as I have said, been used on various previous occasions, extending over a considerable period, for that purpose." It was held by Lord Bramwell and Morris that the harbor master had authority to permit the ship to use the lock for the purpose for which she used it, but that he had no authority to undertake that the lock was safe, or to undertake any duty of care, nor did he in fact so undertake; that the captain took the ship into the lock not of right, but only under a license and at his own risk, the use of the lock being for an abnormal and extraordinary purpose; and that the dock owners were not liable.

³ *Gillson v. London & I. Docks Joint Committee* (1892) 8 Times L. R. (C. A.) 702. The defense was that when the ladder obstructed the line, it was the duty of the dockmen to request the persons on the ship to move it, and that it was contrary to orders for the dockmen to touch such ladders themselves. There was evidence that the negligent employee had in the first instance applied to the ship's people to remove the ladder, and that he only unfastened it himself on being told that there was nobody on board who could be immediately spared for that purpose.

2311. Servants handling goods.—a. Work performed with relation to railway cars.—An action is maintainable against the employer of laborers who, while engaged in loading his goods at a railway station, set a car in motion without making any provision for stopping it,¹ or who place it on a steep grade without taking proper precautions to prevent it from moving,² or leaving it on a siding so near the main track that it comes into collision with a passing train.³

b. Work performed with relation to mercantile establishments, etc.—Liability is imputable to the employer, where servants engaged in delivering or removing goods at or from the premises of the defendant or some other party handle the goods themselves so carelessly as

The trial judge directed the jury that if T. was employed by the defendants to do whatever was necessary for getting the crane along, without any express prohibition about moving the gangway, they might be liable, even though they had expressly directed T. to move it in a particular way; but that "If, on the other hand, it was not part of Tann's business at all to meddle with the gangway, if there was either an express direction or a positive notorious practice of the docks that the dockmen were not to meddle with the ship's accommodation gear,—then it was not within the scope of his employment." The jury rendered a verdict for the defendants. Held, that the latter part of this direction could not be complained of by the plaintiff. Lopes, L. J., said that he could imagine a case where, although the servant was not strictly employed to do a particular act, yet that act was reasonably necessary for and incidental to the purpose for which he was employed, so as to make it an act within the scope of his employment, and the judge might have made that a part of his summing up. But on the evidence it was clear that the act complained of was not necessary in this sense. Lord Lindley remarked that this was not the point of the summing up. The judge was trying to make plain to the jury the distinction between acts which were not within the scope of the servant's employment, and acts which were within the scope of his employment, even though they were contrary to orders; and the test he applied was, What was the servant employed to do?

¹ *Noble v. Cunningham* (1874) 74

Ill. 51 (car ran against another upon which plaintiff, a car repairer, was working).

² In *Oil Creek & A. River R. Co. v. Keighron* (1873) 74 Pa. 316, connected with a railroad was a branch line on which were oil stations where the railroad company left its cars to be filled by the owners of the oil, and then moved them. Two cars coupled together were placed at a station on a steep grade under charge of the oil company's superintendent, none of the railroad company's servants being there. The superintendent, having filled one car, detached it to fill another; the first car ran down the grade, and collided with a locomotive, which set fire to the cars and burned a neighboring house. Held, that the railroad company was liable for the negligence of the superintendent in managing the car. The court said: "The cars, however, were at the time of the injury subject to the control and management of Hines, for the purposes aforesaid. His authority was general within the limits of the special purpose. That purpose was, to fill the cars with oil; that was the general object for which the cars were intrusted to him. It was within the general scope of his powers so to use and move the cars, as to facilitate the loading thereof. As to third persons, he was clearly the agent of the railway company, and it is liable for his acts."

³ *Montgomery & E. R. Co. v. Chambers* (1885) 79 Ala. 338 (defendant was a gas company, having exclusive possession and control of a siding adjacent to its works, for the receipt and delivery of coal).

to cause damage to person or property;⁴ or are guilty of negligence in respect of the management of an instrumentality used for the pur-

⁴In *Tompkins v. North Hudson R. Co.* (1899) 63 N. J. L. 322, 43 Atl. 885, it was held that a purchaser of hay, under whose direction his vendor's wagon was backed upon the sidewalk in front of the door of his stable for the purpose of unloading, was not liable to a pedestrian who, in attempting to pass between the rear of the wagon and the front of the stable, was injured through the negligence of the vendor's employee in unloading the wagon, but that there was evidence from which a jury might find a failure of duty on the part of the vendor. The court said: "His servant, while unloading the wagon, was bound to take care that persons passing to and fro upon the street were not injured thereby. Under ordinary circumstances, when carefully done, the unloading of a wagon upon a sidewalk can be accomplished without injury to passers-by; and there was nothing in the facts of the case as presented by the plaintiff, to show that his injuries were received notwithstanding the use of reasonable care by Niver's driver. This being so, the liability of Niver was clearly a question which should have been submitted to the jury. The case against the railway company, however, fails to show any neglect of a duty owing by it to the plaintiff, or any tortious conduct by it contributing to his injury. It took no part in the unloading of the bale from the wagon, and the carelessness of Niver's employee cannot be attributed to the company; for, although it instructed him where to discharge the hay, it did not, by so doing, create the relationship of master and servant between them, nor make itself responsible for his acts in carrying out those instructions. Nor was there anything wrongful in the instructions themselves. The company had a right to have the wagon backed on the sidewalk temporarily, for the purpose of discharging the hay. Every person occupying lands along the line of a public street has a right to obstruct the sidewalk in front thereof for a reasonable time, in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the pub-

lic to a greater extent than is necessary for the purpose; and does not thereby become bound to furnish to the passer-by a safe passage around the obstruction. *Welsh v. Wilson* (1886) 101 N. Y. 254, 54 Am. Rep. 698, 4 N. E. 633. As the company had the legal right to obstruct the sidewalk in front of its stable for the purpose of having the hay delivered, and owed the plaintiff no duty which it failed to perform, there was no error in the direction to nonsuit, so far as it was concerned."

In *Dumontier v. Stetson & P. Mill Co.* (1905) 39 Wash. 264, 81 Pac. 693, the liability of a vendor of lumber for injuries caused by the negligence of the teamster delivering the lumber, who in unloading it suffered it to slide downhill upon the vendee, was held to be for the jury.

In *Ridge v. Railroad Transfer Co.* (1894) 56 Mo. App. 133, the defendant had contracted with a merchant to deliver goods at his store, without specifying the place. The plaintiff's plate glass window was broken as a result of the defendant's servant placing goods upon an elevator in front of the store, to be lowered into the basement. The defendant was held liable on the ground that his servants had, with his knowledge and consent, deposited goods on the elevator for several years previously.

Actions were also held to be maintainable in the following cases: *Post v. Stockwell* (1887) 44 Hun, 28 (servant who was sent to get bags of paper shavings from a building undertook to guard the entrance to the building while the bags were being thrown through a hatch from an upper story, and neglected to warn a person about to enter the building); *Kelly v. Cohoes Knitting Co.* (1896) 8 App. Div. 156, 40 N. Y. Supp. 477 (person passing a mill was struck by box of goods thrown from the door onto a wagon); *Ferara v. Freeborn* (1911) — R. I. —, 78 Atl. 897 (article which was being lowered slipped from its fastenings and fell on passer-by); *Williams v. Cunningham* (1902) Rap. Jud. Quebec 23 C. S. 263 (similar accident).

pose of performing their work;⁵ or in respect of their failure to remedy, after the termination of their work, any abnormally unsafe conditions which may have been created as one of the necessary incidents of its performance.⁶

The right of recovery was denied in one case on the ground that the negligence complained of was incidental to a certain disposition of the goods in question, which the servant had consented to make at the request, and for the accommodation, of the person to whom they were being delivered;⁷ and in another case on the ground that the act complained of, which had been done for the purpose of frighten-

⁵In *Price v. Simon* (1898) 62 N. J. L. 153, 40 Atl. 689, where a servant engaged in delivering ice ran out of a customer's house with his ice tongs open and came into collision with a child, his employer was held liable.

In *Ray v. Jones & A. Co.* (1904) 92 Minn. 101, 99 N. W. 782, a pedestrian injured by the negligence of the servant of a coal dealer, in suddenly raising the cover of an opening in a sidewalk without seeing that persons passing along the street were warned, was held to be entitled to maintain an action both against the servant's master and the owner of the premises.

⁶In *Whiteley v. Pepper* (1877) L. R. 2 Q. B. Div. 276, 46 L. J. Q. B. N. S. 436, 36 L. T. N. S. 588, 25 Week. Rep. 607, the carman of a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway, which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, she fell into the opening. Held, that the coal merchant was responsible for the resulting injuries, as the carman was acting as his servant in the delivery of the coals.

Mellor, J., thus dealt with the argument of the defendant's counsel, that all responsibility connected with the delivery of coals in the way adopted lay upon the customers only: "I cannot agree with that contention. It may be that in this case an action would lie against the occupier of the premises, but it is clear to my mind that an action lies against the defendant for the negligence of his servant. It is the

common case of negligence by a servant in the scope of his employment for which the master is responsible. The dictum of Williams, J., is no doubt entitled to very great respect, but it is to be observed that the judgment in the case of *Pickard v. Smith* (1859) 10 C. B. N. S. 470, 4 L. T. N. S. 470, merely decides that the occupier was responsible; we do not say that there was not abundant justification for that decision, and there is no expression in the judgment itself which at all conflicts with our decision.

In *Waters v. Pioneer Fuel Co.* (1893) 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52, the jury was held to be justified in finding from the evidence that the replacement of the cover of an opening in a sidewalk, after the completion of the delivery of coal, was a part of the teamster's business, as the requesting to have it opened before the delivery was commenced.

In *Tuomey v. O'Reilly* (1893; N. Y. C. P.) 3 Misc. 302, 22 N. Y. Supp. 930, where a cellar door in a sidewalk was left open by the driver of brewery wagon, it was not disputed that this negligent act was within the scope of his employment.

See also *Minns v. Omeme* (1901) 2 Ont. L. Rep. 579, affirmed in (1902) 8 Ont. L. Rep. (C. A.) 508, where the defendant was held to be chargeable with the negligence of servants who, being engaged at night in unloading and storing a cask of beer, had left open a trapdoor in the sidewalk without protecting it by a fence or a light.

⁷*Atherton v. Kansas City Coal & Coke Co.* (1904) 106 Mo. App. 591, 81 S. W. 223. There plaintiff ordered coal from defendant, and on its arrival ordered the teamster to put the same

ing some boys, was not, under the given circumstances, one which fairly tended to effectuate the discharge of the servant's duty.⁸

in a coal house. Plaintiff opened the door through which the coal was to be thrown, and asked the driver to throw in a number of lumps to plaintiff for the purpose of making a pile in the doorway. Plaintiff remained in the room, and carried these lumps thrown to her by the teamster and piled them in the doorway. While she was thus engaged the driver threw in some coal which struck her hand and severely injured it. Held, that the teamster, while engaged in throwing the coal to the plaintiff, was acting under her direction, and not under the direction of his employer, and hence the latter was not liable for his negligence in throwing the coal.

⁸ *Guille v. Campbell* (1901) 200 Pa. 119, 55 L.R.A. 111, 86 Am. St. Rep. 705, 49 Atl. 938, where a servant employed to drag bales of cotton from the sidewalk to the defendant's warehouse made a motion as if to throw a hook which he used in handling the bales, at boys who were playing on and around the bales, but not obstructing his work; the hook slipped from his hand and struck a boy standing near the bales and watching the work. The grounds upon which the defendant was held not to be liable were thus stated: "The test then is: 1. What purpose did Fitzgerald intend to accomplish by the act which caused the injury? 2. Was this purpose a matter of his own, or was it part of his employment? The act causing the injury was the waving by Fitzgerald of the iron hook, and allowing it to slip from his hand. His purpose was manifestly to frighten the boys, and drive them away from the bales. But at the time it does not appear that any of the boys were in any way obstructing Fitzgerald, or interfering with him in the accomplishment of his work. The boy was struck with the iron hook which had been given to Fitzgerald to use in pulling the bales around, but this use of the hook in converting it into a missile was entirely foreign to that for which it was intended by the master in giving it to the servant. The accident occurred while Fitzgerald was walking from the warehouse out to the bales. But suppose, for the purpose of illustration, that Fitzgerald had been sent

from the office to drag in the bales at a point a few blocks distant, and while upon the way thither had met a crowd of boys upon the sidewalk, and had waved the hook at them to clear a passageway for himself. If, under such circumstances, the hook had slipped from his hands, striking a boy standing at one side, surely it would not be contended that his employer was responsible for that act. So here we are not able to say that the act causing the injury was done in carrying out the duty to which the servant was assigned. His duty was simply to lay hold of the bales, and drag them, one by one, from the sidewalk into the warehouse. In performing this duty, he used the hook to grapple more securely with the bale, and this was the only use for which it was intended or for which it was supplied by the master. The request to drag the bales of cotton from the sidewalk cannot be held to imply authority to injure a boy standing on the sidewalk, looking on at the work. The act of violence by which the injury was occasioned was not done in execution of the authority given, but was quite beyond it, and must be regarded as the unauthorized act of the servant, for which he himself, and not the defendants, must be answerable. Whether this action was simply careless, or whether it was malicious, it was his own, and was not incident to the authority granted. The facts of the case are undisputed. The deviation from the line of the servant's duty was in this case, we think, sufficiently marked to justify the learned trial judge in determining as a matter of law that the servant was not doing the business of the master in the performance of the act causing the injury." It is perhaps disputable whether the nonliability of the defendant in this instance should have been predicated as a matter of law. The writer ventures to think that the circumstance that the boys were not in any way interfering with the servant's work at the time when he waved the hook was not necessarily so conclusive as the court assumed it to be. It would seem to have been a possible deduction from the facts that he made this motion because he apprehended

c. Work performed with relation to ships.—In one case a verdict against a master stevedore for an injury inflicted upon a passer-by by a heavy article which his foreman had thrown from the cart of a person who had contracted to carry goods to a quay and unloaded them there was sustained on the ground that the facts warranted the inference that, in assisting the contractor's servants to unload the goods, the tort-feasor had not transcended the scope of his employment.⁹ In another case it was held to be a question for the jury

that they might interfere with his work. It is submitted that the jury, if it had placed this construction upon the evidence, would have been justified in finding also that the act was within the scope of his employment, although his apprehension may have been unfounded.

⁹ *Burns v. Poulson* (1873) L. R. 8 C. P. 563, a stevedore employed to ship iron rails had a foreman whose duty it was, with the assistance of laborers, to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there. The foreman, being dissatisfied with the manner in which the carman was unloading the rails, got into the cart and threw out one of them so negligently that the plaintiff was injured. A verdict against the defendant was sustained (Brett, J., dissenting). Denman, J., said: "The contention before us on the part of the defendant was that, inasmuch as the duty of the stevedore did not commence, in relation to any particular portion of the rails in question, until they were on the ground, it was impossible to hold the defendant liable for the act of Malone in throwing the rail in question from the cart; that that act could not be within the scope of his employment or duty, being an act done at a period antecedent to that at which his duty in relation to the iron commenced, and at a place where he had no business to be meddling with it at all. In my opinion, this contention of the defendant proceeds upon too narrow a view of the duty or employment of Malone; and I think that the cases applicable to the subject establish that, even though in the ordinary course of his employment it would not be a part of Malone's duty to assist in moving the rails from the cart, it was still a question for the jury, and not for

the judge, whether in this particular case he was acting within the scope of his employment. It cannot, I think, be contended in this case that the judge or jury were bound to hold that Malone was acting for any purpose of his own, as distinguished from his master's service, . . . nor, as it appears to me, if it was a question for the jury, would it be unreasonable for them to have found that he was acting within the scope of his employment, inasmuch as they might not unreasonably have thought that the act was one done for his master's benefit, and with a zealous desire to expedite the work, and, for aught I know, in a manner proper and even usual under the circumstances for a person employed as Malone was at the time. . . . Can it be said that, in the present case, it would have been unreasonable for a jury to find that the act of the foreman in getting into the cart and throwing the iron down was an act bona fide and not unreasonably done in the zealous discharge of his duty to his master, in the course of the business he was employed upon? And if they were of that opinion, might they not also properly find that he was acting within the scope of his employment?" As the case is a close one it may be advisable to quote a portion of the remarks made by Brett, J., in his dissenting judgment: "The arguments raise the question, What is the proper application in point of law in this case, of the phrase or doctrine 'that the servant must be acting within the scope of his authority?' Some cases have raised the question whether the servant in what he did was intending to act for his master or for purposes of his own. That does not seem to me to be the point in this case. Malone may be considered to have been intending to act in performance of the duty delegated to

whether the defendant, a person who had taken a contract to put certain bales of cotton on board a lighter and throw them into the hold, was liable for injuries received by a member of the crew of the lighter who was struck by a falling bale while working in the hold. The *ratio decidendi* was that, so far as the particular bale was concerned, it might properly have been inferred from the evidence that the contractor's servant who had thrown it had, in doing so, acted on his own judgment, and not, as his duty required, under the directions of a man stationed by the captain of the lighter at the hatchway for the purpose of indicating when and where the bales were to be thrown. In this point of view, the essence of the tort-feasor's misconduct was that he had, in effect, violated his employer's instructions to submit himself to the control of the signalman in respect of the time and place for the throwing of the bale.¹⁰

him. In this case the question is whether the time had arrived or the circumstances had arisen for doing anything which the servant was employed to do. Had his employment commenced? . . . Now, what the defendant was employed to do, what he might according to that employment have done himself, he employed Malone to do. He employed Malone to carry the iron rails, after they were on the ground at the quay, thence into the ship, and there stow them. For anything done by Malone in carrying or stowing the rails, or anything done by Malone with the rails after they were on the ground, with intent to carry out his orders to take them into the ship and stow them there, the defendant would have been liable. But it seems to me that the defendant had not employed Malone to do anything with regard to the rails before they were on the ground. The defendant himself was not employed to do anything with the rails before they were on the ground. Anything voluntarily done by Malone, therefore, before the rails were on the ground, though done with intent to serve the defendant, was not a thing done which the defendant had employed Malone to do. The evidence which described and limited the employment of the defendant and of Malone was given on behalf of the plaintiff, and there was no evidence to vary or render doubtful the limitation of the commencement of that employ-

ment. There was no question which the jury would have been entitled to entertain about it. The judge was, in my opinion, bound to say that what was done by Malone was done before his employment by the defendant was called into play, that is to say, it was a thing which the defendant had not employed Malone to do."

¹⁰ *Hickey v. Merchants' & M. Transp. Co.* (1890) 152 Mass. 39, 24 N. E. 860. The ruling of the trial judge, that there was no evidence for the jury that the tort-feasor was acting as the servant of the defendant when he threw the bale of cotton into the hold, was pronounced erroneous. The court said: "The defendant had undertaken the duty of putting the cotton on board the lighter, and of throwing it into the hold. Marks was the defendant's servant, and until the bale was thrown in, it had not passed out of his possession, which was the possession of the defendant. If, at the moment before he threw it in, he had been ordered by the defendant's stevedore not to throw it in, but to wheel it back to the wharf, it would have been his duty to obey. It was only for a few moments that the servants of the defendant, if they submitted to the control of Barter, would be under his control, and then only to the extent of obeying his directions as to the place in the hold where, and the particular time when, the cotton should be thrown into the hold."

D. NEGLIGENCE OF SERVANTS WHOSE WORK HAS RELATION TO LANDS AND TENEMENTS.

2312. Servants engaged in rural work. Generally.—a. Management of animals belonging to master himself.—A master cannot be held responsible for a negligent act done by a servant in respect of the driving of an animal which has never been placed in his charge.¹

b. Disposition of trespassing animals.—On the ground that a servant hired to perform general farm work is impliedly authorized to drive trespassing animals out of his master's premises, it has been held that his master is liable for any injuries which such animals sustain in consequence of improper methods to which, in the exercise of his discretion, he may resort for the purpose of discharging this function.² The fact that the methods pursued by him are adopted in contravention of explicit directions given by his master with respect to the manner of performing the work will not preclude the owner of the animal from recovering.³

¹ *Lessoff v. Gordon* (1909) — Tex. Civ. App. —, 124 S. W. 182 (plaintiff was run into by a cow which a minor, in the absence of his father and without his knowledge or authority, and against the express wishes of his mother, was attempting to pen).

² In *Evans v. Davidson* (1879) 53 Md. 245, 36 Am. Rep. 400, the evidence tended to show that the defendant had on his farm one L., who was employed to do general farm work; that on the day the plaintiff's cow was killed, the defendant was away from home; that L., in driving the cow from the plaintiff's cornfield, negligently struck her with a stone and killed her; that the defendant had given no orders in regard to driving the cattle out of the field, and that he did not know the cow was in the corn until after she was killed. Held, that the trial judge had improperly taken the case from the jury. The court said: "In the very nature of the employment [of the tort-feasor], there must be some implied authority and duties belonging to it; and this as well for the protection of the master as third parties. If, for instance, a servant thus employed should see a gate open or a panel of fence down, through which a herd of cattle might or would likely enter and destroy his master's grain, we suppose all would say that it would be the positive duty of the

servant to close the gate or put up the fence to prevent the destruction of the grain; and if he should pass by and wilfully neglect such duty, it would constitute cause and a sufficient justification for the discharge of the servant. If that be so, how much more imperative the duty where, as in this case, in the absence of the master, the servant, being in the field at work, and seeing a herd of cattle break into the field, and in the act of destroying the corn, to drive out the cattle and thus to save the corn from destruction? To do such act for the preservation of the growing crop must be regarded as ordinary farm work, and such as every farmer employing a servant to do general farm work would reasonably contemplate and have a right to expect as matter of duty from the servant. The servant, therefore, was acting in the course of his employment in driving out the cattle, and if he did, while driving them out, commit the wrong complained of, the master is liable therefor."

That the master is liable for the negligence of his servant in driving trespassing cattle out of his field by means of dogs, although it is not shown that he directed the work to be performed in this particular manner, was laid down in *Smith v. Causey* (1856) 28 Ala. 655, 65 Am. Dec. 372.

³ *Schmidt v. Adams* (1885) 18 Mo.

In one case where the master's liability was denied, the decision proceeded upon the ground that, when considered with reference to the nature of the instructions given in regard to the work in question, the act complained of must be pronounced wilful, wanton, and unauthorized.⁴ In another, the immunity of the defendant was referred to the notion that the tort-feasor had transcended the scope of specific directions, limited in respect of space.⁵ The correctness of these rulings would seem to be at least doubtful. No exception, how-

App. 432 (defendant told his boys to drive cattle out of his lot, but not to do so with dogs).

⁴In *Cantrell v. Colwell* (1859) 3 Head, 471, the plaintiff's horse jumped over the fence of the defendant's inclosure while he was absent from home, and his wife requested one J. C., a relative, who happened to be passing by, to turn it out. After trying in vain to catch it, and after pursuing it round the inclosure for some time, J. C. threw a stone at it and broke one of its fore-legs. No opening was made in the fence for it to pass out at until after the injury was done, when he laid down the fence and let it out. The court reasoned thus: "The wrongful act of the servant may, in certain cases, be said in some sense to have been done in the course of his employment in his master's service; and yet, in no proper sense, was it within the scope of the authority given him by the master. And notwithstanding the apparent confusion to be met with in some of the cases, the distinction is clearly enough illustrated in the books, between an injury to a third person arising from the negligence or unskilfulness of a servant, who really had no other purpose at the time but the execution of the duty confided to him by his master, and a similar injury resulting from the wilful and unauthorized act of the servant, not done in execution of his master's orders, but altogether aside from the authority given him, and prompted perhaps by his own malice or wilfulness, or other improper motive. . . . Upon these principles we think it clear that the present suit cannot be maintained. The request to turn the mare out of the field cannot be tortured to imply an authority or command to injure or destroy the animal in doing so. The fair inference would be exactly the reverse of this. The act of violence by which

the loss was occasioned was not done in execution of the authority given; but was altogether beyond it, and must be regarded as the wilful, wanton, and unauthorized act of the servant, for which he himself, and not the defendants, must be answerable." It is submitted, however, that the evidence, so far as it is stated in the report, would have justified the inference that the tortious act was done for the purpose of performing the given work. It was doubtless prompted by the petulance of a man disappointed at the ill success of his efforts. But this circumstance was clearly not enough of itself to absolve the defendant, if a jury would have been warranted in finding from the rest of the facts that the stone was thrown with a view to carrying out the instructions given, and not solely for the gratification of personal resentment.

⁵In *Oxford v. Peter* (1862) 28 Ill. 434, the appellant directed N. to go through a certain field and drive out any cattle which he might find there. After having driven out one animal which he saw there, N. went into an adjacent lane and chased for a short distance some other cattle that happened to be in it. While he was doing so a cow fell and was killed. The grounds upon which the appellant was held not to be liable to the owner of the cow were thus stated by the court: "When the directions of the master are general as to the business in which the servant is employed, he confides in his discretion, but when the directions are specific, it is otherwise. In the former case, the master becomes liable for all the acts of the servant performed in the discharge of the duty required. But in the latter case, if the servant exceeds the specific directions, the act performed beyond the authority becomes his own, for which the master is not liable. The act then becomes wilful on

ever, can be taken to a decision by which the master was declared not to be liable for an act which had been done by the servant upon a highway, after the completion of the work assigned to him, and which was merely an incident of an attempt on his part to prevent the servant of the owner of the trespassing animal from taking it home.⁶

c. Management of machinery.—Where a servant in charge of his

the part of the servant, and is not in furtherance of the business of the master. In this case, the direction was only to drive out any cattle which might be found in the field. The pursuit of the cattle not in the field was beyond the directions of the appellant, and for which he is not responsible. When the boy had driven out the cow found in the field, he had performed his duty and complied with appellant's directions." The position thus taken seems to be open to the objection that the evidence, so far as it is stated, was consistent with the inference that the servant had pursued the cattle in the lane simply with the intention of removing them from the neighborhood of the field, and thus preventing a renewed trespass upon his master's premises. If this was actually the motive which prompted his action, the defendant might, it is submitted, have been properly found liable by a jury. The case would merely have presented the ordinary situation of a servant's departure from instructions in respect of the manner of performing a prescribed piece of work. It may be that, if the master had expressly forbidden the servant to go outside the field, he could not have been held responsible for anything done after he had passed into the lane. In this point of view, it would seem to follow that, if the evidence set out in the record was insufficient to enable the court to determine the case with relation to this possible aspect of the servant's conduct, a new trial should have been ordered. But under the circumstances, it is apprehended that a positive limitation as regards locality could not be legitimately inferred, at least as a matter of law, from the general directions given.

⁶ *Yates v. Squires* (1865) 19 Iowa, 26, 87 Am. Dec. 418. There the plaintiff and defendant owned adjoining lands between which there was no par-

tition fence, and their horses had been accustomed to run in the common inclosure. The defendant, when leaving home on the day in question, directed his son to turn the plaintiff's mare out of this inclosure if she got in there, this being the whole of the directions which he gave concerning the matter. The mare, being found in the inclosure, was turned out into the road by the son. After she had been out about fifteen minutes, and two of the plaintiff's little boys were endeavoring to drive her past the house of defendant towards their home, the defendant's son stood in the road to prevent them from doing so; and as the mare came up to go past, he struck her with his whip, whereupon she jumped upon the fence and was fatally injured. The defendant did not return home or have any knowledge of the accident until after it occurred. The court said: "The master directed the servant to turn the mare out of the pasture. If, in the execution of this order, the servant had done the wrong which produced the damage, the liability of the master would be unquestioned. But after the servant had fully discharged this duty, and the control of the master in that service was ended, he committed the wrong complained of. The fact that the wrongful act was done shortly after the performance of the other act which he was directed to do cannot change the liability of the master. If that service was ended, it is immaterial whether it had been ended fifteen minutes or fifteen days. The act, in either case, not being done in the service of the master, he is not liable for it." The general ground thus assigned was clearly sufficient to sustain the conclusion of the court; but it might well have been referred to the more special consideration that the act in question was obviously done either from the servant's personal amusement or from personal malice.

master's mowing machine, with horses attached, abandoned them to engage in an unlawful personal combat with the defendant, and the horses, being frightened by the noise of the encounter, ran away and injured the machine, it was held that the plaintiff was chargeable with the negligence of his servant in leaving the horses, and could not recover for the damage to the machine.⁷ On the other hand, where the plaintiff's minor son, whom he had deputed to act as water carrier while his wheat was being threshed by a horse-power machine which the defendant had furnished, together with the horses and a driver, sustained an injury as a result of his having complied with the driver's directions, it was held that, in the absence of proof that the driver was invested with the power of superintendence over the plaintiff's employees, the defendant could not be held liable for the injuries in question.⁸

d. Acts incident to the work of teamsters.—In a case where the machinery of a mill was damaged by an iron bolt concealed in a bag of grain which the defendant had brought to be ground, it was held that the owner of the mill was entitled to recover upon evidence which showed that not long before the defendant's servant had, while making a journey with his wagon, carried the bag with him and fed a portion of the contents to the team; that the iron bolt, which had been used as a clevis pin, was then deposited by the servant in the bag as the most convenient receptacle available; that on his return to the defendant's house he had, without removing the bolt or notifying the defendant, laid the bag in the place from which he had removed it; and that the defendant had subsequently filled it up again and taken it to the mill.⁹ In another case damages were held not to be recoverable from the master of a servant who had so negligently handled a

⁷ *Page v. Hodge* (1885) 63 N. H. 610, 4 Atl. 805.

⁸ *Williams v. Gobble* (1900) 106 Tenn. 367, 61 S. W. 51, holding that the trial judge had improperly charged the jury without qualification that if the driver and water carrier were not fellow servants, the defendants would be liable for the acts of the driver.

⁹ *Tuel v. Weston* (1874) 47 Vt. 634. The court said: "The defendant insists that under the declaration and the facts developed, he cannot be made liable in this case. The declaration alleges personal negligence on the part of defendant in taking the bag of grain to the mill to be ground, containing the

bolt. What would have been the effect under such a declaration if the hired man had put up the corn and taken the bag to the mill for the defendant, it is not necessary now to inquire. The defendant himself took the grain to the mill. His act was the direct cause of the injury to the plaintiff. For that act he is responsible, and he cannot shield himself from that responsibility by showing that his servant was negligent in not informing him that there was a bolt in the bag. The injury resulted from the combined acts of the defendant and his servant, for both of which the defendant is responsible."

pipe which he was smoking as to set fire to a haystack from which he had been sent to take a load.¹⁰

e. Felling trees.—In a Scotch case where a person walking along a highway was killed by a tree which was being cut down on the defendant's premises by servants acting under general orders regarding such work, but without any special directions as to the manner of performing it, the action was held not to be maintainable.¹¹ But this decision would, it is apprehended, scarcely be treated as good law in other jurisdictions.¹²

f. Removal of earth, etc.—In one case the defendant was held liable for the acts of his servants in negligently depositing on the plaintiff's land certain stones which they had been directed to remove from the bed of a stream within the defendant's boundary line.¹³

2313. Servant's using fire in connection with rural work.—More than two hundred years ago the law was thus laid down by Holt, Ch. J., in a case where the plaintiff's heath was destroyed by a fire which spread from his neighbor's close: "If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit."¹ The accepted doctrine on the subject, as it has been defined with greater exactness by later decisions,

¹⁰ *Heard v. Flannagan* (1884) 10 Vict. L. R. (L.) 1 (lighted pipe placed in the pocket of the servant's waistcoat which he had laid against the stack set fire to some loose matches).

¹¹ *Linwood v. Hathorn F. C.* (1817) p. 327 (Sc. Sess. Cas.). Upon the appeal to the House of Lords (1821) 1 Sc. App. Cas. 20, 3 Bligh, 193, the proceeding was held to be defective, on the ground that the servants had not been properly brought before the House. But Lord Eldon intimated that, independently of this technical point, the judgment of the lower court was probably correct under the circumstances.

¹² In *Baird v. Hamilton* (1826) 4 Sc. Sess. Cas. 1st series, 797, Lord Pitmilley thus commented on the case before the court: "There are two things which go to decide it: 1. The servant was doing an act which he was specifically hired and employed by his master to perform, wherein it is distinguished from the case of *Linwood*,

where no orders were given to cut down the tree which occasioned the injury. 2. The accident happened from the omission of ordinary caution in performing that act; and in this also it differs from the case of *Linwood*, where it was nearly a *casus fortuitus*." Neither of these reasons, it is submitted, would be deemed valid in England or the United States. An occurrence that is "nearly" a *casus fortuitus* is surely somewhat of a juristic anomaly. If an actual *casus fortuitus* had been a proper inference from the evidence, the defendant was, of course, entitled to be absolved, and it seems to have been with relation to this aspect of the facts that, in the case before the House of Lords, Lord Eldon's opinion was expressed. See note 11, *supra*.

¹³ *Southwick v. Estes* (1851) 7 Cush. 385.

¹ *Turberville v. Stampe* (1698) 1 Ld. Raym. 264.

may be enunciated as follows: For a servant's negligence in respect of allowing fire to escape from the land of his master on to that of another person, his master must respond in damages, if the fire was kindled by the servant in pursuance of the master's directions,² or with his consent,³ or as a means impliedly authorized for the purpose of carrying out a particular piece of work which he had been ordered to perform, or which came within the range of the duties embraced by the contract of hiring.⁴

²*Johnson v. Barber* (1849) 10 Ill. 425, 50 Am. Dec. 416; *Armstrong v. Cooley* (1849) 10 Ill. 509 (master liable, although servant did not adhere strictly to the directions given).

³In *O'Connell v. Strong* (1837) Dud. L. 265, the use of the fire which the servant kindled for the purpose of clearing new land seems to have been expressly authorized by the master, but the report is not clear upon the point; nor is it of much importance in view of the decisions cited in the following note.

⁴In *Simons v. Monier* (1859) 29 Barb. 419, the owner of a piece of land occupied by his servant directed him to summer-fallow a part of it. In order to prepare the land for the plow, the servant cut down and piled up the brush growing on it, and then at a time of unprecedented drought, when the act was negligent in itself, directed his son, a lad, to set fire to the brush heaps, which he did, and thereby fire was communicated to the plaintiff's woods. Held, that the removal of the brush was within the scope of the servant's employment. An exception taken to an instruction based upon the theory that the negligence of John Terry, the actual tort-feasor, was imputable, was thus disposed of: "The setting of the fire, which the jury have found was a negligent act, was done by John at the time, by the express direction of his father. Upon this state of facts the judge, I think, was clearly right in instructing the jury that the act of setting the fire was the act of the father. It was his immediate personal act; for, although it was done by the hand of the son, the hand was directed, guided, and controlled by the mind and will of the father. It was the father's will and volition exclusively. It was his carelessness, and not the carelessness of the son. It was precisely as much the act

of the father as though he had used some other means or instrument in conveying the fire and kindling the flame." The court proceeded thus: "This being so, the defendant was clearly liable, if the setting of the fire was within the scope of the employment of Seth Terry, as a hired servant upon the farm. Of this, it seems to me, upon the undisputed facts, there can be no doubt. He had been directed by the defendant to summer-fallow the piece of ground where the fire was set. In order to prepare the ground for the plow, it became necessary to cut and remove the brush growing upon it. This preparation was an essential part of what he was required to do. It was clearly a necessary incident, and must be held to have been embraced in the general directions. It was the careless manner in which he undertook to remove the brush so cut, in respect to time and circumstances, which constitutes the alleged cause of action. It is claimed by the defendant's counsel that this question, as to whether the removal of the brush was within the scope of the employment of the servant, should have been submitted to the jury as a question of fact to be found by them. But I think it was clearly a question of law upon the undisputed facts, as to which there was no conflict of evidence, and the judge might properly have charged directly what seems to have been assumed, that the cutting and removal of the brush was a part of the work of summer-fallowing the land, and was within the scope of the employment."

In *Ellegard v. Ackland* (1890) 43 Minn. 352, 45 N. W. 715, the court thus discussed the question whether the evidence was sufficient to charge the defendant with the negligence of his son in setting the fire which destroyed plaintiff's property: "There was enough to show that the son was employed by him,

Under the general principle discussed in § 2285, *ante*, it is manifest that, if the circumstances are otherwise such as to warrant the inference that the servant was impliedly authorized to kindle a fire for the purpose of executing the work assigned to him, any injury which results from its getting out of control is none the less imputable to his master because he was expressly forbidden to kindle it.⁵

not merely to do some one specified thing, as to plow a particular field, but as a general farm hand, and that within the scope of his employment was to do the grubbing, to facilitate which he set the fire. Where a master authorizes a servant to work for him, the former is liable for injury to another caused by the latter's negligent manner of doing the work, or by some negligent act of his done in the course of and for the purpose of performing the work, even though the master may have forbidden him to be negligent, or to do the negligent act. Authority to the servant to be negligent is not required to make the master liable. The evidence was sufficient."

In *Lewis v. Schultz* (1896) 98 Iowa, 341, 67 N. W. 266, the servant in question, together with the defendant's son, who had been invested with a general authority to conduct his farm, were directed to "go to the meadow, to fix it up, so it could be mowed; to level it off, clear it up, cut down the ant hills, and get it in shape for next year." The evidence also showed that the hay which remained on the ground was an obstruction which would interfere to some extent with the use of the mower during the next season, and, if left, that it would kill the grass which it covered. It also appeared that the removal or destruction of part of the hay was necessary in order to level ant hills which it covered. The court, adverting to this state of facts, observed: "Surely the setting out of the fire was within the scope of the servant's employment, or at least the jury was authorized to so find. It does not follow that because the master gave no express directions to set out the fire, and did not know of it until after it had been done, he is to be exonerated." It was furthermore remarked that, although no special verdict had been rendered, it was apparent that the son had explicitly empowered the servant to set out the fire on the prairie land in question, and that the

master had authorized the son to burn over the prairie.

In *Marlowe v. Bland* (1910) 154 N. C. 140, — L.R.A.(N.S.) —, 69 S. E. 752, a nonsuit was held to have been properly ordered in a case where a farm hand who had been directed merely to cut and pile certain cornstalks in a field set fire to the pile and caused damage to the adjacent premises. The court said: "As a general proposition the duty of a hired man is to do what he is told, and in this instance he was directed to do a definite, specific thing importing no menace to anyone, and, after completing the work that was given him to do, he goes on of his own motion and does something else,—engages in an act which is not infrequently a source of danger to neighbors,—and does it under circumstances amounting to a negligent wrong and causing substantial pecuniary injury. Plaintiff did not rely on the inferences which might arise from the fact that his neighbor's hired man, while engaged in clearing off a field on a windy day, set fire to a pile of cornstalks near the plaintiff's woodland, from which it might be reasonably inferred that this negligence was within the scope of his employment, but his own proof goes further and shows that the employee had no orders to burn these stalks, nor was he sent with general directions to clear off the field, involving some extent of discretion in his method."

In *Gibson v. Wood Lumber Co.* (1908) 91 Miss. 702, 45 So. 834, the testimony tended to show that the fire which damaged the plaintiff's property was set out by a man in the employ of defendant, the owner of a turpentine grove. Held, that the trial court had erred in rejecting evidence that the man was actually engaged in the furtherance of defendant's business at the time when he kindled the fire.

⁵ *Wickham v. Wolcott* (1901) 1 Neb. (Unof.) 160, 95 N. W. 366 (fire set out on land in contravention of orders

In one of the American states the doctrine has been adopted that the master cannot be held liable for damages occasioned by the spread of fire, if the servant had not received any explicit authority to kindle it at the particular place in question;⁶ nor if he was directed not to

covering both time and place); *Read v. McGivney* (1904) 36 N. B. 513 (servant hired to pile up pieces of unburnt wood left over from previous fires violated order forbidding him to light the piles).

In *Keith v. Keir*, F. C. (1812) p. 679 (Sc. Sess. Ct.) (fire lighted to facilitate clearing operations), the report states distinctly that the use of fire was prohibited; but in *Baird v. Hamilton* (1826) 4 Sc. Sess. Cas. 1st series, 797, 1 Fac. 742, it was mentioned by Lord Boyle that the session papers showed that the use of fire was authorized. This correction was evidently not known to Park, J., when, in *M'Kenzie v. M'Leod* (1834) 10 Bing. 385, he remarked that he could not agree with the decision for the reason that "when a master prohibits a certain mode of proceeding, and the servant chooses notwithstanding to resort to it, it is a strange thing to say the master shall be liable." But it is apprehended that under the more recent English and American authorities, the question whether the use of fire was or was not authorized would, as regards servants working in pursuance of general instructions to clear land, be treated as a wholly immaterial element.

⁶ *Wilson v. Peverly* (1823) 2 N. H. 548. The evidence was that a fire was set upon the land of the defendant by his orders, and the charge of it given to a hired laborer; that the defendant then left home on business, directing this laborer, after setting the above fire, to employ himself in harrowing other land of the defendant in the same neighborhood; that, in the course of the day, the fire spread from the farm of the defendant to that of the plaintiff, causing the injuries complained of. The jury found specially that the damages were not caused by any neglect in setting or watching the fire first kindled, but were produced by the laborer of the defendant, who, during his master's absence, and before he commenced harrowing, undertook to carry brands from the first fire into the plowing field to consume some piles of wood and brush

which were there collected, and on his way dropped some coals, from which all the subsequent injury arose; that carrying the fire in this manner from one field to the other was, under all the circumstances, dangerous, and was not in conformity to any express directions of the master; and that this laborer was accustomed to work under the particular directions of the defendant, and could conveniently have harrowed without first burning the piles of wood, though to burn them first was the usual course of good husbandry. Held, that upon these findings a general verdict for the defendant had properly been entered. The court said that the general principle which defines the extent of a master's responsibility does not "reach wrongs caused by carelessness in the performance of an act not directed by the master, as a piece of business of some third person, or of the servant himself, or of the master, but which the master did not either expressly or impliedly direct him to perform. *M'Manus v. Crickett*, 1 East, 106; Noy's Maxims, chap. 44; 2 Rolle, Abr. 553; *Croft v. Alison*, 4 Barn. & Ald. 590, 23 Revised Rep. 407. When a general agent is employed, then all acts within the scope of his agency are the master's act; but when a laborer works under the special orders of the master, the master is responsible only for his skill and care in executing those orders. *Bush v. Steinman*, 1 Bos. & P. 404; *Sanderson v. Baker*, 3 Wils. K. B. 317, 2 W. Bl. 832; *Turberville v. Stampe*, 1 Ld. Raym. 264. Thus, a piece of labor might be very properly and safely performed at one time, and not at another, as in this case the setting of a fire in the neighborhood of much combustible matter. And if the master, when the fire would be highly dangerous in such a place forebore to direct it to be kindled, and employed his servant in other business, it would be unreasonable to make him liable if the servant, before attending to that business, went in his own discretion and kindled the fire to the damage of third persons. The master, *quoad hoc*, is not acting

kindle it unless the master was present.⁷ The rationale of the decisions to this effect is that the powers of a special agent are strictly circumscribed within the limits defined by his instruction. But it is apprehended that most courts would deem this principle to be inapplicable to the circumstances involved in such cases, and treat the master's liability as being a permissible deduction from the general character of the appointed work of the servants in question. The essence of their tortious conduct seems to have been merely the performance of that work in a manner different from that specified in the instructions given, and not the doing of something wholly outside the scope of their employment.⁸

2314. Servants using fire in houses.—As long ago as the fifteenth century it was laid down that an action lies against a person whose fire is kept so negligently in his house by a servant that his neighbor's house is burned down.¹ That the doctrine so enounced was founded upon the notion of an absolute liability on the part of the defendant to see that due care was used in preventing the spread of fire from his premises would seem to be a necessary conclusion from the circumstance; the decision was rendered at a time when the general principle *respondeat superior*, in the sense in which it is now understood, had not yet been adopted as a part of the common law (see § 2233, *ante*). However this may be, it is fully settled that, under that principle, the owner or occupant of a building is liable for injuries caused by the negligence of his servants in respect of the use of fire in the course of their employment.²

in person or through the servant; neither *per se* nor *per aliud*; and the doctrine of *respondeat superior* does not apply to such an act, it being the sole act of the servant."

⁷ *Andrews v. Green* (1882) 62 N. H. 436. There the defendant had a number of men employed with an overseer in clearing a piece of ground adjoining the plaintiff's field. In the defendant's absence, and without his or the overseer's knowledge, one of the men intentionally started a fire which spread to the plaintiff's field. The defendant's nonliability was affirmed on the authority of *Wilson v. Peverly*, *supra*.

⁸ In this point of view it is important to note that *Wilson v. Peverly*, *supra*, is a decision of somewhat early date, rendered before the "class of acts" which a servant is hired to perform had been fully recognized as the appropriate criterion of a master's liability.

¹ *Beaulieu v. Finglam* (1401) 3 V. B. 2 Hen. IV. 18 pl. 6. See § 2233, par. (d) *ante*. In Noy's *Laws of England* (Blythwood's ed.) p. 95 (early part of seventeenth century), the effect of the case is thus summarized: "If a servant keep his master's fire negligently, an action lies against his master; otherwise, if he carry it negligently in the street." Under the modern authorities the second half of this statement clearly needs some qualification, as the master would be held responsible if the servant was carrying fire in the course of his employment. The first half is cited as good law in 1 Bl. Comm. p. 431. The rule which it embodies has also been affirmed in *Canterbury v. Atty. Gen.* (1843) 1 Phill. Ch. 306, 12 L. J. Ch. N. S. 281, 7 Jur. 224.

² In *Lothrop v. Thayer* (1885) 138 Mass. 466, 52 Am. Rep. 286 (action brought by a landlord who occupied

Whether the negligence of an employee can be imputed to the occupant of a house, so as to preclude him from recovering damages from a person through whose negligence it has been set on fire, is a question to be determined from the facts in each case.³

As to the liability of a tenant to his landlord for damage caused to the demised premises by the negligence of his servant in dealing with fire, see § 2344, *a, post*.

part of a building rented to defendant), the court observed: "It must, however, we think, be regarded as too well established to be overturned by judicial decision, that the occupant of a building is responsible to the owners of adjoining property for the want of ordinary care on the part of himself or his servants acting within the scope of their employment, in kindling or guarding the fires used for heating the building." The authorities cited were *Laughan v. Menlove* (1837) 3 Bing. N. C. 468, 4 Scott, 244, 3 Hodges, 51, 6 L. J. C. P. N. S. 92, 1 Jur. 215, 18 Eng. Rul. Cas. 715; *Filliter v. Phippard* (1847) 11 Q. B. 347, 17 L. J. Q. B. N. S. 89, 12 Jur. 202. The actual purport of the decision was that a tenant at will of a part of a building, the other part being occupied by the landlord, in each part of which personal property of the landlord was contained, was liable for the destruction of the part in the possession of the landlord and its contents by fire caused by the negligence of himself or his servants in kindling or guarding fires in stoves used for heating the part of the premises let to him; but that he was not liable for the destruction of the part so let from the same cause, if the burning was not intentional, and the negligence was not so gross as to amount to recklessness.

³In *Fero v. Buffalo & State Line R. Co.* (1860) 22 N. Y. 209, 78 Am. Dec. 178, where sparks from a locomotive entered the plaintiff's house through a door left open by a mason in his employment, it was laid down that the mason, even if the terms of his hiring were not such as to render him an independent contractor, was not to be regarded as acting within the scope of his employment in respect of his omission to shut the door in question, which was in a part of the house where he was not at work. The court observed: "Neither his employment nor his duty charged him with any responsibility in regard to

closing the door, or any other act of precaution, if any such can be assumed to be devolved upon the plaintiff or his employees in respect to the protection of the property."

In *Read v. Pennsylvania R. Co.* (1882) 44 N. J. L. 280, the servants of a railroad company left in a house where the oil used by the company was kept, a stove red-hot, or so adjusted that it would speedily become red-hot. Around it was scattered inflammable waste, upon which was a can of oil. A fire broke out in the house and spread to the plaintiff's premises. Held, that he was entitled to recover damages from the company. The contention mainly relied upon by the defendant was that no responsibility arises from an accidental conflagration beginning upon the defendant's property, and that no negligence upon the part of the defendant or its servants appeared in the case. But the jury were to be warranted in finding that the conduct of the servants had been negligent. It was stated by the court that the statute, 6 Anne, chap. 31, absolving from liability persons in whose house or chamber any fire should accidentally begin, had been incorporated in the laws of New Jersey, but the amending statute of 14 Geo. III. chap. 78, by which the provisions of the earlier act were to extend to fires accidentally originating in a stable, barn, or other outbuilding, had never been adopted in that state. Accordingly, as the fire in question had originated in the storage house of the defendant, its liability depended on the common law. The court observed that "whatever the earlier impression may have been regarding the responsibility of a person who kindled a fire upon his premises for all resulting damages to his neighbor's property, the rule, as early as the decision in *Tubervil v. Stamp*, 1 Salk. 13, has been considered settled, that without a negligent kindling or guarding of a fire, no liability

2315. Servants hired to manage elevators and lifts.—The scope of the employment of a servant of this description obviously extends to such matters as the various operations incident to the raising or lowering of the elevator itself,¹ and the closing of the door of the shaft.² On the other hand, the employer cannot be held liable where the injury complained of was sustained at a time when the servant in charge of the elevator had, for the accommodation of the injured person, diverted it from its normal and legitimate uses;³ nor where the

could be fixed upon a person from whose premises it spread and destroyed the property of another." In answer to the objection that the court erred in overruling the offered instructions of the company to its servants in regard to the care of the stove and the contents of the oil house, the court said: "The case of the plaintiff is grounded, not upon any negligent act of the company in failing to properly instruct its employees, but in the actual negligence of its servants in the line of their employment in the control of the stove. If they were negligent, then, whether they followed or violated their instructions was immaterial, as in either case the company were responsible."

In *Parafine Oil Co. v. Berry* (1906) — Tex. Civ. App. —, 93 S. W. 1089, where a fire set out by defendant's servant for the purpose of protecting defendant's derrick, oil tank, etc., from accidental fire, escaped from his control and burned plaintiff's grass, etc., defendant was held to be liable for the injuries so sustained, though the servant's act in setting the fire was unauthorized and unlawful.

¹In *Reed v. McCord* (1897) 18 App. Div. 381, 46 N. Y. Supp. 407, the actual point decided was that an employee in charge of the drum of a hoisting machine was not, as matter of law, free from negligence in failing to make sure that the clutch or dog was in place before he permitted the machine to reverse for the purpose of lowering the load. A verdict finding defendant to be liable for the death of a person upon whom the load rapidly descended in consequence of the clutch's not being in place was accordingly sustained.

In *Kaplan v. J. C. Lyons Bldg. & Operating Co.* (1909; App. Div.) 119 N. Y. Supp. 264, a verdict against the defendant was sustained, where the plaintiff, who entered the open door of

an elevator supposing the operator to be within, was injured by a sudden descent thereof, caused by the pulling of the cable by the operator from below.

For cases in which actions were held to be maintainable in respect of injuries caused by the descent of elevators upon artisans working in the shafts, see *Anderson v. Standard Plunger Elevator Co.* (1908; App. Div.) 113 N. Y. Supp. 593; *Schwartz v. Onward Constr. Co.* (1909) 130 App. Div. 588, 115 N. Y. Supp. 380. See, however, note 5, *infra*.

²*Stephens v. Chaussé* (1888) 15 Can. S. C. 379, affirming (1887) Montreal L. R. 3 Q. B. 270, 10 Legal News, 406 (injury caused by falling down shaft).

³In *Sweeden v. Atkinson Improv. Co.* (1910) 93 Ark. 397, 27 L.R.A.(N.S.) 124, 125 S. W. 439, where a child whom the wife of the man operating the defendant's elevator had brought as a guest to the building where he was employed was injured while on the elevator, a judgment for the defendant was affirmed on grounds thus stated: "The uncontroverted evidence showed that, without authority from the master, the servant had invited the plaintiff into the building as his own guest, and had invited her into the elevator as his own guest for the purpose of taking her for a ride. He did this not for the purpose of furthering the interest of his employer, nor was the act incident to the business of the defendant in which he was engaged. It was wholly and exclusively a purpose of his own. It was the same as if he had taken the carriage and horses of his employer without permission, and taken his little friend for a ride in that. He simply used the elevator in which to take the plaintiff for a ride; and when he did this, he stepped aside from the defendant's business, even though it was for a short time, to do an act not connected with that busi-

accident resulted from the handling of the elevator or its appurtenances by a servant whose duties were not in any way connected with its operation.⁴

According to one view, the negligence of a servant in failing to keep a promise, express or implied, made to an artisan, that the elevator shall not be moved above or below a certain level while he is at

ness, nor for the benefit of his employer. The act done was not within the scope of his employment, and was not done by authority or permission of the defendant. During the time that this independent act and exclusive purpose of the servant was being carried out, the relation of master and servant between the defendant and Elliott was suspended. The defendant was therefore not liable for the injury which was then sustained by the plaintiff, although it might have been caused by the negligence of Elliott."

See also *Jossaers v. Walker* (1897) 14 App. Div. 303, 43 N. Y. Supp. 891, note 5, *infra*.

⁴In *Gibson v. International Trust Co.* (1900) 177 Mass. 100, 52 L.R.A. 928, 58 N. E. 278, the janitor of a building, while riding in the elevator, moved the elevator boy's stool without his knowledge, and he lost his balance in attempting to sit down. In reaching out for some support, he took hold of the lever and started the elevator, thus causing an injury to the plaintiff, a passenger. Held, that the janitor was not acting as the servant of the defendant in regard to the removal of the stool.

In *Sherwood v. Warner* (1906) 27 App. D. C. 64, 4 L.R.A. (N.S.) 651, 7 Ann. Cas. 98, a machinist, while engaged in repairing a damaged elevator in an apartment house, caught his arm, and requested the janitor of the building to raise the elevator. The janitor negligently lowered it, thus causing the loss of the machinist's arm. Held, that the owner of the house was not liable for the injury since the janitor had acted as the agent of the plaintiff, and not in the general course of his employment. Under the given circumstances, the propriety of affirming nonliability as a matter of law may fairly be considered doubtful. Was it not rather a case in which the right of recovery depended upon whether such an emergency existed as to justify the defendant himself,

if he had been present, in attempting to release the plaintiff's arm, without waiting to summon the operator, or some other person familiar with the operation of elevators? If he would have been so justified, it would seem to be a legitimate inference that a servant who took the same step might justifiably have been found to have acted as his agent in the matter.

In *H. B. Phillips Co. v. Pruitt* (1904) 26 Ky. L. Rep. 831, 1105, 82 S. W. 628, 83 S. W. 114, it was the duty of the cashier in defendant's store to see that the door of the passenger elevator was shut when not in use, but not her duty to shut it herself. She noticed that the elevator had moved up above the level of the floor for some 12 or 15 feet and that the door was ajar and without knowing of the approach of plaintiff, a customer, she instructed one of the bundle boys to lower the elevator and shut the door, and the plaintiff seeing the boy open the door wide to lower the elevator as directed, stepped into the shaft and fell to the bottom. In an action by plaintiff for injuries thus sustained, it was held that the evidence warranted a finding that the act of the boy in opening the door to pull down the elevator was within the apparent scope of his authority in obeying the cashier's orders.

In *Cullen v. Higgins* (1905) 216 Ill. 78, 74 N. E. 698, it was held that a waitress in a hotel could not recover for injuries received while she was attempting to board the elevator through a door which was opened for her by a bell boy who had nothing to do with the operation of the elevator.

In *Mouse v. A. N. Kellogg Newspaper Co.* (1894) 58 Minn. 406, 59 N. W. 941, an action for an injury sustained in falling down an elevator shaft, the defendant occupied, as tenant, the sixth story of a building. For the use of tenants and those having business with them, there was a freight elevator extending up through the several stories.

work within the shaft, is not imputable to his master.⁵ The rationale of this doctrine is that, in entering into an agreement which interferes with the usual method of operating the elevator, the servant transcends his authority. It is, however, open to some weighty, if not conclusive, objections. In the first place, it seems difficult to contend that a change of method under the given circumstances con-

Its shaft was inclosed, but had, on defendant's story, a door fastened on the inside or elevator side, which the man in charge of the elevator opened when it stopped at that story, and closed and fastened when it left that story, going up or down. The elevator and the door were in the control of the owner of the building, the defendant having no more control of them than anyone else. Anyone desiring the elevator to come or stop at that floor gave a signal by touching a bell. Plaintiff, who was in the employment of an express company which carried packages for defendant, received and receipted for them at its room, and took them down by means of the elevator. As soon as he receipted for them, they were entirely in his control, and the defendant and its servants exercised no control over them, and had no part in getting them to or down on the elevator. On the occasion when he was injured he had gone up the elevator, received and receipted for some packages, and was waiting for the elevator to come to that story. An employee of defendant, though it was outside of his duty, and was unconnected with any business of his master, reached through a broken window in the door in the elevator shaft, and opened it. After a little while, defendant's shipping clerk, knowing plaintiff was waiting for the elevator, called out to him, "All right, Charlie," and he, supposing that meant the elevator was up, picked up a package, walked through the door, and, the elevator not being there, fell down the shaft. It was urged that defendant was chargeable with negligence because of its shipping clerk's having indicated that the elevator was all right. But the court rejected this contention, saying: "In the first place, there is no evidence that the shipping clerk knew the door was open without the elevator being there, and, secondly, his act of advising plaintiff the elevator was right was not the act of his master, nor was

it done in performing any duty to his master. It was no part of his duty to assist plaintiff, in any way, in handling or getting the packages on the elevator. On the evidence, defendant could not be held on the ground that the open door made its premises unsafe. It was not responsible for the act of the man who opened it; for in doing so he was not about his master's business, and it was not shown that any of its servants whose duty it might be to shut it knew it was open. The manager was not there. The evidence was stronger to show plaintiff knew it was open, without the elevator being up, than it was to show anyone else but the man who opened it knew of it."

⁵ In *Jossaers v. Walker* (1897) 14 App. Div. 303, 43 N. Y. Supp. 891, a mechanic sent by his master to perform, in and about the elevator shaft of a hotel, certain work incident to the installation of a refrigerating plant, made with the elevator man an arrangement by which he was permitted to get on the top of the elevator, and was to be notified when the elevator was about to be moved up and down. Held, that he could not recover for an injury caused by the sudden starting of the elevator without warning. The court said: "The crucial question here is as to the defendant's responsibility for the particular acts of negligence alleged to have been committed by Paxter, the man in charge of his elevator. The defendant was not notified of the arrangement made between the plaintiff and Paxter, nor was it shown that he was aware of the use to which the elevator was being put under that arrangement. There was, in fact, no proof that he ever assented, expressly or impliedly, to that use. The question then is, Was that use within the scope of Paxter's authority? We think not. Paxter was the defendant's servant to operate the elevator for the service of the hotel and its guests. Whatever was necessary or proper for that service was within his

stitutes anything more than mere disobedience to the master's directions regarding the manner in which the prescribed functions of the servant are to be discharged. In other words, there is no departure from the performance of the general class of acts which the servant is employed to do. In the second place, if we were dealing with a case from which the element of a promise was absent, an ac-

authority. But there his authority ceased. It was limited to the appropriate use. He was not authorized to depart from his defined function, nor to operate the elevator in a direction foreign to its proper purpose. Here he permitted the plaintiff to utilize this elevator as a species of scaffold upon which to do his work. This work was not done under the defendant's direction. It was work which the plaintiff did, primarily, for one Craig, a carpenter, and it was incident to the putting into the hotel of a refrigerating machine by a firm in Buffalo. The elevator was not placed where it was, nor was it intended to be used, for any such purpose as that to which it was here applied. Paxter's act, in permitting that use, was entirely outside the scope of his employment as elevator man of the hotel. He thus diverted the elevator from its normal and legitimate use, and put it to a use which was not contemplated either in its construction or operation, or in his employment with regard thereto. It follows that Paxter's negligence was his own, and not the defendant's."

In *Hall v. Poole* (1901) 94 Md. 171, 50 Atl. 703, plaintiff, having been sent by a firm of electricians to repair the electric bells of defendants' elevator, came to the conclusion that it was necessary to repair a battery which was in the cellar of defendants' building under the elevator. He told the elevator boy not to bring it down below the first floor until notified that the repairs were completed, and the boy agreed not to do so. While plaintiff was at work in the cellar, the elevator descended and struck him. The boy was employed by the defendants solely for the purpose of running the elevator, and the defendants had no knowledge of the presence of the plaintiff in the cellar, or of his agreement with the elevator boy. Held, that the defendants were, in point of law, not responsible for the injury. The court said: "If, therefore, the plaintiff,

without any notice whatever to the defendants, assumed the risk of making an arrangement with the elevator conductor to run the elevator in a way different from the manner he was employed to run it, it would seem but reasonable that they should not be held liable for an injury resulting from his own act together with the negligent act of their servant, if such act of the latter was not authorized by them directly or indirectly. It may well be that the defendants, if they had been informed of the arrangement made by the plaintiff with their servant, would have refused to sanction it. They employed him to run the elevator in the usual way from the top to the bottom of the shaft, carrying passengers and freight in the car, and while they may have considered him entirely fit for that work, they might have refused, and justly so, to allow him to put himself in a position involving risk of accident outside the regular course of his work. It appears from the evidence of several witnesses on the part of defendants, that it was not at all necessary for the plaintiff to stand in the shaft directly under the elevator to repair the batteries, although this is denied by the plaintiff. But in spite of this conflict of testimony, it is clear from the evidence that, in the judgment of the employees of the defendants, they were of opinion that there was ample room for the plaintiff to do the work without placing himself in what must be conceded to be a very hazardous position. Hence, in order to avoid danger, if they had been consulted in regard to the plaintiff going into the shaft, the defendants could have insisted upon the work being done in the safer way. But in addition to this, it seems too clear for discussion that if it be conceded, as it must be in this case, for the evidence is uncontradicted, that the elevator boy was employed to run the elevator and carry freight and passengers, it was not within the scope of his employment to allow

tion would clearly be maintainable against the master, if the servant, knowing that the artisan was inside the shaft, did not exercise due care to avoid bringing the elevator into collision with his person. There seems to be no sufficient reason why the presence of that element should be regarded as having the effect of abridging the remedial rights of the injured person. Influenced by these considerations, several courts have held the master to be liable in such circumstances as those under discussion.⁶ Such liability is, of course, negatived if

the plaintiff to use the shaft for a purpose for which it was not constructed. It certainly was no more within the scope of his authority to permit the plaintiff to use the shaft for repairing the batteries than it would have been to permit him to use the car as a scaffold to repair the shaft."

⁶ In *Rink v. Lowry* (1906) 38 Ind. App. 132, 77 N. E. 967, the action was held to be maintainable on the ground that the defendant's servant was, in respect of making the promise, fulfilling the defendant's duty to protect a person whom he had invited to work in the building.

In *Soderstrom v. Patten* (1907) 131 Ill. App. 32, the plaintiff arranged with the elevator boy to move the elevator up into the shaft some distance and keep it still until he was notified that certain plastering work at the foot of the shaft was completed. Almost immediately after the elevator was run up as agreed, and stopped, it was started again and run up farther by the elevator boy, the consequence being that the counterweights came down and injured the plaintiff's arm. The grounds upon which the liability of the defendant was affirmed were thus stated: "The elevator man was not an automaton, but a reasoning and intelligent being, put in control of the piece of machinery in question, and was therefore impliedly authorized to regulate its motions under extraordinary circumstances; . . . the rightful presence of a repairer at the bottom of the shaft, whose work would take a few minutes, was such a circumstance. The negligence of the elevator man did not depend on the promise, nor consist in the breaking of it. His negligence was in so running the elevator that it injured a person not a trespasser, whom he had reason to know would be likely to be injured by his so running it. The agreement or

arrangement is proof that he had notice of the situation." The court expressly disapproved the decisions in *Jossaers v. Walker* and *Hall v. Poole*, note 5, *supra*.

The authority of those decisions was also repudiated in *Beatty v. Metropolitan Bldg. Co.* (1911) 63 Wash. 207, — L.R.A. (N.S.) —, 115 Pac. 90, Ann. Cas. 1912 D, 528, another case, where the injury resulted from the operator's having broken an express promise. A verdict for the plaintiff was sustained on grounds thus stated: "In this action the promise made for appellant's protection was to temporarily refrain from operating the elevator below the second floor. The making of such promise, and the circumstances surrounding it, gave the operator actual notice that appellant was about to be in a position of danger should the car be operated below the second floor. The boy remained in charge of the car as respondent's employee, and it seems unreasonable to contend that, while thus employed and in charge of the car, it was not his duty to refrain from injuring the appellant."

In *Farmers' & M. Nat. Bank v. Hanks* (1910) — Tex. Civ. App. —, 128 S. W. 147, the grounds upon which the defendant was held to be liable for the death of a workman upon whom, while he was plastering an elevator shaft, the operator allowed the cage to descend, were thus stated: "Page knew the position of deceased, and the danger to him from the descending car. Under this state of facts, it was manifestly the legal duty of Page, as the representative of appellant in charge and control of the elevator car, knowing that deceased was employed in a dangerous position underneath the car, not to start same in his direction without giving him warning of its approach. Deceased was in a position of imminent danger, known to the elevator man at the time. If,

the evidence shows that the artisan himself knew that the special arrangement in question was in contravention of the master's explicit directions.⁷

2316. Servants employed in buildings upon various other kinds of work.—a. Use of water.—For any negligent acts done in respect of the water supply of a building by the servants of a person occupying the whole or a part of it, he is manifestly liable if the work which they were hired to perform requires them to handle those pipes or draw water from them, and the injury complained of was inflicted while they were engaged in that work.¹ With regard to negligent acts

in the circumstances, it was the legal duty of appellant to give warning to deceased of the coming danger to him, and it was negligence to omit to give some cautionary signal of the approaching car, then the agreement of Page that he would give a cautionary warning before starting the car downward to deceased was simply an agreement that he, for appellant, would perform a plain duty owing to deceased in the facts of the case. Being intrusted by appellant with the sole charge and control of the operation of the elevator car, Page had such authority as was necessary for the performance of his duties that were in furtherance of appellant's business, and for the accomplishment of the object for which he was employed. Whatever was proper or necessary to the performance of the legal duty owing by appellant to deceased, in the operation of its elevator car, was within the scope of Page's authority as its representative, and the jury were authorized in the facts to so find that Page, in agreeing to give a warning of the movement of the car, was acting within his authority to operate the car, and to its proper purpose."

In *Donovan v. Gay* (1888) 97 Mo. 440, 11 S. W. 44, an action was held to be maintainable, where the operator forgot the plaintiff's warning to stay up. The report does not state that an express promise was made by the operator, the decision being referred simply to the consideration that it was his duty to protect the plaintiff while at work.

In *Siegel, C. & Co. v. Norton* (1904) 209 Ill. 201, 70 N. E. 636, the plaintiff, when he went into the elevator shaft, told the operator, who answered, "All right." Held, that the workman was entitled to maintain an action for an

injury caused by the lowering of the elevator. The court took it for granted that the negligent act was within the scope of the operator's employment.

⁷In *Snider v. Crawford* (1891) 47 Mo. App. 8, the plaintiff, just before he began his work, directed the elevator boy not to start the elevator until he was notified. To this arrangement the boy agreed, but broke his promise, the consequence being that the plaintiff was knocked off a joist by the ascending counterweight. The evidence showed that the understanding between the plaintiff and the defendant himself was that the elevator should not run above the second floor while the work was in progress. The right of the plaintiff to recover was denied on the ground that he knew that his special arrangement with the boy was contrary to the master's instructions.

¹In *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, the effect of which is stated in note 3, *infra*, Grove, J., observed, *arguendo*: "Suppose this were not a clerk, but a housemaid whose duty it was to clean up the room and attend to the lavatory and wipe out the basin, then I think that, although she was expressly prohibited from using the basin, and was told not to leave the tap open, yet, notwithstanding the prohibition, her act of using the basin and omitting to turn off the water would be so incident to her employment that the master would be liable."

In *Steele v. May* (1902) 135 Ala. 483, 33 So. 30, a guest in defendant's hotel had received permission to use a bath tub in the room of another guest, and rang for a bell boy to prepare the bath. The bell boy opened the faucets through which water was drawn into the tubs, and left the room to procure

of that description, which are committed by a servant while he is using water in a lavatory for personal purposes, the position has been taken that the master may be held responsible where the tort-feasor was authorized to use the lavatory in question for such purposes;²

towels. He was gone for a considerable time, during which the tub overflowed, and the water injured plaintiffs' goods in a store under the hotel. Held, that the negligence of the bell boy occurred while he was acting within the scope of his employment, and that the defendant could not escape liability on the ground that it was understood between the defendant and his guests that it was the duty of the latter to turn off the water when they used the baths. Even though such an understanding might operate so as to render the tort-feasor in the present instance accountable to the defendant,—a point which the court declined to decide,—the existence of the duty created by such an understanding could in no wise affect the plaintiffs, who were not parties to the understanding and had no knowledge of it. As to them, it was the duty of defendant to see that the guest discharged their obligation to him.

²In *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708, the defendants sublet to the plaintiffs the lower rooms of their house, while they retained the upper rooms for carrying on their own business. In these upper rooms there was a lavatory for the use of the defendants' clerks, the key of which was kept by the defendants' foreman. This foreman, leaving off work at 7 o'clock, went at ten minutes past seven to the lavatory to wash his hands. Turning on the tap and finding no water, he went away without turning the tap off. When the water was turned on next morning it overflowed, went through the floor, and damaged the plaintiffs' goods in the room below. The jury found that the damage was caused by the negligence of the clerk in leaving the tap open. Held, that the defendants were liable for the damage so caused. Lord Coleridge, Ch. J., said: "I agree that it is not for every act of negligence by a servant that a master is liable; but the master is liable if the act of negligence was done by the servant, either within the scope of his authority or as an incident to his employment. I say with

some doubt, on the variety of cases decided, that it might have been within the scope of his employment to wash his hands; I should say it was, though I do not desire to place my judgment upon that, as I am clearly of opinion that it was an incident to his employment. In such houses there is generally some place for the clerks to hang up their coats, some place to hang up their hats, and a lavatory, and so on; all these things are incident to the employment." The learned judge remarked that the ground on which *Stevens v. Woodward* (next note) was decided was "that there was an act of trespass committed, and that it would be monstrous to make the person against whom that trespass was committed liable for the damage thereby caused." The remark of Grove, J., in that case to the effect that he would come to the same conclusion if there had been no express prohibition involved, was considered to be a mere *dictum*. Hawkins, J., said: "I rest my judgment entirely on the ground that it was intended that the clerks should use this tap in the course of their employment; that this clerk did use it in the course of his employment, and for the negligent use of the tap the master is liable. It is perfectly true that it is not every negligent act of a servant for which a master is liable. For instance, if a servant is doing something which has no reference to his employment, as getting up fireworks for his own amusement, and a fire takes place, the master is clearly not liable, as the act of the servant was not within the scope of his employment. But this is a totally different case. Here, there is a lavatory provided for the use of the clerks, the clerk uses it, and it is as a clerk, and because he is a clerk, that he uses it, and if, in the course of using it, he is negligent, I think the master is responsible."

The general principles laid down in the above case are in harmony with four American decisions, three of which antedated it. In none of these, however, were those principles explicitly formulated.

but not where he had been expressly forbidden to make use of it.³ The theory of the English courts which have adopted this doctrine is that, under the former circumstances, the use of the water, even if it is not within the scope of the servant's employment, may properly be regarded as an incident of his employment; while, under the latter circumstances, the use of the water is neither within the scope of the employment nor incident to it.

In *Gass v. Coblens* (1869) 43 Mo. 377, a storekeeper on the upper floor of a building was held liable for the negligence of his clerk in leaving water running from a hydrant in his apartments, and thus damaging the property of the occupants of a lower floor.

In *Pike v. Brittan* (1886) 71 Cal. 159, 60 Am. Rep. 527, 11 Pac. 890, the landlord of a building was held liable to his tenant for injury to goods by water negligently permitted by the janitor to overflow from a washbasin in his room.

In *Simonton v. Loring* (1878) 68 Me. 164, 28 Am. Rep. 29, the occupant of the upper portion of a building was held liable for damages caused to lower occupants by the negligence of a servant who, after using a urinal, had left open the faucet which had regulated the flow of water into the bowl.

See also *Marshall v. Cohen* (1871) 44 Ga. 489, 9 Am. Rep. 170, where a landlord was held responsible for damage done to the goods of a tenant by an overflow of water from a water-closet; but his liability was referred to the notion that the act of his agent in allowing the escape pipe to become and remain obstructed rendered him guilty of maintaining a nuisance.

³In *Stervens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, the plaintiff occupied premises beneath the offices of the defendants, who were solicitors. In the room of one of them was a lavatory for his own use exclusively, and his orders were that no clerk should come into his room after he had left. A clerk violated this prohibition, and having turned the water tap and washed his hands, negligently left it so that water flowed from it into the plaintiff's premises and damaged them. Held that the defendants were not liable for this damage. Grove, J., said: "I think I should have come to the same conclusion as that I have arrived at, if there had been no express prohibition in the case,

and it had merely been shown that the clerks had a room of their own and a lavatory where they could wash their hands. Then what possible part of the clerk's employment could it be for him to go into his master's room to use his master's lavatory, and not only the water, but probably his soap and towels solely for his, the clerk's, own purposes? What is there in any way incident to his employment as a clerk? I see nothing. The case seems to me just the same as if he had gone up two or three flights of stairs and washed his hands in his master's bedroom. It is a voluntary trespass on the portion of the house private to his master. I do not use the word 'trespass' in the sense of anything seriously wrong, but he had no business there at all. In doing that which his employment did not in any way authorize him to do, he negligently left the stopcock open, and the water escaped and did damage. I think there was nothing in this within the scope of his authority or incident to the ordinary duties of his employment." (The remark at the commencement of the passage, regarding the immateriality of the element of a prohibition, was disapproved in the case cited in the preceding note.) Lindley, J., said briefly: "I do not see on what principle the defendants are to be held liable for a negligent act of a man who trespasses in their room and leaves their tap running. The facts show that the clerk was a trespasser after his master had left."

Although the case is not, strictly speaking, in point, reference may be made to *Killion v. Power* (1866) 51 Pa. 429, 91 Am. Dec. 127, where it was held that a person, although not in the employ of the occupant of a store in a building, who used the water by his permission in one of the rooms, was not a trespasser, and that it was negligence in the occupant not to see to the condition of the spigot before the store was closed.

b. Acts done with relation to gas pipes.—Where an explosion of gas resulted from the improper means employed by a servant for the purpose of discovering a leak in a pipe, the court held that, although he had not been authorized to look for the leak, his doing so might be regarded as an act within the scope of his employment, if the gas was escaping in such large quantities as to render it impossible for him to continue his work until the leak was stopped.⁴ This would seem to be one of those cases in which the distinction taken by some courts between acts within the scope of a servant's employment, and acts incident to his employment, might well have been treated as the *ratio decidendi*. See subsec. *a*, *supra*.

As to the liability of employers who send workmen to perform work upon gas pipes, see § 2346, *post*.

c. Use of electrical appliance.—In a case where the janitor of a bank turned a current of electricity into a railing erected in front of a window, to prevent people from congregating there, it was held that the jury might properly find his employers liable, even though the act might have been done without their knowledge, or contrary to their wishes.⁵

d. Disposition of rubbish and waste materials.—Injuries resulting from the manner in which rubbish taken from premises is disposed of by a servant whose duties comprise such work are imputable to his master.⁶ This rule is applicable even though the method of dis-

⁴ *Pine Bluff Water & Light Co. v. Schneider* (1896) 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547. There the imprudence of the servant of a storekeeper in using a lighted match to locate a leak was held to be chargeable to him, and consequently to constitute a good defense to action brought by him against the gas company for the damages caused to his property by the explosion. The court said: "It was his [*i. e.*, the boy's] duty to work in the storeroom into which the gas which had accumulated under the store began to force its way. The entrance of this gas would necessarily interfere with the work that he was engaged in on behalf of Schneider. It would not be unreasonable to hold that, in order to prevent such interruption of his work, he had the implied authority to discover and stop the escape of gas into the room in which he was at work. It is not necessary to show that he had authority to look for the defect in the pipe with a lighted match. If the

act of attempting to discover the defect in the pipe in order that the escape of gas might be stopped was one within the scope of his authority, and that act was done in a way so negligent that it caused or contributed to the injury complained of, it is then of no avail to show that the master did not consent to or approve of the negligence."

⁵ *Whaley v. Citizens' Nat. Bank* (1905) 28 Pa. Super. Ct. 531.

⁶ In *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445, 454, the janitor of a building, whose duty it was to collect and burn waste paper, was directed to burn it in the furnace. In violation of his instructions, he burned it on a large uninclosed lot frequented by children, and at a time when a high wind was blowing. A child of tender age was seriously burned through her clothes taking fire. Held, that the master was liable for the injuries thus sustained.

In *Douglass v. Stephens* (1853) 18

position adopted by the servant involves the commission of an unlawful act.⁷

In a case where the plaintiff was injured by a piece of scrap iron thrown from the defendant's factory, one of the reasons assigned for denying the right of recovery was that the piece of ground where the plaintiff was standing when he was struck was not used for the deposit of such iron, and that the defendant's servants had consequently no such duties to perform there in respect of the disposal of refuse as would warrant the jury in inferring that the iron was thrown by one of them in the course of his employment.⁸

Mo. 362, a gutter and the opening to a sewer were obstructed by rubbish thrown out by the defendant's employees, when they were cleaning his store, which led to the flooding of plaintiff's goods during a rain storm. The court sustained a verdict for the defendant, based upon the ground that the immediate cause of the damage was the failure of the plaintiff's servants to take proper steps to save the goods.

⁷ *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 643. In that case, where a child was injured while playing in a street with a burning pile of rubbish, the submission of the question of the defendant's liability for the act of its servants in lighting the fire was approved on grounds thus stated: "We are also of the opinion that this evidence shows that the act of burning the rubbish was within the scope of their employment. The depositing of the rubbish in the street must be regarded as a temporary disposition of it, for otherwise it would have amounted to an unlawful obstruction of the street. Its prompt removal in some way would necessarily be one of the implied duties resting on the defendant's servants in carrying on the business. But it is said that the burning of the rubbish was an unlawful act, and that therefore authority to do so could not be implied by reason of the employment merely; that express authority from the master must be shown in order to make him liable therefor. The doctrine of the early English cases would seem to lead to this conclusion, but the modern decisions, both in England and America, agree with Mr. Wood in his statement of the law. The test is not the lawfulness or the unlawfulness of the means

adopted by the servant to accomplish his master's business, but it is whether such means are so far incident to the employment as to come within its scope. . . . We think that the authority conferred by the defendant on its servants to place the rubbish in the street carried with it the power or duty of removal, and if the servants adopted unlawful means for the accomplishment of this duty, or even in so doing disregarded the defendant's express commands as to the mode, the defendant must answer for the resulting damages. But if we are wrong as to the implied authority of removal, the evidence which tends to prove that the defendant's servants had been accustomed to burn the trash also furnished some evidence of express authority to so dispose of it."

⁸ *Hogle v. H. H. Franklin Mfg. Co.* (1907; App. Div.) 105 N. Y. Supp. 1094. The fact thus emphasized seems to have been scarcely sufficient of itself to justify the court in setting aside the verdict. It is submitted that a servant whose duties require him to get rid of refuse does not depart from the course of his employment when he deposits it in a place that is unusual or prohibited. But the evidence also showed that the "piece of iron must have been thrown a distance of 25 or 30 feet horizontally, indicating that the person who did it exerted considerable force, and threw it intentionally, and for his own mischievous purpose;" and it was "not known who that person was, whether a servant or a chance visitor, nor why he did it, except that it was the deliberate conscious act of a depraved mind."

In another case, where the defendant company supplied its workmen with beer as a beverage, and they were accustomed to throw out the empty kegs onto a roof in a passageway, from which they were afterward removed, it was held that the company was liable for an injury caused to a pedestrian by a keg which rebounded from the roof and fell upon him.⁹ The main subject of controversy was whether the plaintiff had been invited to use the passageway, or was mere licensee. But the decision is worthy of notice in the present connection, as one which illustrates the liability of a master in regard to acts which may be described rather as incidents of the employment, than as fully within the scope of the employment. See subsec. *a*, *supra*.

e. Cleaning of footpaths.—Where ice is formed by water which a servant of the occupant of a building uses while engaged in his appointed work of sweeping the pathway in front of it, a person who loses his footing on the slippery surface thus produced is entitled to recover from the occupant for the resulting injuries, even though the servant may not have been directed to use the water.¹⁰

f. Use of trapdoors.—The right of persons injured by the negligence of servants in omitting to close trapdoors, etc., after the completion of the work which rendered it necessary to keep them open, or in failing to guard them properly while that work was in progress, has been affirmed in several cases.¹¹

g. Manipulation of awnings.—A right of action for injuries

⁹ *Corrigan v. Union Sugar Refinery* (1868) 98 Mass. 577, 96 Am. Dec. 685. At the second trial the ground of action relied upon was the personal negligence of the master in not taking proper precaution to prevent such accidents as the one in question. See *Hogle v. H. H. Franklin Mfg. Co.* (1910) 199 N. Y. 388, 32 L.R.A.(N.S.) 1038, 92 N. C. 794, affirming (1908) 128 App. Div. 403, 112 N. Y. Supp. 881, reviewed in § 2223, note 3, *ante*.

¹⁰ *Kavanagh v. Vollmer* (1903; App. Div.) 84 N. Y. Supp. 475.

¹¹ *Rooney v. Woolworth* (1905) 78 Conn. 167, 61 Atl. 366, former appeal (1902) in 74 Conn. 720, 52 Atl. 411; *Falardeau v. Boston Art Student's Asso.* (1903) 182 Mass. 405, 65 N. E. 797; *Engel v. Smith* (1890) 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21; *Schuepbach v. Laclede Gaslight Co.* (1911) 232 Mo. 603, 135 S. W. 29.

In *Stevenson v. Joy* (1890) 152

Mass. 45, 25 N. E. 78, an action against an abutter upon a city street, whose premises were let to various tenants, to recover for personal injuries occasioned by plaintiff stepping into a coalhole maintained by him in the sidewalk, the cover of which was unfastened, it was admitted that the building and coal hole were under the care of a janitor employed by him; and the presiding judge refused to rule, as requested by the defendant, that "the landlord is not responsible to third parties for the misconduct or injurious acts of his tenants; and if the defendant furnished a proper and safe coalhole and cover and fastening, he would not be liable to the plaintiff, if, through the neglect of his tenant, the cover was not properly fastened, unless the fact that the tenant was so using the coalhole was brought to his knowledge." Held, that the defendant had no ground of exception.

caused by the fall of an awning in the front of the defendant's store exists, where the evidence warrants the conclusion that the person who was manipulating it when it fell was his servant.¹²

E. SERVANTS ENGAGED IN SOME MISCELLANEOUS OCCUPATIONS.

2317. Servants transmitting telegraphic messages.—With regard to the question whether the operator of a line of telegraph is liable to the addressee of a message for damage caused by the negligence of his servants in despatching or delivering it, there is a conflict of opinion. The English courts have taken the position that he is not liable,¹ while the American courts hold that he is.² This controversy, however, is not concerned with the general question of the scope of a servant's authority, and is therefore foreign to the subject of the present chapter.

2318. Servants working in and about mines.—The right of recovery has been affirmed, where the employees of a mining company caused the death of a railroad brakeman by forcing a car from a switch onto the railroad track, so as to cause a collision with a train upon which the brakeman is employed;¹ and where the servant of an independent contractor was killed through the negligence of a mining company's servants in operating tramcars.²

On the other hand, it has been held that the yardmaster of a mining company which uses its tracks solely for its individual business, and not for the carriage of passengers, has no apparent authority to consent to the use of one of its tracks by an excursion train.³

2319. Servants engaged in the construction, alteration, repair, or demolition of structures.—The employers of servants of these descriptions are liable for any damage which may result to person or property by reason of the unskilful manner in which the work is performed.¹ He must also answer for any negligence of which they are

¹² *Lewy Art Co. v. Agricola* (1910) 169 Ala. 60, 53 So. 145.

¹ *Playford v. United Kingdom Electric Teleg. Co.* (1896) L. R. 4 Q. B. 706, 10 Best & S. 759, 38 L. J. Q. B. N. S. 249, 21 L. T. N. S. 21, 17 Week. Rep. 968; Beven, Neg. 2d ed. p. 1354; Pollock, Torts, p. 456, Webb's Am. ed. p. 674.

² *Shearm. & Redf. Neg.* § 543; Gray, Communication by Teleg. §§ 71-73.

¹ *Hess v. Berwind-White Coal Min. Co.* (1896) 178 Pa. 239, 35 Atl. 990.

² *Lookout Mountain Iron Co. v. Lea* (1906) 144 Ala. 169, 39 So. 1017.

³ *Vormus v. Tennessee Coal, I & R. Co.* (1892) 97 Ala. 326, 12 So. 111 (company not liable for an injury sustained by an excursionist in jumping off the train to prevent a collision with one of the company's trains, of the position of which the yard master negligently failed to inform those in charge of the excursion train).

¹ *Cleghorn v. Taylor* (1856) 18 Sc. Sess. Cas. 2d series 654, 28 Scot. Jur.

guilty, while engaged, during the progress of the work, in using the materials and apparatus supplied by him,² and for their defaults in respect of any subsidiary acts which are necessary to enable them to perform their duties, or which are, in a reasonable sense, incidental

287 (tenement adjacent to that of the defendant was damaged by the fall of a defective chimney).

In *Western Real Estate Trustees v. Hughes* (1909) 96 C. C. A. 658, 172 Fed. 206, an action was held to be maintainable for damage inflicted on the plaintiff's property through the fall of a party wall, which was overthrown by the negligence of a servant engaged in lowering the defendants' floor. It was held that the court had properly refused to incorporate in its charge to the jury an instruction to the effect that, although the lowering of the floor was intrusted by the defendants to their servants, still, if the latter attempted to lower it beyond its original position, and in so doing exceeded or violated their instructions, the former were not responsible for any act done in that attempt.

In *Gilmartin v. New York* (1869) 55 Barb. 239, a gardener in the employ of a city, while attempting to take down a liberty pole in a public park, did the work so unskillfully that it fell against a telegraph pole. The pole was broken by the shock and fell upon the plaintiff's daughter. Held, that the city was liable.

² *Variety Mfg. Co. v. Landaker* (1906) 129 Ill. App. 630 (defendant, one of several contractors for different kinds of work upon a building, was held liable for injuries which the plaintiff, the servant of another contractor, sustained through the negligence of his servants in moving some planks which had been used as a scaffold by the plaintiff while constructing the elevator shaft); *O'Rourke v. Guy B. Waite Co.* (1908) 125 App. Div. 825, 110 N. Y. Supp. 170 (piece of iron fell in a building under construction); *Western U. Teleg. Co. v. Catlett* (1910) 100 C. C. A. 489, 177 Fed. 71 (telegraph cross arm thrown from car by servant of a telegraph company killed a trackman); *Miller v. Levering & G. Co.* (1911) 144 App. Div. 12, 128 N. Y. Supp. 812, reversing (1910) 126 N. Y. Supp. 1138 (injury caused by fall of bolt from scaffold); *American Engineering & Constr.*

Co. v. Kostolnik (1910) 141 Ky. 8, 131 S. W. 1033 (injury caused by fall of hammer from a plank on a trestle); *Peterson v. Standard Arch Co.* (1910) 123 N. Y. Supp. 326 (injury caused by the fall of a plank from a building under construction); *Holmes v. McNevin* (1861) Lower Can. Jur. (S. C.) 271 (contractor held to be liable for the negligence of workmen in letting fall a heavy beam from a building in course of erection); *Vandal v. Prowse* (1880) 4 Legal News (S. C.) 2 (plaintiff injured by the fall of a heavy piece of metal while workmen were repairing defendant's roof).

In *Reinke v. Bentley* (1895) 90 Wis. 457, 63 N. W. 1055, where a switchman standing on the top of a railway car was caught by a rope which a foreman in charge of the construction of a building had stretched across the railway track, for the purpose of assisting him to move a derrick, it was held that he had not departed from the scope of his employment in thus stretching the rope, and in failing to obey his instructions to call upon the specialist in derricks whenever he changed the position.

In *Sartirana v. New York County Nat. Bank* (1910) 139 App. Div. 597, 124 N. Y. Supp. 197, where subcontractors employed to set the stone work of a building had a derrick erected, which was constantly in use and under the control of the subcontractors' servants, it was held that the fact that they were lowering material for an employee of the principal contractor when the negligence of the servants caused an injury to a passer-by, did not relieve the subcontractors of liability. The court said that the subcontractors, "having installed the derrick on the top of the building and assumed to regulate its operation, including the lowering of the platform to the sidewalk, it is of little or no importance what was on the platform or who put it there at the time the accident occurred, because they were bound to see to it that in lowering the platform a person lawfully using the sidewalk was not injured."

In *Crabb v. Wilkins* (1910) 59 Wash.

to those duties.³ Work which, without his authority, they perform in assisting the servant of another person, is not comprehended in this category, even though it may have been undertaken for the purpose of expediting their own work.⁴

2320. Mechanics and artisans of various descriptions.—In a case where a boiler exploded in consequence of its being subjected to an unauthorized degree of pressure by the servant deputed to test it, the court applied the general rule that a master cannot escape liability on the mere ground that the negligent servant departed from his instructions.¹

302, 109 Pac. 807, the negligence of servants in leaving dynamite caps lying on the ground near a well drill, where children passing on their way to and from school might get them, was held to be imputable to their master in a case where a child was injured by the explosion of a cap.

In *Brunner v. American Teleg. & Teleph. Co.* (1892) 151 Pa. 447, 25 Atl. 29, where the plaintiff's horse was frightened by the noise of a dynamite cap, exploded by a member of the "pole" gang of a force of men engaged in erecting a line of telegraph, the evidence showed that the "digger" gang had a "dynamite man" among its members. Held, that the trial judge had improperly excluded the testimony of the tortfeasor that he had obtained and exploded the cap for his own amusement.

³ In *P. Cox Shoe Mfg. Co. v. Gorsline* (1901) 63 App. Div. 517, 71 N. Y. Supp. 619, where the defendant's servants, while engaged in cleaning out a sewer pipe, took a plug out of another one which had no connection with it, and which the defendant had told them to disregard, it was held that the question whether another person in the same building, whose goods were damaged by the water which flowed from the second pipe, could recover damages, was for the jury, and depended upon the object which they had in view when they removed the cap. If they believed it to be a proper thing to do in connection with their work, the defendant would be liable for their acts. If they did it from idle curiosity to see how much water there was in the pipe, and knowing and understanding that it had nothing to do with the job they were engaged in,—the relief of the drain or sewer,—it would not be within the scope of their authority.

In *Mayer v. Thompson-Hutchinson Bldg. Co.* (1894) 104 Ala. 611, 28 L.R.A. 433, 53 Am. St. Rep. 88, 16 So. 620, it was held that a person injured by a falling brick which a servant had, either negligently or intentionally, pushed from the top of a completed wall which he had no business to touch, was not entitled to recover damages from the employer, although the tortious act was committed before the workmen had left the top of the building.

In *Denny v. Virginia Bridge & Iron Co.* (1910) 150 Mo. App. 72, 129 S. W. 714, it was held that, as it was within the authority of defendant's superintendent of bridge work to have pieces of bridge iron carried to a blacksmith shop to be worked on, he had implied authority to order his men to throw the pieces after they had been worked on into the roadway; and that the defendant was consequently liable for an injury caused by a horse's leg being entangled in one of the pieces.

⁴ *Brown v. Jarvis Engineering Co.* (1891) 166 Mass. 75, 32 L.R.A. 605, 55 Am. St. Rep. 382, 43 N. E. 1118. For a review of the case, see § 2286, *ante*.

¹ In *Ochenheim v. Shapley* (1881) 85 N. Y. 214, the defendant, a boiler maker, had just completed a boiler for a customer. The boiler stood in the street in front of defendant's manufactory, and defendant told his superintendent to test it. The customer asked for a test under 180 pounds pressure; defendant said that 150 pounds was enough. The superintendent said that he would test it "200, anyhow." When the pressure was applied, defendant and the customer had walked away. After a pressure of 198 pounds was reached, the superintendent took hold of and held down the lever, whereupon the boiler exploded, and

The owner of a powder mill is liable for damages caused to an adjacent house by an explosion of the powder, resulting from the negligence of an employee working for the establishment.²

A master blacksmith is liable for the damage caused by the negligent or unskilful manner in which a horse is shod by his servants.³

plaintiff, who was standing in the street, was injured. Held, that the act of the superintendent was in the line of the defendant's business, and that the trial judge was justified in so holding, without submitting the question to the jury. Discussing the contention "that the servant, in exposing the boiler to a greater pressure than the 150 pounds directed by the master, was doing an independent, wilful, and criminal act of his own, outside of and beyond the scope of his employment and of the master's business," the court said: "In testing the boiler Carter was acting in the master's business, and in the line of his own employment. That was the master's duty intrusted to the servant. The experiment of actual trial was an essential element closing and finishing the manufacture. The test was an ordinary and usual act in the business, and had been many times before applied by the act of the same servant. In making the test the latter went beyond the master's wish. There was no peremptory command to stop at a pressure of 150 pounds. What was said was advisory merely; the expression of an opinion by the master that such limit was sufficient. But the customer was not satisfied. He desired the test of a stronger pressure. The servant, in granting it, was acting for the master; seeking to satisfy the master's customer; establishing the strength and perfection of the master's workmanship; and this was just as true after 150 pounds was passed as before. The servant was reckless and foolhardy in his overconfidence, but even if wanton and wilful, and going beyond the master's direction, the latter is not excused, since the servant was still testing the boiler; doing an act within the scope of the master's business, and in the plain and definite line of the servant's employment. How can we apply the contrary theory to the existing facts? Did Carter go outside of his employment when the steam gauge indicated a pressure beyond 150 pounds? Was he then acting without regard to his service, and to accomplish some pur-

pose of his own, foreign to his service? What was, or could have been, that foreign, independent, personal purpose, having no connection with the business of the master? There is not a shadow of evidence of its existence. No fact in the least indicates any such purpose or aim. It is idle to suppose that he meant to explode the boiler, and not only commit suicide, but involve innocent bystanders in the catastrophe. There was plainly no purpose, no object, no aim, except to test the boiler beyond the master's wish, in the rash and reckless confidence that it would bear the strain. In so doing he was engaged in the master's business, although going beyond his directions."

² *Fisher v. Western Fuse & Explosives Co.* (1910) 12 Cal. App. 739, 108 Pac. 659, holding that a complaint was not demurrable which alleged that defendant had in its employ a servant whose duty it was "to handle, carry and take charge of the powder in said magazine," and that the magazine exploded as a result of this servant's negligence. Such complaint implies that it was a part of the duty of the servant to exercise care to prevent an explosion, and that, where he negligently permitted or caused the explosion, he violated his duty as a servant. It also shows by necessary implication that the servant acted within the scope of his authority, though there is no express allegation to that effect.

³ "If a smith's man pricks my horse, the master is liable." Holt, Ch. J., in *Wayland's Case* (1702) 3 Salk. 234.

"If a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant." 1 Bl. Comm. * 429. (The latter part of this statement regarding the servant would not be accepted as correct at the present day. See chapter CXII., *post*).

"If a man sends his horse to the shop of a blacksmith to be shod, and the servant of the latter so carelessly and unskilfully perform the work as to lame the horse, the master will be liable,

Employers whose business involves the use of wires for the transmission of electricity are answerable for any negligent acts done by their servants, while working upon those wires.⁴

The circumstances under which the negligent manipulation of machinery is deemed to be within or beyond the scope of the employment of certain servants are exemplified by the cases cited in the note.⁵

whether he had knowledge of the manner in which the work was performed; or not; because the injury was produced while the servant was acting in the employment of the master." *Church v. Mansfield* (1850) 20 Conn. 284.

⁴ *Knowlton v. Des Moines Edison Light Co.* (1902) 117 Iowa, 451, 90 N. W. 818; *McNicholas v. New England Teleph. & Teleg. Co.* (1907) 196 Mass. 138, 81 N. E. 889 (lineman in the service of telegraphic company allowed insulator to fall on plaintiff); *Brunner v. American Teleg. & Teleph. Co.* (1894) 160 Pa. 300, 28 Atl. 690 (horse frightened by explosions of blasting cartridges which were being tested); *Henning v. Western U. Teleg. Co.* (1890) 41 Fed. 864 (case submitted to jury upon allegations that plaintiff came into contact with a wire which a lineman in the service of a telegraph company allowed to fall on the live wire of an electric light company, and remain there, hanging down); *Tackett v. Henderson Bros. Co.* (1910) 12 Cal. App. 658, 108 Pac. 151 ("live" wire was allowed to sag).

The negligence of the lineman of an electric light company in reporting that a circuit upon which a wire had been grounded, and which he had been sent to clear, was cleared, although he had not, in point of fact, remedied the trouble, was held to be imputable to the company, in *Harrison v. Kansas City Electric Light Co.* (1906) 195 Mo. 606, 7 L.R.A.(N.S.) 293, 93 S. W. 951.

⁵ In *Gunderson v. Northwestern Elevator Co.* (1891) 47 Minn. 161, 49 N. W. 694, a child went into a shed where machinery was operated by horse power, and sat upon the seat to drive the horse. The defendant's servant whose duty it was to start the machinery, knowing that he was there, started the machinery and then left it unattended, after which the child, in attempting to get down, was caught in the machinery and injured. Held, that the defendant was liable. The court said: "We need not

consider the question whether the act of the agent in granting permission to the deceased to ride on the horse power was in the course of his employment or not; for whether the deceased was within the building and upon the machinery with or without the express or implied consent of defendant, its agent, then present and engaged in and about its business, knew the situation of the deceased lad; and his negligent act in starting the horse and leaving the boy in a perilous position was in the course of his employment, and is clearly imputable to the defendant."

In *Riegler v. Tribune Asso.* (1899) 40 App. Div. 324, 57 N. Y. Supp. 989, affirmed without opinion in (1901) 167 N. Y. 542, 60 N. E. 1119, a newspaper proprietor was held to be liable to a plumber working on the roof of an adjoining building, for injuries sustained by the ignition, from his plumber's furnace, of benzin thrown upon him by an employee of the former, who, instead of pouring benzin into a can after cleaning machinery with it, had emptied it out of a window, in disregard of his employer's instructions. The *ratio decidendi* was that the act of emptying the benzin was as much a part of the tortfeasor's duty as the use of it for the purpose of cleaning the machinery.

In *Flinn v. World's Dispensary Medical Asso.* (1901) 64 App. Div. 490, 72 N. Y. Supp. 243, the defendant, an electrical appliance company, which had furnished a motor and rheostat to plaintiff's employer, a newspaper company, for the operation of its presses, sent an agent to repair the rheostat. After he had completed the repairs, the company's press foreman told him that one of the presses was charged with electricity. Thereupon the foreman procured a wire, and he and the agent discharged the press by connecting it with a water pipe. As they did so, the press moved, injuring plaintiff's hand. The court said: "The fact proved and not

As to the management of elevators in buildings and agricultural machinery, see §§ 2312, *c* and 2315, *ante*.

As to injuries caused by the manner in which rubbish and waste material is disposed of by servants, see § 2316, *d, e, ante*.

disputed was, that Porter was sent upon this occasion only to repair the rheostat. There is not a shadow of evidence that he was authorized or directed to work upon or in any manner interfere with the motor or press. It is not claimed that he was incompetent, or that the motor or rheostat was not properly connected. It is apparent that the electricity in the press was due to defective insulation somewhere, but there is nothing in the case to indicate that the motor or rheostat was the cause, beyond the bare fact that the press was charged. It is possible that they had something to do with it. It is equally possible that they did not. There is not a particle of proof that they did. The work of grounding or discharging the electricity from the press was not that of the defendant. That was not done in the performance of any duty imposed by the contract or any act authorized by it, and was not the natural and necessary consequence of anything which the defendant had ordered or directed to be done. Porter had finished the particular work he was sent there to do, and was waiting for a train to take him home, when he was requested by the foreman of the Times Company to do an act outside of his employment and his master's business, to accomplish a purpose foreign to it. It is clear that the relation of master and servant between Porter and the engine company was suspended during the time he was doing the work for the Times Company at the request of its foreman, and for that reason the plaintiff should fail and the motion for a nonsuit should have been granted."

In *Healy v. Patterson* (1904) 123 Iowa, 73, 98 N. W. 576, it was held that an action would not lie where a platform arranged for dumping grain from wagons was suddenly allowed to tilt, so as to throw the plaintiff off of his wagon which stood upon it. Discussing the contention of counsel that it was defendant's duty to provide agents and servants who could and would properly protect the interests of his patrons, the court said: "This is, no doubt, true, as

an abstract proposition of law; but there is no allegation in the petition, and no evidence which would justify a finding, that he did not provide servants who could and would properly protect his customers. Ault was employed for that purpose, and knew how to operate the dump with safety. He was not required to be present at all times. Plaintiff knew that Ault had operated the dump theretofore, and he had never seen Davis about the place prior to the time he received the injuries. Defendant is not to be held responsible for the acts of strangers, nor for the unauthorized and forbidden conduct of his employees, unless, after knowledge thereof, he was himself guilty of some misconduct. Of course, where one invites another to deal with him, and provides a place for the delivery of articles sold, he is bound to use reasonable care to make and keep the place in a reasonably safe condition for the uses intended. There is no charge in the petition that the dump was in an unsafe condition. Plaintiff's theory is that defendant's servant Davis was negligent in not properly handling the appliance. This may be conceded, and yet, if this servant was a mere interloper, and had no authority to operate the dump, and if he undertook to do so in violation of his instructions, the defendant is not responsible for his act."

In *Regan v. Reed* (1901) 96 Ill. App. 460, the employer of a servant in charge of an engine which has a blow-off pipe extending over a canal was held to be liable for his negligence in allowing the mud and sediment in the boiler to be ejected so as to injure a person in a passing boat. The court said: "The rule is well established in this state that where the servant of a defendant, while in the discharge of his duties to the defendant, perverts the appliances of his employer to wanton and malicious purposes, to the injury of another, the employer is liable to the person so injured. *Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 298, 95 Am. Dec. 489; *Chicago, B. & Q. R. Co. v. Dickson* (1872) 63 Ill. 151, 14 Am.

2320a. Billposters.—In a case where some of the bills which a bill-poster hired by the defendant had deposited on a highway were blown by the wind against a horse, belonging to the plaintiff's intestate, and so frightened it that it ran away and was killed, the right of the plaintiff to recover damages for the loss of the horse was denied on the ground that the place where the accident occurred was about 15 miles away from the place where the contract of hiring required the bills to be posted.¹

2321. Servants whose work has relation to logs and timber.—The negligent acts of a servant engaged in logging operations are, of course, imputable to his employer whenever they have relation to the actual handling of the logs.¹ Whether they are to be so imputed in a case where they are committed in relation to work which, according to circumstances, may or may not be regarded as being incidental to the duties which the tort-feasor was hired to perform, is a question which should ordinarily be submitted to the jury.²

Rep. 114. To blow mud and sediment out of the boiler was the engineer's duty. He testifies the boilers needed this cleaning that day, and no one contradicts him. If, therefore, he performed his duty in wanton disregard of the safety of the people on the boat, his employers are liable. The canal was a public highway, and boats had a right to pass along its course, and as the towpath was on the west bank, any passing boat would naturally travel near that side. Defendants were in duty bound to so exercise their own rights as not to unnecessarily interfere with the rights of others. It was only occasionally necessary to blow the mud out of the boiler. The engineer was bound to know that when this was done it carried the mud and steam beyond the ordinary line of travel of canal boats. It was plainly his duty to discharge this steam and mud when no boat was passing, and to ascertain that fact before acting. If, as Smith testifies, he turned the steam on without looking to see if a boat was passing, his employers are liable for the injury inflicted."

In *Phelan v. Granite Bituminous Paving Co.* (1905) 115 Mo. App. 423, 91 S. W. 440, the employers of an engineer in charge of a steam roller were held liable for his negligence in continuing to sound his whistle and blow off steam after he had observed that a horse which

was approaching the machine was frightened at the noise.

¹ The court said: "The only ground on which the jury could have found that the man was a servant was that there was evidence that the defendant Steinberg, Spitz's managing man, said that he sent his 'agent' to Framingham, etc., which is not enough; and we do not think that we need the assistance of a jury to say that leaving the bills in the road, 15 miles away, was not within the scope of an employment to paste them on boards in Framingham." *Smith v. Spitz* (1892) 156 Mass. 319, 31 N. E. 5.

¹ *Shaw v. Reed* (1845) 9 Watts & S. 72 (defendant's raft of logs ran against another belonging to plaintiff); *Lilley v. Fletcher* (1886) 81 Ala. 234, 1 So. 273 (milldam injured by floating logs driven against it from a boom which had been left open at night by defendant's manager; prima facie liability of defendant was taken for granted, but recovery denied on the ground of plaintiff's contributory negligence).

² In *Smaltz v. Boyce* (1896) 109 Mich. 382, 69 N. W. 21, it was held that a foreman put in charge of a lumber camp by the person in charge of the owner's business was not, as a matter of law, outside the line of his employment in causing the men under his supervision, when no kind of work was available, to burn the brush on certain

An employer whose servants erect a pile of lumber in an unskilful manner is liable for an injury caused by the fall of the pile,³ although they may have deviated from his instructions in respect of the place where it was erected.⁴

2322. Servants employed in mercantile establishments.—The defense that the act from which the given injury resulted was done in contravention of the master's orders was unsuccessfully put forward in a case where the plaintiff was injured by the accidental discharge of a gun which a salesman in a store had loaded at the request of a customer, who refused to purchase it unless this was done;¹ and in a case where a salesman directed a customer to go down a defective flight of steps.²

As to the liability of the proprietor of a store for the negligence of a servant who is endeavoring to discover a leak in a gas pipe, see § 2316, *b*, *ante*.

2323. Servants engaged in the collection of tolls.—In a case where a traveler had been injured by the negligence of the keeper of a toll-gate in handling the gatebeam after the hours during which toll was collected, it was unsuccessfully urged that the liability of the owner for the acts of the servant ceased with the close of toll hours. This contention the court rejected on the ground that "the gate was intrusted to his management at all times, and he was therefore at all times the servant of the company so far as the care and management of the gate was concerned."¹ In another case the owners of a bridge were held not to be liable for injuries caused by a horse taking fright at a piece of furniture which a person who was assisting the toll col-

land, for the purpose of clearing it to raise potatoes thereon; the evidence being that the time of the men, while so employed, was kept and paid for by the owner, that tools were furnished for the purpose of clearing the land, and that the owner had received previous crops raised on similar clearings.

³ *Andrews v. Boedecker* (1888) 126 Ill. 605, 9 Am. St. Rep. 649, 18 N. E. 651.

⁴ *Cosgrove v. Ogden* (1872) 49 N. Y. 255, 10 Am. Rep. 361.

¹ *Garretzen v. Duenckel* (1872) 50 Mo. 104, 11 Am. Rep. 405. The court said: "Brewer, the servant, was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of this authority

and engaged in furtherance of his master's business. There is no pretense that he was endeavoring to do anything for himself. He was acting in pursuance of authority, and trying to sell a gun, to make a bargain for his master, and in his eagerness to subserve his master's interests he acted injudiciously and negligently. It makes no difference that he disobeyed instructions. Innocent third parties who are injured in consequence of his acts cannot be affected thereby."

² *Clack v. Southern Electrical Supply Co.* (1897) 72 Mo. App. 506.

¹ *Noblesville & E. Gravel Road Co. v. Gause* (1881) 76 Ind. 142, 40 Am. Rep. 224.

lector to clean the tollhouse had placed on a platform adjacent to the road.²

2324. Servants in places where intoxicating liquors are sold.— In one case the proprietor of a saloon was held to be liable for the action of his barkeeper in ejecting a person while in an intoxicated and helpless condition, in a careless and reckless manner, and without regard to his safety, so as to cause a fracture of his leg.¹

2325. Servants in places of amusement.— The owner of a merry-go-round is liable for injuries which a person using it sustains through the negligence of the employee placed in charge of it.¹

As the use of beer by the members of a band hired to furnish music in a park is a purely personal affair, their employers cannot be held liable for injuries caused by the negligence of one of them in allowing a bottle to drop on a person seated below the bandstand.²

2325a. Servants employed in public parks.— In a case where a gardener employed in a public park attempted to take down a liberty pole which had become dangerous, and did the work so unskilfully that it was precipitated against a telegraph pole, which was thereby broken off and thrown against and killed the plaintiff's decedent, it was held that the defendant municipality was liable, although no express orders to remove the pole had been given by the officer having charge of the public parks. The *ratio decidendi* was that, as between

² In *Wiltse v. State Road Bridge Co.* (1886) 63 Mich. 643, 30 N. W. 370, the court said: "Mrs. Dunn was employed, as appears by the record, for a special service for the defendant. That service was to receive the toll from those using the bridge, see to it that the roadway was unobstructed, and to notify the company when the bridge needed repairs. She could live in the tollhouse or not, as she chose. The defendant had no interest in nor any control over her in conducting her household affairs or work, or over the acts of her servants while they were engaged in that business; and it is difficult to see how the defendant can be made liable for Mrs. Dunn's or her servants' negligent acts, if any such there were, while they were conducting their household affairs. Certainly the acts of Mrs. Dunn and Miss Butts, relied upon as negligent by the plaintiff, were not done in the employment or service of the defendant;

neither were they directed by the defendant expressly or impliedly, but were done in Mrs. Dunn's own private business, without the knowledge or assent of the defendant, and at her own instance. . . . The difficulty in this case is that the acts complained of were not fairly or reasonably incident to the nature, character, or purpose of the business in which Mrs. Dunn was employed, or in discharging the duties with which she was intrusted, and the defendant cannot, under such circumstances, be made liable, even though her acts were negligent."

¹ *Brazil v. Peterson* (1890) 44 Minn. 212, 46 N. W. 331.

¹ *Linthicum v. Truitt* (1911) — Del. —, 80 Atl. 245 (instruction to jury).

² *Williams v. Mineral City Park Asso.* (1905) 128 Iowa, 32, 1 L.R.A. (N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 Ann. Cas. 924.

the gardener and the municipality, the condition of the pole justified him in proceeding to take it down without orders.¹

2326. Servants employed in hunting expeditions.—Where sportsmen had driven out into the country for a day's shooting, and a man whom they had taken with them to attend to their horse and cook their dinner had imprudently lighted a fire close to a wood, instead of complying with a direction to light it in the middle of the road; it was held that his employers were liable for the damage caused on the plaintiff's property by the spread of the fire.¹

2327. Servants engaged in salvage work.—An insurer's instructions to a wrecking master to render "such assistance as is necessary" to a stranded vessel does not confer on him authority to accept an abandonment of a part owner's interest, or to navigate the disabled vessel to her home port after she has been once moved into a harbor.¹

¹ *Gilmartin v. New York* (1869) 55 Barb. 239.

¹ *Percy v. Butler*, Newfoundl. Rep. (1884-96) 237.

¹ *Kirby v. Thames & M. Ins. Co.* (1886) 27 Fed. 221. In that case, after the insurer had, in compliance with the request of the half owner whose interest was insured, sent an agent to render "necessary assistance," the half owner notified the insurer that he abandoned his interest to the insurer. The agent, with the aid of the master, crew, and

such half owner, then moved the disabled vessel to a harbor. Afterwards, without further orders from the insurer, the agent, the master, and the crew, with the aid of the part owner, attempted to navigate the vessel to her home port, which was also her port of destination. During the voyage she was lost. Held, that the insurer was not liable to the owner of the uninsured half interest in the vessel for her loss, and was not, as to him, chargeable with negligence.

CHAPTER C.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER FOR INJURIES OCCASIONED BY THE NEGLIGENCE OF HIS SERVANTS TO THIRD PERSONS STANDING IN A CONTRACTUAL RELATIONSHIP TO HIM.

2328. Introductory.

A. LIABILITY OF CARRIERS OF GOODS.

2329. Common carriers of goods.

2330. Other carriers of goods.

B. LIABILITY OF CARRIERS OF PASSENGERS.

2331. Generally.

2332. Cases embodying the doctrine that a carrier is liable for negligent acts outside as well as within the scope of the servant's employment.

2333. Cases embodying the doctrine that a carrier is liable only for negligent acts within the scope of the servant's employment.

2334. General remarks.

2335. Liability for negligence in respect of the medical treatment of passengers.

2336. Liability in respect of the baggage of passengers.

C. LIABILITY OF BAILEES OTHER THAN CARRIERS.

2337. Liability of innkeepers.

a. In respect of the property of guests.

b. In respect of the persons of their guests.

2338. Bailees of other descriptions. Generally.

2339. Liability of keepers of boarding houses.

2340. Liability of hirers of vehicles and horses.

2341. Liability of bailees of things to be kept for a reward.

a. Warehousemen.

b. Agisters.

2342. Liability of persons contracting for the performance of certain work.

2343. Other illustrative cases.

D. LIABILITY INCIDENT TO SOME OTHER CONTRACTUAL RELATIONSHIPS.

2344. Liability of occupant of premises to the owner.

a. Tenant.

b. Licensee.

2345. Liability of landlord to tenant.

2346. Liability of vendor to vendee.

2346a. Liability of tenant for commission of waste by his servants.

2328. Introductory.—In the following sections, the cases which have involved the remedial rights of a claimant standing in some contractual relationship to the persons to whom it was sought to impute the negligence of a servant will be reviewed in so far as they have any relevancy to the limits of a master's vicarious liability. In this category it would clearly be improper to include the cases in which the quality of the servant's act, in respect of its having been done or not done within the scope of his employment, was not adverted to at all. Cases of this type, which, it should be observed, constitute much the larger portion of those in the reports, throw no light whatever upon the circumstances which serve to differentiate acts to which the principle *respondeat superior* is applicable, from acts which lie outside its domain.

Since the existence of a contractual relationship in any given instance imposes upon the contractor a certain definite obligation, the proper inference, in a purely logical point of view, might seem to be that this obligation is absolute, in such a sense that if the contractor delegates the performance of the contract to servants, and it is defectively performed by reason of their negligence, he should be held responsible for consequent damage, irrespective of whether that negligence was or was not within the scope of their employment. An examination of the cases cited in § 2332, *post*, will show that such an inference has been drawn by many of the American courts with regard to the liability of common carriers of passengers; and it would presumably be drawn by all courts in the case of common carriers of goods. But, in dealing with other descriptions of contracts, the courts have almost invariably proceeded upon the theory that the master is liable only for those defaults of his servants which fall within the scope of their employment.

A. LIABILITY OF CARRIERS OF GOODS.

2329. Common carriers of goods.—It is elementary law that a common carrier of goods is deemed to insure them against all loss or injury except such as may be caused by "the act of God or the public enemy."¹ From this doctrine it is manifestly a necessary deduction that he is chargeable with all the negligence of his servants in respect of the transportation of the goods, irrespective of whether it was or was not within the scope of the servant's employment; and

¹ 2 Parsons, Contr. ** 159 *et seq.*

consequently that, in an action to recover compensation in respect of goods lost or damaged by his servants, the character of the duties and powers assigned to them is not a material element, except in a relation to the question whether the goods were duly accepted. But the writer has not found any specific judicial affirmation of this point.

For the cases dealing with the validity and effect of contracts limiting the liability of common carriers of goods, it will, for the purposes of this chapter, be sufficient to refer the practitioner to text-books.²

As to the liability of a carrier in respect of a passenger's baggage, see § 2336, *post*.

2330. Other carriers of goods.—A private carrier is bound to use ordinary diligence in respect of the goods delivered to him for transportation.¹ But where the contract is performed by the agency of servants, he is responsible for their negligence only in so far as it is within the scope of their employment.²

² See Laws of England, Carriers, §§ 41; 53 & 57. Macnamara, Carr. §§ 82 *et seq.*; Hutchinson, Carr. §§ 388 *et seq.*

A carrier cannot limit its liability for the negligence of its employees by stipulating that those furnished to assist the shipper in loading and unloading freight shall be the employees of the latter. *Missouri P. R. Co. v. Smith* (1891) — Tex. —, 16 S. W. 803. The court said: "With reference to the fifth clause, it may be said that it is but a stipulation which attempts to absolve the carrier from, and limit his liability for, damages for its own negligence, and that of its servants and employees. The effect of it is that the shipper assumes all the risks of the negligence of the company and its employees. That necessarily absolves the company from its own negligence, and this it has been repeatedly held it cannot do. *Gulf, C. & S. F. R. Co. v. McGowan* (1886) 65 Tex. 640; *Missouri P. R. Co. v. Ivy* (1888) 71 Tex. 414, 1 L.R.A. 500, 10 Am. St. Rep. 758, 9 S. W. 346. In answer to this, it may be said that, under the contract, the negligence of the employees engaged in loading the stock was not the negligence of the company, because, by the terms of that instrument, they were declared to be the employees of the shipper. But declaration, recital, or stipulation did not have the effect to make them servants or employees of appellee. The facts only could make them so. It

is undisputably established by the evidence that they were not in his service or under his control. They were the servants of appellant, and, against the protestations of appellee, were guilty of both negligence and cruelty. It was shown that the horses were punched and driven by them with poles having iron spikes in the end of the same, which resulted in serious injuries to the animals. Being in the company's service, there were no facts to authorize the finding upon this issue, if the contract in this respect was valid."

¹ 2 Parsons, Contr. *157.

² In *Boson v. Sandford* (1689) 2 Salk. 440, where goods were spoiled by the negligence of the master of a ship, the liability of the ship was affirmed by Chief Justice Holt on the broad ground that "whoever employs another is answerable for his care to all that make use of him." It would appear, however, that this statement, notwithstanding its generality, is not to be regarded as one which embodies the conception of an absolute obligation arising out of the contract of carriage. Nowhere in the judgment is any particular effect explicitly ascribed to the contract. See § 2235, *ante*. But whatever may have been the actual rationale of the decision, it is clear from the later cases that, as a general rule, the right of recovery has been treated as being dependent upon the question whether the tortious con-

"By the common law, . . . owners of ships were responsible to other persons for injuries to their property resulting from the tortious

duct of the servant was or was not within the scope of his employment.

In *Ellis v. Turner* (1800) 8 T. R. 531, the master of a ship had refused, merely on the ground of inconvenience, to unload plaintiff's goods at an intermediate port to which they had been shipped, and the ship was afterward sunk without any negligence on his part. Held, that the shipowner was liable for the damage done to the goods. Lord Kenyon, Ch. J., said: "Perhaps, as between the defendants and their servant, the master of the vessel, this was misconduct in the latter; but, as between the defendants and third persons, the former are answerable upon their contract. The maxim applies here *respondet superior*. . . . For, though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage." The master has deemed himself to be justified in assuming that the defendant in this case was a private carrier, because the report does not state that he was regarded as a common carrier. It must be admitted that, if he was actually a common carrier, the decision would be an authority opposed to the theory of absolute liability suggested in the following subsection.

In *Brind v. Dale* (1837) 8 Car. & P. 207, 2 Moody & R. 80, it was ruled that the extent of the obligation of a person who, not being a common carrier, agrees to carry goods for hire, is to make good losses arising from the negligence of his own servants.

In *Abrahams v. Bullock* (1901) 85 L. T. N. S. 237, 49 Week. Rep. 653, 18 Times L. R. 701, the plaintiff, a wholesale jeweler, hired from the defendant, for the use of his traveler, a horse, brougham, and driver, for a specified weekly sum, to include the driver's wages. One day the driver went into a restaurant to get his dinner, leaving

the brougham unattended, and during his absence certain jewelry was stolen. Held (by Ridley, J., sitting alone), that the defendant was not liable for the negligence of the driver. Two reasons were assigned for the decision: (1) The contract did not impose upon the defendant the duty of taking care of the goods carried in the brougham, and consequently that it was not within the scope of the driver's duty to protect them. (2) The driver was performing his work under the control of the plaintiff's servant, so that, if he did not know that the driver was in the habit of leaving the brougham unattended, he should have known it. The case was therefore one "in which plaintiff failed in the duty left upon him by the arrangement made, and was therefore himself to blame."

In *Gleadell v. Thomson* (1874) 56 N. Y. 194 (where a set-off was claimed by the defendants in an action brought by the carrier for the freight on their goods), the evidence showed that, after the defendants' cargo has been deposited on the plaintiff's wharf, the defendants had sent tarpaulins to protect it against damages from an impending storm, and that one of these tarpaulins had been forcibly taken by persons in the employment of the plaintiff, against the protest of the defendants' servants, to cover the hatch of the ship, which had been left open. Commenting upon this state of facts, the court said: "In substance, the defendants were prevented from protecting their property by the use of means provided by themselves, by the servants of the plaintiff, who appropriated to the use of the master, and for the protection of his property in their charge, the means which the defendants had supplied for the protection of the iron, and which the jury have found would, if the defendants had been allowed to use them, have prevented the injury to their property. For the injury to the goods sustained under such circumstances, the plaintiff was liable. The goods were at the time in the plaintiff's custody, and he owed a duty to the defendants to use reasonable and ordinary care for their protection. The defendants had the right to provide additional security

acts of the master or mariners, to the full extent of the damage thereby occasioned.”³ But special statutes limiting their liability have been enacted in England and the United States.⁴

There is a conflict of authority with regard to the question whether a person who furnishes messengers to the public for hire is a common carrier in respect of the parcels intrusted to them.⁵

against injury to the property from the storm, and their servants were lawfully on the pier for the purpose of protecting it. The interference of the plaintiff's servants in taking the tarpaulin was wrongful, but the injury to the iron in consequence thereof was not wilful, in the sense that they designed it; nor, in taking the tarpaulin, were they pursuing any objects of their own, but they were at the time engaged in their master's business, and although he did not authorize the wrong committed, it was done in the course of their employment for him, and for his benefit; and for their act the master is, we think, within the authorities, chargeable.”

In *Kennedy v. Dodge* (1867) 1 Ben. 311, Fed. Cas. No. 7,701, the liability of shipowners for the negligence of the master of the ship in overloading a wharf with the goods of the consignee (defendant) was affirmed on the ground that the act was done in the ordinary discharge of the master's duties. For a case involving similar facts, see *Vose v. Allen* (1855) 3 Blatchf. 289, Fed. Cas. No. 17,006.

In *The Zenobia* (1847) Abb. Adm. 80, 93, Fed. Cas. No. 18,209, it was held that “the delay of the master in presenting a proper manifest, so that the libellant could pass his property through the customhouse, is a neglect of his duty as master; and damages naturally incident to any failure of duty towards the shipment on the part of the master fall properly within the responsibility of the vessel. She is bound for the safe carriage and due delivery of the cargo; and acts of misconduct by the master, which are injurious in either respect to the shipper, will subject her to make adequate recompense to the freighter. The liability of the vessel upon this score is, however, limited to damages for the act or neglect of the master in his capacity as such. For any tortious endeavor on his

part, to prevent the libellant from recovering possession of his goods, she is not responsible; nor would such acts of the master committed at this port and in command of the ship, fall within the jurisdiction of the court in an action against him personally.”

In the following cases, where the negligence of the masters of the ships was held to be imputable to their employers, the defaults in question were assumed to be within the scope of their employment. *The Seine* (1859) Swabey, Adm. 411; *The Niagara v. Cordes* (1858) 21 How. 7, 16 L. ed. 41; *Dusar v. Murgatroyd* (1803) 1 Wash. C. C. 13, Fed. Cas. No. 4,199; *The Rebecca* (1831) 1 Ware. 189, Fed. Cas. No. 11,619; *The Waldo* (1841) 2 Ware, 165; Fed. Cas. No. 17,056; *Stinson v. Wyman* (1841) 2 Ware, 176, Fed. Cas. No. 13,460.

³ *Spring v. Haskell* (1860) 14 Gray, 309, where it was laid down that, where a vessel belongs to more than one owner, they are each liable *in solido*. Referring to the United States statute mentioned in the next note, the court said that it “does not, in the terms in which it is expressed, propose to alter or vary the rights or relations of ship owners as between themselves, nor as between them and any other person who shall have suffered damage in consequence of the unjustifiable acts of their servants or agents, except in reference to the amount of compensation which may be recovered of him.”

Malpica v. McKown (1830) 1 La. 248, 20 Am. Dec. 279, where the contention on behalf of the defendant, that his responsibility was limited to the value of the vessel and the freight earned, was rejected on the ground that no restrictive law had been enacted in Mexico where the contract had been made.

⁴ English merchant shipping act, 1894, § 503; U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943.

⁵ See note to *Haskell v. Boston Dist. Messenger Co.* 2 L.R.A. (N.S.) 1091.

B. LIABILITY OF CARRIERS OF PASSENGERS.

2331. Generally.—In the majority of the reported cases involving the liability of carriers for injuries caused to passengers by the negligence of the servants, the acts complained of were such that their quality as acts done within the scope of the employment of the servants was beyond the possibility of argument, and was consequently not referred to as one of the elements upon which the right of recovery depended. Such cases are of no special significance for the purpose of the present investigation. In so far as they illustrate the application of the principle *respondeat superior*, they merely embody the obvious conclusion that passengers are entitled to hold carriers liable for injuries occasioned by acts which import a violation of the recognized and normal duties of such servants as train despatchers, telegraph operators, conductors, brakemen, engineers, switchmen, and drivers of stagecoaches. For information regarding the disputed points upon which such cases actually turned, the reader is referred to treatises on carriers or railroads.

The essence of a contract for the carriage of a passenger is a specific undertaking on the carrier's part, that he and his personal effects shall be conveyed safely, so far as that result can be attained by the exercise of that high degree of care which the law requires.¹ In this point of view it would seem to follow, as a necessary conclusion, that, in the event of the passenger's being injured through an act of a servant of the carrier which falls short of the obligatory standard of care, the right to recover damages for the injury should be regarded as accruing irrespective of whether the tortious act was or was not within the scope of the servant's employment or authority. But the cases cited in the following sections show that this theory of the carrier's liability is not universally accepted.

The right of recovery is in many instances affected by the provisions of special contracts. For information as to this aspect of the matter, the practitioner is referred to text-books on the law of carriers.²

2332. Cases embodying the doctrine that a carrier is liable for negligent acts outside as well as within the scope of the servant's employment.—The decisions and *dicta* collected in the note below reflect

¹ The duty of a carrier is to provide for the safety of his passengers "as far as human care and foresight will go." *Christie v. Griggs* (1809) 2 Campb. 79. See, generally, the cases cited in 2 Parsons, Contr. pp. 233 *et seq.*

² See Hutchinson, Carr. §§ 467 *et seq.*

with more or less distinctness the theory that injuries occasioned to passengers by the negligent acts of servants are imputable to the carrier, irrespective of whether the tort-feasors were or were not acting within the scope of their employment.¹

¹ *Federal courts.*—In *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, it was laid down without any qualification that "a passenger is entitled, in virtue of the contract of carriage, to protection against the misconduct or negligence of the carrier's servants."

The absolute obligation of a carrier to protect passengers against the negligent acts of his servants was also recognized in *New Orleans & N. E. R. Co. v. Jopes* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109 (*arguendo*), and in *Grand Trunk R. Co. v. Parks* (1910) 106 C. C. A. 186, 183 Fed. 750, where, however, the act complained of—negligence of a car cleaner in leaving a slippery banana peel in a car—was clearly within the scope of the tort-feasor's employment.

Florida.—The absolute duty of a carrier to protect passengers against the negligent as well as the wilful acts of his servants is distinctly recognized in *Pelot v. Atlantic Coast Line R. Co.* (1911) 60 Fla. 159, 53 So. 937.

Massachusetts.—In *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, it was laid down that, for a violation of the contract of carriage by force or negligence, the plaintiff may bring an action of tort or an action of contract.

See also *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, where a passenger was held entitled to recover for an injury caused by a missile thrown in sport by the conductor of another car at the motorman in charge of the car on which the passenger was riding. The precise grounds upon which recovery was allowed are stated in § 2425, note 4, *post*.

Minnesota.—In *Smithson v. Chicago (I. W. R. Co.)* (1898) 71 Minn. 216, 73 N. W. 853, it was held that the liability of a railroad company for the negligent act of its servants in stopping a train at night at an unusual place, without display of signals,—whereby a rear-end collision occurred, to the injury of a fireman in the employ of another com-

pany,—was not negated by the fact that the halt was made to transfer a dog from the engine to the caboose, and was wholly without the scope of the servants' authority.

New York.—"An act which would amount to a breach of the carrier's contract, if negligently done, would be equally a breach, if done wilfully and maliciously. It is immaterial whether a breach of contract results from the negligence or wilfulness of the defendant's agent." *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185.

"A common carrier of passengers undertakes to protect . . . [them] from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passengers." *Scott v. Central Park, N. & E. River R. Co.* (1889) 53 Hun, 414, 6 N. Y. Supp. 382.

A carrier is bound "to protect the passenger against any injury from negligence or wilful misconduct of its servants while performing the contract." *Dwinelle v. New York C. & H. R. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

Oregon.—In *Lakin v. Oregon P. R. Co.* (1887) 15 Or. 220, 15 Pac. 641, the tort-feasor, a man who was being taught by an engineer to operate a locomotive, detached the engine while the passengers and the engineer were dining at a way station. When he was returning towards the train, the engine, having got out of his control, ran against it. On the trial the jury inquired of the judge, whether, "in case the jury find that the employees of the company, that is, the fireman and brakeman moved, or permitted the engine to be moved, without the consent of the engineer, the company was liable for any damages that might arise from such moving." The supreme court said that the answer that the company, under the circumstances, was responsible for all their acts, was correct, but disapproved of the inclusion in the answer of the words, "whether within the scope of their employment or not." The rea-

2333. Cases embodying the doctrine that a carrier is liable only for negligent acts within the scope of the servant's employment.—The right of the aggrieved party to recover on the ground that the alleged negligence was within the scope of the tort-feasor's employment has been affirmed under the following circumstances: where the conduc-

sors for this view were thus stated: "That left the inference that the fireman and brakeman might not have been acting within the scope of their employment, if they moved, or permitted the engine to be moved, without the consent of the engineer. If it were possible that the acts of the fireman and brakeman in the matter referred to could have been without the scope of their employment, as it related to the respondent, the instruction would have been erroneous; and it was inaccurate as given under any view. The court, however, was entirely excusable in committing the inaccuracy, as there has been a contrariety of decisions upon the point that are calculated to confuse anyone. But for a fireman, brakeman, or any other of the employees of a railroad company, having charge and management of a train of cars employed in transporting passengers from and to given places, to get out of the scope of their employment concerning such passengers, would be to get out of the employment of the company by dissolving their relations to it as servants. The error in attempting to excuse common carriers from liability on account of an injury resulting to a passenger has arisen from a misapplication of the old principle that the master is not liable for the malicious acts of his servant. When a servant goes outside of his employment, and wantonly inflicts an injury upon a third party to whom the master owes no duty, it may well be said that the servant was a principal in the affair; that he was acting for himself in that matter, and was not a servant. But where the master obligates himself to transport a person from one place to another safely and properly, and to protect him from injury from any source that human judgment and foresight are capable of providing against, and the master intrusts the performance of the duty he has so undertaken to discharge to his employees, he becomes responsible for their acts, whether negligent or

malicious; and they continue in the line of their employment until their relation with the master is absolved. The specified duty of an employee in such a case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed."

Texas.—In *Missouri, K. & T. R. Co. v. Hibbitts* (1908) 49 Tex. Civ. App. 419, 109 S. W. 228, the ground upon which it was held that an action was maintainable by a passenger who had been injured while alighting from a moving train after the conductor had refused to stop it was that the conductor was the representative of the company in respect of the performance of those duties which it owes to its passengers.

In *International & G. N. R. Co. v. Lane* (1910) — Tex. Civ. App. —, 127 S. W. 1066, the position which was held under the defendant railroad company, by a servant to whom the condition of the door of a car was reported by a passenger to whom it afterward caused an injury, was held to be immaterial, where the servant's functions were connected with the operation of the cars. For the negligence of a servant of that description, the company would be liable, whatever might be the position that he held.

West Virginia.—The railway company's liability grows "out of its obligation to answer for any injury inflicted upon the passenger by the wilful misconduct or negligence of its servant who was put in charge of the train for the purpose and with the duty of carrying the passengers safely." *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

Wisconsin.—"The contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent." *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504.

tor of a passenger train accepted an unattended passenger who was so drunk as to be unable to take care of himself;¹ where the train on which the injured person was traveling came into collision with another one,² or was derailed;³ where a pistol, while in the hands of the porter of a sleeping car, was accidentally discharged;⁴ where a railway passenger was injured as a result of a train having been started while he was in the act of alighting;⁵ where the injury resulted from the improper manner in which a servant rendered assistance

¹ *Price v. St. Louis, I. M. & S. R. Co.* (1905) 75 Ark. 479, 112 Am. St. Rep. 79, 88 S. W. 575 (man awoke during the night and staggered in a dazed condition onto the car platform and fell off). The court said: "It is one of the duties of the conductor to pass upon the eligibility, so to speak, of those presenting themselves for transportation."

² *Choppin v. New Orleans & C. R. Co.* (1865) 17 La. Ann. 19, the liability of the company was affirmed on the ground that it was liable for any damage caused by its servants in the exercise of their contractual functions.

In *Fitzsimmons v. Milwaukee, L. S. & W. R. Co.* (1893) 98 Mich. 257, 57 N. W. 127, where a railroad engineer, having undertaken, in violation of the rules and regulations of the company, and without an order from the train despatcher, to run his engine from one station to another, came into collision with a train belonging to the same company, the liability of the company for a consequent injury to a passenger upon the train was affirmed on the ground that the engineer had acted in the line of his employment.

³ In *Gulf, C. & S. F. R. Co. v. McGown* (1886) 65 Tex. 640, where a person traveling on a pass was injured through the derailment of a train, it was laid down that the negligence of a common carrier's agents of every grade, in regard to passengers, is, as to matters within the scope of their employment, that of the carrier himself.

⁴ In *Heinrich v. Pullman Palace Car Co.* (1884) 10 Sawy. 80, 20 Fed. 100, where the complaint alleged injuries from a car porter's negligent discharge of a pistol, an answer averring merely that he received the pistol from another passenger, in violation of the carrier's orders to receive no package or article

of luggage from passengers, was held to be demurrable.

⁵ In *Louisville, N. A. & C. R. Co. v. Wood* (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, a complaint averring that the conductor who had charge of defendant's train did negligently cause the injury to the plaintiff by causing the train to move while she was still on the platform, and by jerking her to the ground, was held not to be demurrable, for the reason that "he was the agent of the company so far as concerned the rights of passengers in alighting from the train."

In *Leavenworth Electric R. Co. v. Cusick* (1899) 60 Kan. 590, 72 Am. St. Rep. 374, 57 Pac. 519, the right of the plaintiff to maintain an action for injuries caused by the premature starting of a street car in response to a signal given to the motorman by some unknown intermeddler was affirmed on the ground that the evidence showed that the accident was traceable to the omission of a conductor then off duty, who was riding on the car, and who had promised the regular conductor to have the car stopped at a certain street and let the plaintiff off. The court said: "If the custom among conductors to assist one another in exigencies such as the one under consideration, as testified to by Conductor Flora, was known to the company and assented to by it, or not dissented from, Buckley then became, by virtue of that authorized custom, the company's servant for the purpose of starting the car again as well as stopping it. In other words, for the performance of that particular duty he became the company's agent to see that the plaintiff was safely off the car before it started up, and the neglect of that duty, leaving the plaintiff exposed to the premature starting of the car through the act of an intermeddler, was the negligence of one of

on an occasion when it seemed to be needed;⁶ where a servant came into contact with a railway passenger and knocked him down;⁷ where the exclamations and acts of a trainman caused a railway passenger to suppose that a collision was imminent, and so terrified him

the company's employees. If, on the other hand, the custom among the company's conductors to lend one another assistance in such cases, as testified to by Conductor Flora, was unknown to the company, and therefore unauthorized by it, or if no such custom existed, Conductor Flora was himself guilty of negligence in abandoning the duty of his position, or in deputing its performance to another, and for such abandonment of duty by him, the company is as much responsible as for the abandonment of the same duty by the man Buckley. There is no escape from these conclusions. They are irrefutable. If Flora rightly deputed the performance of his duties to Buckley,—that is, rightly as to the company,—and Buckley negligently omitted to perform them, the company is liable. If Flora had no right to turn the performance of his duties over to Buckley, but nevertheless did so, he must be held to have negligently abandoned them, in which event the company is equally liable."

⁶ *Simonin v. New York, L. E. & W. R. Co.* (1885) 36 Hun, 214, where a passenger, being in danger of falling from a gang plank, was seized by a deck hand and pulled on board so violently that his leg was broken. Held, that the question whether the deck hand acted within the scope of his employment had been properly left to the jury.

In *Drew v. Sixth Ave. R. Co.* (1867) 1 Abb. App. Dec. 556, 26 N. Y. 49, where a boy who was about to alight from a street car was seized by the driver in such a manner as to cause him to fall off while the car was still in motion, his right to recover was affirmed on the ground that it was within the scope of such a servant's employment to help infirm and aged passengers to get on and off.

In *Macer v. Third Ave. R. Co.* (1881) 15 Jones & S. 461, as plaintiff was getting off a horse car, the conductor touched a bell, the car started, plaintiff stumbled, and the conductor, in reaching to grasp and save her, struck her, accelerating her fall. The court

refused to set aside a verdict against the railroad company. The court said: "If it were necessary to pass upon the point, it should be held, in my judgment, that the intervening act of the conductor, if it were performed in order to prevent the plaintiff falling from the car, was within the scope of his employment."

In *Western & A. R. Co. v. Voils* (1896) 98 Ga. 446, 35 L.R.A. 655, 26 S. E. 483, a train stopped at such a station, and, after an employee thereon had assisted some passengers to alight, started to move on. The plaintiff then informed the flagman of her desire to get aboard, and he thereupon signaled to the engineer to stop the train. The train then stopped at a low place where it was difficult to mount the platform steps, and the flagman undertook to assist the plaintiff to get upon the train. There was evidence to the effect that it was customary for flagmen to give assistance to passengers. Held, that it was for the jury to determine whether the employee in question was acting within the scope of his duty, so as to render the company liable for injuries received by the plaintiff on account of a fall occasioned by his negligence.

⁷ *Milner v. Great Northern R. Co.* (1884) 50 L. T. N. S. (Q. B. Div.) 367. The evidence showed that at a certain station the cloakroom clerk assisted at the parcels office, where he "used to take up parcels for passengers from the cloakroom to the train when there was no porter there, and that was a regular thing for him to do." While he was running back to his office after having, at the request of a passenger, taken a parcel to a train, he ran into a porter, who in his turn was thrown against a ticket collector, who upset the plaintiff's wife. Held, that the trial judge had improperly nonsuited the plaintiff on the ground that there was not evidence that at the time of the accident M. was acting within the scope of his employment.

In *Louisville & N. R. Co. v. Kelly* (1883) 92 Ind. 371, 47 Am. Rep. 149,

that he jumped from the train;⁸ where the driver of an omnibus which was obstructing the track of a street railway struck with his

where a passenger had been, either carelessly or purposely, jostled by a brakeman and thrown from the train while he was passing from one car to another, the right to maintain the action was affirmed on the ground that "a carrier is responsible for injuries wilfully or carelessly inflicted upon passengers by servants engaged in the performance of duties within the general scope of their employment, whether the particular act was or was not authorized."

In *Spinney v. Boston Elev. R. Co.* (1905) 188 Mass. 30, 73 N. E. 1021, the court, in discussing certain instructions, made the following remarks: "The movements and acts of the conductor, in their bearing upon the safety of the plaintiff as a passenger, were, as between her and the defendant, acts concerning their undertaking with her to use the proper degree of care in all respects to carry her safely. So to speak, his conduct in the car was official conduct, as it regarded a passenger, and could not be looked at in a light merely personal to himself. If it was in any respect wanting in due care, and that negligence caused injury to the plaintiff's person, it was negligence for which the defendant was answerable, whether the conductor was competent or incompetent, and whether or not the company might reasonably have known of his incompetency. Not only did these rulings forbid the jury to find that an injury to the plaintiff occasioned by the negligence of the conductor in carelessly coming in contact with the plaintiff, and thereby throwing her down and falling upon her, would not be a ground for damages unless the company knew, or had reason to know, that the conductor was incompetent, if the accident was caused by a jerk, but also if his so falling against the plaintiff was brought about merely by the ordinary motion of the car. Plainly a carrier of passengers is answerable for such negligence of an employee." The natural inference to be drawn from the stress here laid upon the circumstance that the act complained of was incidental to the "official" functions of the conductor seems to be that the obligation of a carrier to protect his passen-

gers was not regarded as being absolute with respect to negligent torts in the same sense as it is with respect to wilful torts. See § 2447, *post*. But the attention of the court was evidently not directed to the inconsistency which in this point of view resulted from its exposition of principles in the case under review.

In *Schimpf v. Harris* (1898) 185 Pa. 46, 39 Atl. 820, an action by a passenger against the receiver of a railroad company to recover damages for personal injuries, it appeared that the plaintiff was injured by being pushed off the steps of a car by a brakeman who was not one of the regular crew of the train, and not on duty; that when the train stopped at the station where plaintiff was injured, the tickets of the passengers had not all been collected; that one of the conductors not on duty told the brakeman in question to go out and see that the tickets were gathered; that the brakeman hurried out, announcing his intention to collect the tickets, which he subsequently did; and that on his way to perform this duty, he pushed plaintiff from the steps. There was ample evidence that it was the duty of a conductor or brakeman not on duty, if he saw passengers leaving without giving up their tickets, to notify someone of the crew, and to collect the tickets himself, if directed to do so by the conductor, or if he could not notify one of the crew. Held, that it was for the jury to say, under all the testimony, whether the brakeman who caused the accident was at the time of the accident acting in the line of his duty.

⁸ In *Ephland v. Missouri P. R. Co.* (1897) 137 Mo. 187, 35 L.R.A. 107, 59 Am. St. Rep. 498, 38 S. W. 926, [1896] affirming 71 Mo. App. 597, where the plaintiff was traveling with other passengers in the caboose of a mixed train, the evidence tended to prove that a brakeman, upon hearing the engineer signal for brakes, shouted, in an excited voice, "Jump off!" "Jump for your lives!" or words of similar import, and then came hastily down from the cupola of the caboose, and ran out of the front door. The plaintiff, alarmed by his exclamation and acts, rushed to the

whip at the conductor of a railway car who had jumped on the step of the omnibus to get its number, and in so striking injured the eye

rear end of the caboose and jumped off. Discussing the contention that the defendant was not liable, because the brakeman's exclamation and act were not in the line of his duty, or within the scope of his authority, the court said: "A number of errors are assigned by appellant, but one only is now insisted upon. It resolves itself into this: Is a railroad company, while running a train designated for carrying both freight and passengers, answerable for damage resulting to a passenger from jumping from the train on account of the negligent and terrifying acts and exclamations of one of the brakemen, made in the car in which he was being carried, and from which he might reasonably infer that a wreck of the train was imminent, though such brakeman had no express duty to perform in or about such car, or in the direction of passengers? There can be no doubt of the correctness of the abstract proposition of law invoked by counsel,—that the master is only answerable for the wrongs of his servant which are committed in the course of the service, and for the master's benefit. But the scope of a servant's duties may be implied from the nature and circumstances of the employment, and the end to be accomplished. Defendant was a carrier of passengers, and its duty to those carried required great care in the running and management of its trains. Lamb was employed as a brakeman on the train. It is true, the expressed duties required of him were limited, and did not include that of directing passengers, or of managing the passenger cars. Under ordinary circumstances, it may be agreed that he had no implied authority to perform such duties. But he was employed to assist in accomplishing the end the master had in view, namely, the safe carriage of the passengers and freight intrusted to its care. A brakeman would certainly have the implied authority, in order to save a train and the passengers, to set the brakes, or perform any other duty, though not in the ordinary course of those expressly assigned to him. Had a wreck of the train really been imminent, and passengers could have

been saved by timely warning, who can doubt the duty and authority of anyone employed upon the train to assist in its management, to give the warning? This would be a duty, not merely of humanity, which all human persons would perform, but a duty to the master, and in furtherance of his business. In such an emergency, in which the avoidance of the threatened danger required prompt action, a brakeman who discovered the peril would surely not be required to hunt up the employee who was expressly authorized to direct passengers, in order that the warning might be regularly given. If, in case of such an emergency, any brakeman on the train could, in the name of the company, give the passengers warning of the danger, they would have the right to rely and act upon such warning. It could make no difference that no real danger was imminent, as in this case. If the brakeman had authority to give the warning in case of actual danger, the passengers had the right to rely and act upon one, though there was really no danger, and he had in fact no good reason for apprehending it. While the terrifying acts and exclamations of Lamb may not have been done in the ordinary course of his employment, it was, in the circumstances, within the scope of his employment, and plaintiff had the right to act upon them; and defendant is answerable for the results, unless, in acting, plaintiff was himself negligent. . . . In case of emergency, in which the lives of passengers and the destruction of property are threatened, and the danger is imminent, the nature and purpose of the employment of a brakeman implies the duty to give aid whenever necessary, in preventing the threatened disaster; and, in circumstances of peril, fright, and panic, passengers have the right to rely on his directions. The scope of authority is determined from the general nature of the employment, and the emergency calling for its exercise, as shown by the evidence in the particular case."

In *Owens v. Wabash R. Co.* (1900) 84 Mo. App. 143, it was held that a brakeman, whose duty it was to assist

of a passenger in the omnibus;⁹ where the driver of a stage coach received a slave as a passenger without having previously made prop-

passengers on and off the car and to call stations and the like, was acting within the scope of his agency in directing a passenger who was being carried past his station to jump from the train.

A petition alleging the same facts had previously been held not demurrable, in *McPeak v. Missouri P. R. Co.* (1895) 128 Mo. 617, 30 S. W. 170.

⁹ *Ward v. General Omnibus Co.* (1873) 28 L. T. N. S. (Exch. Ch.) 850, 42 L. J. C. P. N. S. 265, affirming (1873) 27 L. T. N. S. 761, 21 Week. Rep. 358, Kelly, C. B., said: "Now, I think, such being the state of things, viz., that the driver of the omnibus immediately proceeded to strike the man down with his whip, and prevent him taking his number,—the question for the jury would be, 'Was he doing so to protect himself against an action or indictment, or to protect the owners of the omnibus from any charge against them?' I am disposed to think the former the more probable, and that he was thinking of himself, and not of his masters. But the other is not only possible, but within a reasonable degree of probability. The man may have thought, 'I will not allow my employers to have an action brought against them by this fellow taking my number; I will knock him down.' Then if, so doing, the driver hit a passenger in the eye, I think that is negligence in the performance of his duty, and negligence towards the occupant of the omnibus. His motive may have been a mixed one; but still, if he was acting in the interests of his employers and used his whip negligently, they are liable. The question was left to the jury, and I cannot say there was no evidence to justify their finding." Blackburn, J., said: "A man is responsible for his servant's act in his business, though the servant be excited by drink or passion; but if the servant act for private spite, . . . if the act be done so as to devalue him of his character as servant, the master is not responsible. In the present case, there was a quarrel, and the servant was irritated, but the jury might find he was acting in the course of his duty, or entirely for his own purposes, and

in the former case, find one way, viz., for the plaintiff, and in the latter case, the other way, viz., for the defendants." Martin, B., said: "I am of the same opinion; I agree entirely with the judgment of the exchequer chamber in *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258. That, however, was a case necessarily in tort. There was no relation whatever between the party injured and the party injuring. But in this case there was a contract between the parties. The omnibus company had contracted with Ward to carry him safely, they carried for hire, and I never will be a party to drawing a distinction between an action on the contract, or an action in tort, in such a case. I think the liability is precisely the same, and that there was here a breach of a contract to carry safely by the coachman whipping behind and so hurting the plaintiff." Cleasby, B., said: "I apprehend the question to be, not whether the verdict was a proper conclusion of the jury, as to whether the act complained of was a proper use of the whip by the driver in his character of coachman, but whether it was the necessary conclusion that it was done in that character. Now, if the man struck at had stood by the omnibus and angry words passed, and the omnibus driver had only used his whip, the point suggested by Mr. Giffard might have arisen; it might have appeared that the act was wholly unconnected with the driver's character of coachman, and one arising merely from the chance of his having a whip in his hand, and then the question of negligence would not have arisen. In this case the tram car conductor was on the step of the defendants' omnibus, and I cannot say that it was an impossible or irrational conclusion for the jury to arrive at, that the driver availed himself of the fact of the trespass to justify his use of the whip, saying to himself, 'There he is, he has no right to be there, I will drive him away,' and his lashing of the plaintiff in the eye, whilst striking at the conductor, was clearly an act of negligence."

er inquiry as to his status; ¹⁰ where the captain of a stranded ship, after having got it afloat, proceeded on the voyage without having taken on board the passengers who had been put ashore when it ran aground. ¹¹

The scope of the negligent servant's employment has also been adverted to as the test of liability in cases where the injuries which were held actionable resulted from the passenger's having relied upon information, or complied with directions, given in regard to the following matter: the vehicle upon which and the route by which, he was to be conveyed to his destination; ¹² the time at which the vehicle

¹⁰ *Johnson v. Bryan* (1841) 1 B. Mon. 292. The court said: "It was the business of the driver, in the case before the court, to receive passengers in the way between the stage offices, and was also the business of the agent and sub-agent at Millersburg to enter those on the waybill who had been received. This taking in passengers by the driver, and entry by the agent at the office, was a business intrusted to each of those agents in the employ and by and for the benefit of the employers. And if not specifically intrusted to the young man who made the entry of the slave in question at the stage office, it was intrusted to his father with the implied power to intrust it to another who was competent and trustworthy, in his absence, and who must be regarded as a subagent."

¹¹ *Arayo v. Currell* (1854) 1 La. 528, 20 Am. Dec. 286. The court said: "The owner is sought to be made liable, not on the contract, but for a tort committed by the master, acting within the scope of his powers, in the execution of the contract. . . . We cannot see how the question whether the agent exceeded his powers is at all involved in the inquiry before us. The moment it is admitted or established that the master's agreement for carrying passengers was on terms such as he was authorized to make, its legal consequences must depend on other principles than those of the law of the contract of mandate; the agreement must have the same effect as if entered into with the owner personally. . . . The general rule, where there is no statute limiting the owner's responsibility, is that he is responsible for all damages done by the master while acting within the scope of his powers. Abbot states that this is the

doctrine of the common and civil law, and so do all the writers we have been able to consult."

¹² In *Bullock v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 66, 67 S. E. 60 (on demurrer), the defendant's liability for damages resulting from a station porter's negligence in directing a woman to take a train which proved to be a wrong one was affirmed on the ground that she was entitled to rely on his statement.

In *Missouri, K. & T. R. Co. v. Price* (1908) 48 Tex. Civ. App. 210, 106 S. W. 700, where a passenger was left behind in consequence of his having relied on the assurance of a conductor that the train would stop at a certain station for a certain length of time, the right of recovery for the damage so occasioned was affirmed on the ground that such an assurance was within the scope of the conductor's authority.

In *St. Louis Southwestern R. Co. v. White* (1905) 99 Tex. 359, 2 L.R.A. (N.S.) 110, 122 Am. St. Rep. 965, 89 S. W. 746, 13 Ann. Cas. 965, the court held that "it is within the scope of the authority of one who sells tickets for a railroad company to give information to persons purchasing tickets concerning the route to be traveled in using the ticket, and, when an agent undertakes to give such information, his principal will be responsible if he should mislead the passenger to his injury." The authorities relied upon were: *Burnham v. Grand Trunk R. Co.* (1873) 63 Me. 302, 18 Am. Rep. 220; *Central R. & Bkg. Co. v. Roberts* (1893) 91 Ga. 513, 18 S. E. 315; *Alabama G. S. R. Co. v. Heddeston* (1886) 82 Ala. 218, 3 So. 53; *Lake Shore & M. S. R. Co. v. Pierce* (1882) 47 Mich. 277, 11 N. W. 157; *Gulf, C. & S. F. R. Co. v. Moorman*

of transportation might be safely entered; ¹³ passing from one car to another in a railway train; ¹⁴ standing on the platform of a railway car; ¹⁵ the place at which the passenger is to alight; ¹⁶ the path which he is to follow in order to reach a certain point, after he had alighted; ¹⁷ the failure to inform him that the vehicle on which he is being carried is to be dealt with in a certain manner. ¹⁸

(1898) — Tex. Civ. App. —, 46 S. W. 662; *Texas & P. R. Co. v. Armstrong* (1899) 93 Tex. 31, 51 S. W. 835, Id. (1899) — Tex. Civ. App. —, 53 S. W. 1119.

¹³ In *Olson v. St. Paul & D. R. Co.* (1891) 45 Minn. 536, 22 Am. St. Rep. 749, 48 N. W. 445, where a drover in charge of cattle was injured by the sudden movement of the car, after he had been assured that there was ample time to enter it, an action was held to be maintainable, on the ground that he was entitled to rely on the assurance of the conductor, as representing the company, in the control of the train.

¹⁴ In *Central of Georgia R. Co. v. Carleton* (1909) 163 Ala. 62, 51 So. 27, an action against a carrier for the death of a passenger, an allegation that decedent was a passenger, that the conductor, while acting within the scope of his authority, ordered the decedent to leave the coach in which he was riding and go into another coach while the train was in motion, that decedent, while attempting to comply with the order, was thrown from the train and killed, and that his death was proximately caused by the negligence of the carrier's servants,—was held to state a good cause of action in tort. In the same case, an allegation that decedent was a passenger, and that his death was proximately caused by the negligence of the trainmen in and about his carriage as a passenger was held not to be demurrable.

¹⁵ In *Central of Georgia R. Co. v. Brown* (1910) 165 Ala. 493, 51 So. 565, the liability of a railway company for injuries received by a passenger who was thrown from a car platform by a sudden lurch was affirmed on the ground that the act of the conductor, in requesting him to go on the platform because of the crowded condition of the car, was an act done in managing the train.

In *Norvell v. Kanawha & M. R. Co.* (1910) 67 W. Va. 467, 29 L.R.A.(N.S.) 325, 68 S. E. 288, the *ratio decidendi* was that the conductor of a train represents the railroad company in relation to the transportation of passengers on his train, and that his acts in receiving and carrying them on the platforms when the train is overcrowded bind the company.

¹⁶ In *Carson v. Leathers* (1880) 57 Miss. 650, the owner of a steamboat on which it was customary to notify passengers when their landings were reached was held to be liable for the negligence of its clerk, and of a person to whom the clerk has deputed the performance of his duties, in directing a lady to disembark at a wrong landing in the night.

¹⁷ In *Schnell v. British Columbia Electric R. Co.* (1910) 15 B. C. 378, on the ground that it was within the scope of the authority of the conductor of a street car to direct a passenger to move, on a dark and foggy night, to another car in front, which would take him to his destination before the one in which he had been traveling, he was held to be entitled to recover for injuries caused by falling on the bridge on which the car had stopped.

In *Camden, G. & W. R. Co. v. Young* (1897) 60 N. J. L. 193, 37 Atl. 1013, where plaintiff was struck by another car on a trestle which he was crossing in pursuance of the instructions of the conductor to walk back to the station at which he should have alighted, the liability of the railway company was affirmed on the ground that, in giving the instructions, the conductor acted as its agent.

¹⁸ *Rosted v. Great Northern R. Co.* (1899) 76 Minn. 123, 78 N. W. 971 (passenger in a caboose was exposed to severe cold: liability affirmed on the ground that it was within the scope of a brakeman's duty to notify him as to the intended disposition of the car).

On the other hand, the right of action has been denied with reference to that test in cases where a contagious disease from which a ticket agent was suffering was communicated to a passenger;¹⁹ where a boy was injured while attempting to get on a moving freight train in pursuance of a direction given by an employee engaged in selling tickets and doing the ordinary work of an agent about the station;²⁰ where the plaintiff was pushed off a train by a blow accidentally dealt by a brakeman while he was engaged in a friendly

¹⁹ In *Long v. Chicago, K. & W. R. Co.* (1892) 48 Kan. 28, 15 L.R.A. 319, 30 Am. St. Rep. 271, 28 Pac. 977, where a person, while purchasing a ticket at a railway station, was infected with a disease from which the station agent was suffering, the nonliability of the company was affirmed on the ground that "the negligent or accidental act, if any, of the agent in imparting a contagious disease to Long, the purchaser of the railroad ticket, was not within the scope of his authority, so as to charge the company, his master. The sickness of an agent with a contagious disease cannot be presumed to be authorized or directed by the master, and is not an incident in any way to the employment of selling tickets, or acting as agent at a station." This decision was disapproved in *Missouri, K. & T. R. Co. v. Raney* (1907) 44 Tex. Civ. App. 517, 99 S. W. 589, where the action was brought by a third person. See § 2305, note 2, *ante*. It is clearly inconsistent with the notion that a carrier is a guarantor with regard to the safety, in so far as such safety can be secured by the exercise of a high degree of care. In this point of view it conflicts with the decisions of the same court concerning the right of action in respect of injuries caused by wilful torts. See § 2420, *post*.

²⁰ *Chicago, R. I. & P. R. Co. v. Koehler* (1892) 47 Ill. App. 147. The court said: "Assuming that Haas told the boys to separate along the platform and jump on the train, and that such direction was negligently given, it would be necessary, in order to fix liability upon the defendant, that such direction should be within the real or apparent scope of the authority of Haas as agent. The order must have been given under authority of the company, either expressly conferred upon Haas, or fairly implied from the nature of his employ-

ment and the duties incident to such employment. There is no claim, and can be none, that the company had in fact authorized Haas to give such an order, or to act in a matter of that kind at all. The act directed was expressly prohibited by the company by a notice [*i. e.*, which prohibited passengers from attempting to get onto moving trains] posted in plain view of all the parties who were present. It must therefore be shown to be an act done in the performance of a service which the public would have a right, from the nature and circumstances of the employment, to infer that the company had employed him to perform. . . . It is a matter of common observation that agents and employees at railroad stations do not take part in the work of putting passengers upon trains. In their relation with the public they sell tickets, check and handle baggage, putting it on and taking it off trains, furnish information concerning trains and rates of fare and freight, signal trains which stop only by signal for passengers, and perform other like services; but they are not found helping passengers on or off from trains, or giving orders on those subjects. The care of the public in their relation as passengers to trains running upon railroads is not committed to station agents, but to those who control and operate the trains. Any assistance or direction in getting upon trains comes from brakemen or other employees in the train service. Acts in that department of the passenger service are not within the apparent scope of the powers of a station agent." This case apparently cannot be reconciled with the position of the supreme court of this state regarding the absolute obligations of a carrier to protect passengers against wilful torts. See § 2417, *post*.

scuffle with another employee;²¹ where a female passenger, in attempting to alight from a moving omnibus, fell from the step to which she had been supported by the conductor after he observed that she had disregarded his direction to wait till the omnibus stopped;²² where a passenger was injured in consequence of his having followed the suggestion of a servant to go to a certain hotel by a specified route;²³ where an engine, while standing on a siding, was set in motion by some unknown servant, and came into collision with a train on the main track;²⁴ where a slave who was being carried as a passenger on the defendant's steamboat was injured through the accidental discharge of a gun in the hands of a member of the crew;²⁵ where the injury resulted from the fact that the plaintiff, a drover

²¹ *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166. This decision conflicts with some of those rendered by the same court in regard to the enforceability of claims for injuries caused by wilful torts. See § 2409, *post*.

²² *Lingard v. Kirkpatrick* (1866) 15 L. T. N. S. 245. The decision apparently is to be taken as indicating an acceptance of the contention of defendants' counsel that the conductor was prompted merely by kindness, which could not be held to be part of his business. But doubtless some courts would prefer the view that any act done by a conductor for the purpose of assisting a passenger to get into or out of an omnibus is within the scope of his duties.

²³ In *Alabama G. S. R. Co. v. Godfrey* (1908) 156 Ala. 202, 130 Am. St. Rep. 76, 47 So. 185, it was laid down that, in the absence of specific evidence, it cannot be inferred that it is within the scope of a station agent's authority "to suggest to, or invite, passengers leaving its trains or depot to go to any particular hotel not owned by the company, or to follow any particular route in reaching such hotel, unless such route had otherwise received the sanction of the company's invitation; though it might well be within . . . [his] authority and duty to inform passengers alighting from trains of a safe way of egress from the depot or depot platforms or approaches or grounds 'reasonably near thereto.'" In this case a passenger who had alighted from a train at night went into the depot to deposit his baggage, and was told by the station agent

that a hotel man was there with a light, and that if the passenger would hurry he could catch up with him. It was held that this statement amounted only to the agent's "individual suggestion," for which the carrier was not responsible, unless the route taken to the hotel was within the depot grounds or approaches thereto, or was a passageway which the carrier had otherwise expressly or impliedly invited the public to use as a means of ingress or egress to or from its depot and platforms.

²⁴ *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun, 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107. It was held that the trial judge had improperly charged the jury that if this act of starting the engine had been done by one of defendant's employees, whether negligently or wilfully, defendant would be liable.

²⁵ *McClenaghan v. Brock* (1851) 5 Rich. L. 17. The court reasoned thus: "The defendant, although a common carrier as to the goods with which his boat was laden, was also a passenger carrier as to the plaintiff and his slaves. As to them, he was bound to carry each and all of them safely and securely, as far as human care and foresight could go. In what has he failed to perform this duty? Is the inquiry before us? . . . How can an act of one of the defendant's servants, outside of his employment, and in no way connected with it, be considered as the neglect of his bailment? If the mulatto Henry, in the management of the boat or engine, had, from want of skill or negligence, caused the injury, then the defendant would have been most clearly liable; so, too, if

in a cattle train, relied on the statements of a brakeman with regard to the movements of the train.²⁶

2334. General remarks.—So far as regards the English and colonial authorities cited in the preceding section, all that need be said is that, in treating the scope of the employment as the differentiating test of a claimant's right to maintain an action, the courts have proceeded upon the same theory as in all the cases in which wilful torts have been involved. See § 2407, *post*.

The situation with respect to the American cases is less simple. It will be observed that, in the majority of them, the plaintiffs were successful. So far as these are concerned, therefore, it is a matter merely of implication that the defendants would have been absolved from liability, if the given acts had been determined to be outside the scope of the employment. But this implication may not unreasonably be regarded as a fairly strong, if not conclusive, indication of the actual position of the courts in question. In the cases in which it was held that the action would not lie, there is, of course, no room for doubt as to the actual doctrine adopted.

Assuming, for the purposes of the argument, that all the cases under both of these heads are to be considered as applications of the theory that carriers are liable or not liable according as the torts in question were within or beyond the scope of the tort-feasor's employment, it is clear that they are essentially inconsistent with the conception of an absolute obligation incumbent upon the carrier in respect of the conduct of his servants to passengers. If we collate them merely with those cited in § 2332, *ante*, it will be found that in many instances they conflict with others, in which the existence of such an obligation was asserted, in the same jurisdictions, with reference to negligent acts; while if we extend the range of the comparison to those which relate to the passenger's right of action in respect of wilful torts (see chapter CIII., *post*), the discrepancies of judicial opinion will appear in a much more striking light.

he were a slave, and had wilfully mismanaged either, and thereby had caused the injury, I should have held the defendant liable. But if he was a free man, as we understand was the fact, then the defendant would be no more liable for his wilful act than he would be for the act of a white servant. . . . The injury here has no relation whatever to the boat; it arose from the accidental discharge of the gun in the hands of the mulatto Henry. It may be that he is liable in trespass. So, too,

perhaps, the defendant would have been, if the injury had proceeded from the discharge of the gun in his own hands. But even then his liability would have been immediate and personal, not consequential and relative. His liability would have arisen, in such a case, from his tort, not from his bailment."

²⁶ *International & G. N. R. Co. v. Armstrong* (1893) 4 Tex. Civ. App. 146, 23 S. W. 236 (drover's foot was crushed by reason of the unexpected starting of the train).

This antinomy, however, will probably disappear before many years have elapsed. The doctrine that a carrier insures his passengers against the wilful torts of his servants is now applied in nearly all the courts which have had occasion to determine or refer to the matter, and it is clear that the acceptance of that doctrine logically entails the acceptance of a similar rule with regard to his liability for negligent acts. Up to the present time such a rule has been enounced in the comparatively small number of jurisdictions mentioned in § 2332, *ante*. But this circumstance is readily accounted for by the consideration that the evidence in cases involving claim for injuries caused by the negligence of a carrier's servant is rarely of such a character as to render the scope of his employment a differentiating factor.

2335. Liability for negligence in respect of the medical treatment of passengers.—Apart from statutory provisions, the legal obligations of a carrier who undertakes to furnish a physician or surgeon for a sick or injured passenger are deemed to have been fully discharged where the practitioner selected is reasonably competent in his profession. For the negligence of a person who answers this description the carrier is not answerable.¹ This rule has also been applied in actions brought to recover for injuries received on ships which came within the purview of the English and American enactments requiring the owners to carry competent medical practitioners.²

¹ In *Secord v. St. Paul, M. & M. R. Co.* (1883) 5 McCrary, 515, 18 Fed. 221, the court, in charging the jury, said: "A competent man being in the employ of the company, his services are offered by the company to attend to the injured party. The person that is injured is not compelled to accept his services; he may prefer to go elsewhere; there is a difference between a person whose services are offered, that may or may not be accepted, and a conductor or brakeman that is put on the train, and whose services we must accept. When a man goes upon a train he has no choice about the conductor, brakeman, or anything else. The company assumes that they are responsible for the performance of their duty in such respects. But with regard to a surgeon of that character, the plaintiff could have refused to take him as his surgeon, and could have taken any other surgeon, as he deemed it best to do. So that, as I have instructed you, the duty of the company

is performed, and it has performed all that the law requires, when it furnishes a competent man, and he is ordinarily competent for that duty."

The above case was followed in *Laubheim v. De Koninglyke Nederlandsche S. B. Maatschappij* (1887) 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781, where the action was brought in respect of an injury sustained before the passage of the act of Congress mentioned in the following note.

² In *O'Brien v. Cunard S. S. Co.* (1891) 154 Mass. 272, 13 L.R.A. 329, 28 N. E. 266, the grounds upon which the owner of a vessel carrying immigrants, who had provided a competent surgeon in accordance with the requirements of the act of Congress of Aug. 2, 1882 (22 U. S. Stat. at L. 188, chap. 374), was held not to be liable for his want of care in performing an operation, were thus stated: "The only ground on which it is urged that the defendant is liable for his negligence is

2336. Liability in respect of the baggage of passengers.—The general rule is that, in respect of the baggage of passengers, public carriers of passengers are liable as common carriers of goods.¹ It

that he is a servant engaged in the defendant's business, and subject to its control. We think this argument is founded on a mistaken construction of the duty imposed on the defendant by law. . . . Under this statute it is the duty of shipowners to provide a competent surgeon whom the passengers may employ if they choose, in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon or some other physician or surgeon who happens to be on board, or they may treat themselves, if they are sick, or may go without treatment if they prefer; and if they employ the surgeon, they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation, or take the risk of going without it. The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases, and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater."

The above case was relied upon in another where it was held that the mistake of a ship's physician in giving out medicines did not render the shipowner

liable, where it had complied with the English "passenger act," 1855, requiring it to employ a competent physician, duly qualified, and supply him with proper and necessary medicines, and furnish him a proper place in which to keep them. *Allan v. State S. S. Co.* (1892) 132 N. Y. 91, 15 L.R.A. 166, 28 Am. St. Rep. 556, 43 N. Y. S. R. 386, 30 N. E. 482. The court said: "When the shipowner has employed a competent physician, duly qualified, as required by the law, and has placed in his charge a supply of medicines sufficient in quantity and quality for the purposes required, which meet the approval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to the passengers. That from this time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the shipowner, and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines, than to those which are the result of errors in judgment. The work which the physician does after the vessel starts on the voyage is his, and not the shipowner's. It is optional entirely with the passengers, whether or not they employ the physician. They may use his medicines or not as they choose. They may place themselves under his care, or go without attendance, as they prefer, and they determine themselves how far and to what extent they will submit to his control and treatment. The captain of the ship cannot interfere. The physician is not the shipowner's servant, doing his work and subject to his direction. In his department, in the care and attendance of the sick passengers, he is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere except at the passenger's request."

¹Laws of England, Carriers, § 71; Macnamara, Carr. § 316; 2 Parsons, Contr. *199; Hutchinson, Carr. §§ 1241 et seq.

follows that, where such baggage is lost or damaged by reason of the negligence of their servants, they are answerable, irrespective of whether the negligent act in question was or was not committed within the scope of the employment of those servants.

According to a standard treatise, the accepted doctrine in the United States with regard to sleeping car companies is that, in respect of passengers' baggage, they are not subject to the liability either of common carriers of goods or of innkeepers; the extent of the obligation begins to exercise due care.² In this point of view, it is manifest that, as one of the normal functions of the servants in charge of such is to look after the safety of the baggage, the scope of the employment of a servant through whose negligence such baggage is lost or damaged cannot be a material factor, except in a case where the baggage was intrusted to him toward the end of the journey, and the question is raised, whether he was with regard to its custody acting as in the course of his duties, or as the agent of the passenger.³

² Hutchinson, Carr. §§ 1130-1134.

³ *Hasbrouck v. New York C. & H. R. Co.* (1910) 137 App. Div. 532, 122 N. Y. Supp. 123, affirming (1909) 64 Misc. 478, 118 N. Y. Supp. 735, where the contents of the plaintiff's bag were lost by reason of the negligence or dishonesty of a trainman sent by the conductor to assist the plaintiff in carrying it out of the car. A rule with respect to the duties of trainmen prescribed that they were subject to the orders of the conductor, and that they should take their position at the car steps to assist passengers on and off the train, and generally look after their comfort. The complaint was framed in two aspects, one charging the defendant with liability as common carrier and the other as bailee; but the decision of the trial judge, as evidenced by his findings, placed the responsibility upon the defendant as common carrier. For the defendant, it was insisted that the plaintiff, in surrendering her suit case to the trainman before she arrived at the station, and permitting him to have it in his custody before she alighted from the train, constituted him her own agent or bailee, and that such service, to the knowledge of the plaintiff, was so far outside the scope of his employment by the defendant that it is not responsible for his negligence or theft, or failure to deliver back the property in the condition in which it was delivered to

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him. Discussing this contention the court said: "Of course, if the trainman was the agent or bailee of the plaintiff, and not acting as the servant of the defendant, that is the end of the controversy, and the defendant is not liable. We are of the opinion, however, that such was not the situation. The conductor was in charge of the defendant's train. He was under no obligation to direct a trainman or any other person to take care of the plaintiff's baggage. He assumed, however, to send to her one of the defendant's employees, a trainman under his control and a servant of the defendant. In taking the bag from the plaintiff, and thus exercising control over it, he must be assumed to have acted for the defendant. Such an act was not so outside the scope of his employment as to make it an individual act of his own, and constitute him the servant of the plaintiff. If this view be correct, it makes no difference whether the defendant thus had possession of the plaintiff's property as bailee or as common carrier. If such possession was as common carrier, the defendant was an insurer and was bound to redeliver what it received. *Powell v. Myers* (1841) 26 Wend. 591; *Merrill v. Grinnell* (1864) 30 N. Y. 594. There being no explanation respecting the loss of the goods, or endeavor to account for their nondelivery, if the defendant be deemed a bailee, the plaintiff made a

C. LIABILITY OF BAILEES OTHER THAN CARRIERS.

2337. Liability of innkeepers.—*a. In respect of the property of guests.*—At common law an innkeeper is, according to the doctrine commonly accepted, an insurer of the property of his guest against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.¹ In this point of view it would seem that his liability in respect of such property, when it is lost or damaged by reason of the negligent act of his servant, should be deemed to be prdeicable, as in the case of a common carrier, irrespective of whether the act was or was not within the scope of the servant's employment. But this particular aspect of the matter has apparently not been considered by any court.² Nor has the writer been able to find any decisions or *dicta* which throw light upon the ques-

prima facie case of negligence. *Fairfax v. New York C. & H. R. R. Co.* (1876) 67 N. Y. 11. Notwithstanding the rule that in case of bailment the burden is upon the bailor to establish negligence in the care of goods, an unexplained failure to deliver on demand is prima facie evidence of negligence. *Clafin v. Meyer* (1878) 75 N. Y. 260, 31 Am. Rep. 467.

¹ See 2 Parsons, Contr. * 146; *Richmond v. Smith* (1828) 8 Barn. & C. 9, 2 Mann. & R. 235, 6 L. J. K. B. 279; *Shaw v. Berry* (1850) 31 Me. 478, 52 Am. Dec. 628; *Mason v. Thompson* (1830) 9 Pick. 280, 20 Am. Dec. 471; *Lusk v. Belote* (1876) 22 Minn. 468; *Sibley v. Aldrich* (1856) 33 N. H. 533, 66 Am. Dec. 745; *Hulett v. Swift* (1868) 33 N. Y. 571, 88 Am. Dec. 405; *Wilkins v. Earle* (1870) 44 N. Y. 172, 4 Am. Rep. 655; *Classen v. Leopold* (1876) 2 Sweeny, 705. See also the authorities cited in § 2488, *a. post*.

In *Day v. Bather* (1863) 2 Hurlst. & C. 14, where the plaintiff's horse was injured through the negligence of an ostler, Pollock, C. B., said: "Whether the injury was done by the innkeeper or her servant, or a stranger, is immaterial, for unless a guest conducts himself in such a manner that the loss is occasioned by his negligence, the innkeeper is liable." Martin, B., said: "The defendant, having contracted to take reasonable care of the horse, and having employed a person to look after it who did not take reasonable care of it, is responsible for the injury."

By the English statute, 26 & 27 Vict. chap. 41, an innkeeper's liability is limited to £30 for any kind of traveler's property, not being a horse or other live animal or its gear or any carriage, except where the injury has arisen from the wilful act or neglect of his servants, and except the thing has been deposited expressly for safe custody.

² In *Keith v. Atkinson* (1910) 48 Colo. 480, 139 Am. St. Rep. 284, 111 Pac. 55, the correctness of the general principle that, where a traveler has become a guest of a hotel and delivers his baggage checks to the innkeeper's representative or agent, the innkeeper thereby becomes responsible for the baggage, though it is never brought within the precincts of the hotel, was taken for granted. The verdict for the defendant was set aside, because the trial judge had ruled that evidence going to show that it was a general custom in the hotel business for guests to give their checks to bell boys on duty was not admissible for the purpose of showing that the boy to whom the plaintiff had delivered his checks was authorized by the defendant to receive them. But in this case the right of recovery obviously did not depend upon the extent of the liability of the innkeeper in respect of baggage actually in his custody. The only question considered was whether it had been constructively delivered to him. With reference to such a question, the scope of the servant's authority would, of course, be material.

tion whether the character of the functions discharged by a defaulting servant in his master's inn is a material element where the action of the guest is brought in a jurisdiction in which his remedial rights are controlled by one of statutory provisions which declare in substance that loss to property which has not been deposited with the innkeeper in the manner prescribed shall not be imputable to him, unless such loss occurs through his own negligence or that of his servants.³ But such a proviso might, it is apprehended, be reasonably construed as applying to all the servants assisting to carry on the business of the establishment, whatever might be the particular duties assigned to them in the ordinary course of their work.

As to the absolute liability of innkeepers under the civil law, see § 2488, *b*, *post*.

b. In respect of the persons of their guests.—The case cited below seems to be the only one so far decided, which bears upon the question whether the liability of an innkeeper for personal injuries occasioned to a guest by the negligence of a servant is confined to acts done within the scope of the servant's employment.⁴ Presumably the same difference of opinion exists with regard to this point as that which is disclosed by the cases in which innkeepers have been sued for assaults committed by their servants. See § 2457, *post*.

2338. Bailees of other descriptions. Generally.—It might plausibly be argued that, as a bailee is bound by the implied terms of his contract to exercise a certain degree of care in performing it, he cannot relieve himself of that obligation by delegating its performance to a

³ The scope of the employment of the defendant's servants was not one of the points raised in *Rockhill v. Congress Hotel Co.* (1908) 237 Ill. 98, 22 L.R.A. (N.S.) 576, 86 N. E. 740, affirming (1908) 141 Ill. App. 503, where a provision of this tenor was involved. The plea that the loss was caused by a servant acting outside the scope of his employment was clearly not available, since the person to whom the lost baggage was intrusted was the porter, and the evidence showed that either he or the clerk was answerable for its loss. The decision really turned upon the circumstances that the loss occurred while the guest was taking her departure from the hotel, and that the statute was not applicable to such a situation.

⁴ In *Trulock v. Willey* (1911) 112 C. C. A. 1, 187 Fed. 956, it was held that the trial judge had properly refused to

give an instruction to the effect that the defendant was not liable if the doors of the elevator shaft down which the plaintiff fell had been left open by a stranger, or by a servant not acting within the scope of his employment. But the reason of the refusal thus approved was that there was no evidence tending to show such a situation as that which was predicated. As the court distinguishes the case of *Clancey v. Barker* (1904) 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, as being one in which the right of recovery for an assault was denied (see § 2457, note 2, *post*) on the ground that the tort was not committed within the scope of the tort-feasor's employment, it is not an unreasonable inference that the instruction would have been regarded as a proper one, if the evidence had been such as to justify its being given.

servant. The necessary consequence of determining the remedial rights of the bailor upon this footing would obviously be that liability for defective performance caused by the negligence of a servant would be imputable to the bailee, even though the negligent act may have been outside the scope of the servant's employment. Some decisions seem to go nearly, if not quite, to the extent of recognizing some such theory of absolute liability.¹ But the great majority of the cases which bear upon the subject import, more or less distinctly, an adoption of the doctrine that the bailee cannot be held responsible unless it is proved that the servant in question was acting in the course of his duties when he was guilty of the negligence from which the alleged injury resulted.

2339. Liability of keepers of boarding houses.—In a very elaborately argued case, the English court of Queen's bench was equally divided upon the question whether the keeper of a boarding house was bound to indemnify a guest for property which had been stolen from his rooms by some person unknown, owing to the carelessness of one of the defendant's servants in leaving the front door of the house open.¹ It was agreed by the whole court that although, in respect of the custody of a guest's baggage, the keeper of a boarding

¹ See *Coupé Co. v. Maddick* [1891] 2 Q. B. 413, 65 L. T. N. S. 489, 60 L. J. Q. B. N. S. 676 (§ 2340, note 1, *post*); *Sinclair v. Pearson* (1834) 7 N. H. 219 (§ 2341, note 2, *post*); *Leviness v. Post* (1875) 6 Daly, 321 (§ 2342, note 2, *post*); *Hardegg v. Williards* (1895; N. Y. C. P.) 12 Misc. 17, 66 N. Y. S. R. 524, 33 N. Y. Supp. 25 (§ 2342, note 2, *post*).

In *Dansey v. Richardson* (1854) 3 El. & Bl. 144, Coleridge, J., observed that a lodging house keeper "undertakes absolutely to supply his guests with certain things." But it is clear from his judgment as a whole that the master's liability was not conceived of as extending to acts beyond the scope of the employment of the servants. The proposition actually combated by him and Lord Campbell was that the defendant's obligation to the plaintiff was discharged by the exercise of due care in regard to the hiring of servants. See following section.

¹ *Dansey v. Richardson* (1854) 3 El. & Bl. 144. The declaration alleged that defendant, being a boarding house keeper, received plaintiff with her baggage, for reward, as a guest in defendant's

house, on the terms, amongst others, that defendant should "take due and reasonable care" of plaintiff's baggage whilst in the house. Breach: that by negligence of defendant and her servants, plaintiff's baggage was lost. Pleas: not guilty; and a traverse of the receipt on those terms. On a trial, it appeared that plaintiff was received, with her baggage, as a guest; but nothing was expressed as to the care to be taken of the goods. The goods were stolen from the house whilst plaintiff was a guest, and there was evidence that the theft was facilitated by the defendant's servant having left the front door ajar, and there was also some evidence that defendant was aware of habitual negligence of the servant in this respect. The jury were directed that a boarding house keeper was bound to take due and reasonable care about the safe-keeping of the guest's goods, which was explained to be such care as a prudent housekeeper would take of the house for the purpose of protecting her own goods; that leaving the door open might be a want of such care, but that the defendant was not answerable for such negligence in the servant, unless she had

house is not subject to the same obligation as an innkeeper, he impliedly stipulates to take due and proper care of such baggage, and that the act in question might be a breach of that duty. But Erle, J., and Wightman, J., were of opinion that the breach, having in this instance been committed by a servant of the defendant, could not be imputed to his employer, unless negligence with regard to his selection or retention should be proved. Their conclusion was based upon two grounds: (1) That, in view of the character of the contractual relationship between the plaintiff and the defendant, the case was not controlled by the precedents which embodied the doctrine that a bailee for reward was liable for goods lost or stolen through the negligence of his servants; and (2) that the decisions imputing responsibility to a master for injuries caused by the careless driving of his servants upon highways were not in point, because the duty to which they had reference was public in its nature and essentially dissimilar from that owed by the defendant to the plaintiff.² The

herself been guilty of some negligence, as in keeping such a servant with knowledge of his habits. Verdict for defendant on the plea of not guilty; for plaintiff on the other plea.

² Erle, J., said: "The substantial question . . . is whether the keeper of a boarding house be liable to a boarder for the value of any goods stolen from the house, if the negligence of a servant towards the mistress, such as an omission to shut the door according to her order, has given a facility for theft. Which question I answer in the negative, on the grounds that there is no precedent or principle establishing such a liability, and that there is no analogy between this case and either of the two classes of cases above mentioned. . . . In the class of cases relative to certain bailees for reward, who are liable for the loss of the goods if they are stolen through the negligence of their servants, the goods are delivered to, and are in the possession of, the bailee, who, by contract of bailment for reward, undertakes a private duty to the bailor to keep them with care, and to deliver them again; and this private duty is the test to ascertain whether any alleged state of facts amounts to actionable negligence, for the question whether given facts amount to actionable negligence depends upon the legal duty owed to the party who affirms the negligence to be a breach of the duty

owing to him by the opposite party. But in the present case, there is no delivery of the goods of the plaintiff to the defendant; there is no contract by the defendant to keep them with care and deliver them again; there is no reward in respect of goods, the terms being the same for a boarder whether with or without goods; there is no duty of keeping owing from defendant to plaintiff, and, consequently, no measure by which to try whether any given act, such as leaving a door open, is actionable negligence contrary to that duty. The goods of the plaintiff in this case remained in her possession and under her control, and were disposed of by her as she chose, without notifying what she had done to the defendant. The bailee for reward has possession, and can apply care to guard, and undertakes to do so; the defendant had no possession, and could apply no care to goods which she knew not of. The decisions that a bailee by deposit is not liable for a theft by his own servants, unless there was negligence of himself, are in favor of the defendant; for she had not the same duty to keep with care as a depositary has, not having had the possession. . . . If a depositary is not liable for an actual theft by his servant, it seems to me that he ought not to be liable for a theft facilitated by the negligence of his servants. In the other class of cases relied upon by the plaintiff, where the

position taken by Coleridge, J., and Lord Campbell, Ch. J., was that "although the duty of the defendant was not that of a bailee to whom a chattel is personally delivered to be safely kept and returned, for reward," there was a duty incumbent upon her, as a keeper of the boarding house, with respect to the plaintiff's goods when they were lawfully deposited in the hall, and even while they remained in the room appropriated to him; and that "it was a breach of that duty, if, through the gross negligence of the defendant or her servant, the outer door was left open at a time when thieves might be expected to enter the house, and by means thereof the goods were stolen."³ In this point of view the defendant was deemed to be liable, irrespective of whether he was or was not chargeable with personal negligence.⁴ Having regard to the more recent authorities, it may safely be affirmed that the conclusion thus arrived at would be

master is held liable for the act of the servant, the servant has, in the course of his employ, caused damage by a misfeasance in violating some public or private right of the complainant. The usual example of this species of liability is in cases of collisions on highways, there being a public right to the safe use of highways, and a correlative duty not to obstruct that use; and the master who, by himself or his servant, makes a wrongful collision, violates the public right, and is liable for the consequent damages. . . . The omission to shut the front door violated no public right of the plaintiff, and was in no sense an injury to her. Thus, the supposed analogy between the present case and cases of misfeasance by servants fails, from the difference of the acts complained of. It fails also in respect of the remoteness of the damage. In cases of collision the damage is immediate from the injury; but in the present case, the thing complained of is the open door, which, by itself, was harmless; and the damage arose from the wilful trespass of a third person who entered and stole, and therefore the supposed analogy between a mere omission to close a door and direct damage to person or property from wrongful collision fails doubly."

³ See Lord Campbell's judgment at p. 170.

⁴ Coleridge, J., said: "My brother Erle, at the trial, considered the present case not to fall within this rule [*i. e.*, *respondeat superior*]. He separated the

servant's alleged negligence from the defendant's, and so directed the jury in such terms that, unless they thought both concurred (that is, unless the servant were negligent in the act which he did, and the defendant also negligent in keeping the servant), the jury would understand that they ought to find their verdict for the defendant. After much consideration, I cannot agree to this. It seems to me a novelty in the law, without foundation in any satisfactory principle, complicating the inquiry for the jury very inconveniently, and likely to lead them to unjust conclusions. It will be observed that I have not attempted to lay down any precise definition of the amount or kind of care which the defendant was bound to have taken of the plaintiff's goods, but let the rule be that she was only bound to take such as a prudent householder would take of his own (and less than this it can scarcely be), yet, if you understand and apply that rule in the sense in which my brother Erle applied it, it is obvious that it is consistent with the grossest negligence, even misfeasance, on the part of the servant; for a mistress who uses all ordinary care in the hiring and overlooking of her domestics may yet have careless or wilful servants, or drunken ones, or she may unfortunately have a servant who is commonly sober, and yet who, upon one occasion, being intoxicated, may occasion great loss or injury to the goods of the guest in the house; and this may happen in the performance of services for the mis-

approved by any modern court.⁵ Historically, however, the theory of the other members of the court, and the reasoning by which it

tress in her place, and for which the mistress is paid, and yet the mistress will not be answerable. If the rule, so understood, be applicable to the case of negligence or omission, I cannot see, in reason, why it is not equally applicable to misfeasance and commission. The same care may have been taken in the selection of servants guilty of the latter in the grossest degree, as of the former; and if that care be used, the master will have done all that, according to the rule, is required of him. But, it seems to me, the same answer applies in both; the guest is entitled to the due and reasonable care absolutely; he comes to the house, and pays his money for certain things to be rendered in return, among others the care I speak of; to him it is indifferent whether the master renders them in person or by a servant; it is the master who engages for them; the guest does not stipulate for wholesome food, if the master has a good and careful cook; or a dry bed or clean room, if the housemaid be cleanly and careful; or punctual obedience to his orders, if the domestics are civil and careful. He stipulated for all this directly from the master, having no control himself over the servants, and having nothing to do with the master's judiciousness or care or good fortune in selecting them. And the duty of the master must be measured by the same rule; he undertakes to the guest, not merely to be careful in the choice of his servants, but absolutely to supply him with certain things, and to take due and reasonable care of his goods." Lord Campbell said: "I think there may be negligence in a servant in leaving the outer door of a boarding house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part, analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is a danger that thieves may enter and steal the goods of the guests. If he employs servants to perform this duty, while they are performing it, they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a wilful trespass, com-

mitted by them; but the general rule is that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do, and I am not aware how the keeper of a lodging house should be an exception to the rule. He is by no means bound to the same strict care as an innkeeper, but, within the scope of that which he ought to do, I apprehend that he is equally liable whether he is to do it by himself or his servants. . . . With respect to commodatum or 'lending gratis,' it is expressly laid down by Lord Holt, in *Coggs v. Bernard* (1704) 2 Ld. Raym. 916, that the bailee is liable for the negligence of his servant, without any consideration of personal negligence in hiring or keeping him. Putting the case of a horse borrowed, he says: 'If the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.' . . . I conceive that, in all the various sorts of bailment, when a question arises as to the liability of the bailee for the loss of the thing bailed, it is to be determined by the degree of care required from the bailee, and the degree of negligence from which the loss arose; and that the question is not whether the negligence is imputed personally to the bailee, or to his servants within the scope of their employment. . . . In the present case, the jury were told to find for the defendant, although the loss arose from the negligence of the servant, although there was no negligence on the part of the plaintiff, if the defendant was not guilty of negligence in hiring or keeping the servant. This amounts to the doctrine that the boarding house keeper cannot be liable for negligence of the servant, however gross, which causes the loss of the goods of the guest, if the master cannot be justly accused of negligence in hiring and employing that servant. To this doctrine I cannot accede."

⁵ In *Scarborough v. Cosgrove* [1905] 2 K. B. (C. A.) 805, Collins, M. R., re-

was supported, are of much interest, as indicating the reluctance of some judges, even at the date when the case was decided, to treat the vicarious liability of a master as a principle universally applicable.

2340. Liability of hirers of vehicles and horses.—[In England it has been held that a bailee of this description may be held liable for damages sustained by the bailor's vehicle or horses, in consequence of a negligent act committed by a servant at a time when he was using them for his own purposes.¹ But the present status of this decision

marked: "To my mind the reasoning of Coleridge, J., and Lord Campbell, Ch. J., seems conclusive on the whole question, both as to the existence of the duty and the incidental responsibility of the master for the negligence of the servant delegated by the master for the performance of some part of that duty."

¹ *Coupe Co. v. Maddick* [1891] 2 Q. B. 413. The facts involved and the conclusions arrived at were thus stated by Cave, J., in the judgment delivered by him for the whole court: "The question raised in this case is whether a person who has hired a horse and carriage for a year is responsible to the owner of the horse and carriage for damage done to them by the negligent driving of the hirer's servant, where the servant, instead of taking the horse and carriage to his master's stable in the ordinary course of his duty, for his own purposes and to serve a friend, takes the horse and carriage in a contrary direction, and they are injured in consequence of his negligent driving while thus engaged contrary to his duty. The county court judge held that the hirer was not responsible, on the authority of *Storey v. Ashton* [1869] L. R. 4 Q. B. 476 [see § 2295, note 1, *ante*], in which it was held, under similar circumstances, that the master was not liable to a person who had been run over and injured by the servant, on the ground that the servant was not acting in the course of his employment as servant. Mr. Wills, who argued for the defendant in this case, contended that the ground of the hirer's liability to the owner of the horse and carriage is the same as the ground of his liability to a person who is injured by the negligent act of his servant; but we are unable to agree with this contention. When a wayfarer is injured by the negligence of a person who is driving a carriage along a highway, he has

a right of action founded on tort against the driver, and, if the driver is a servant driving in the course of his employment, he has also a remedy against the master on the principle of *respondere superior*; but where a man hires a horse and carriage, there is an implied obligation on his part arising out of the contract, to return them in the condition in which he received them, fair wear and tear and certain accidents excepted; and if they are injured by the negligence of the hirer's servant while driving in the course of his employment, the latter's remedy is by action on the contract, and can be enforced against the hirer only, and not against his servant. That there is a difference between the hirer's liability to the owner and his liability to a wayfarer injured by the negligence of the person driving the carriage is plain from the following instances: A hires a horse and carriage for a year, and lends it for a day to B, who negligently drives over and injures C, at the same time injuring the horse and carriage. In that case A is not responsible to C, because B is not his servant, and consequently the maxim *respondeat superior* does not apply; but he is responsible to the owner of the horse and carriage for the damage done by B's negligence. So, again, if two partners hire a horse and cart for the purpose of their business, and one of them, while driving the cart in the usual course of their business, negligently runs against and injures a person passing along the highway, and at the same time injures the horse and cart, the partner driving is alone responsible to the person injured, but both partners are responsible to the person from whom they have hired the horse and cart. The responsibility of the hirer to the person from whom he hires is a responsibility arising out of contract; his responsibility

as a precedent is somewhat doubtful, having regard to two later cases in which the right of recovery was discussed and determined with reference to the question whether the negligent act complained of was or was not within the scope of the defaulting servant's em-

ity to a person run over by the negligent driving of the horse and cart arises out of tort. Is there any authority for saying that the responsibility of the hirer to take reasonable care of the goods hired does not extend to all injuries caused by the negligence of his servant to whom he has intrusted the care of them? Mr. Wills cited the case of *Finucane v. Small* (1795) 1 Esp. 315, and *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168, cited in *Giblin v. McMullen* (1868) L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445, 9 Eng. Rul. Cas. 283, in which it was held that the hirer was not responsible where his servant had stolen the goods hired. In those cases there was an act of the servant which was tortious as against the letter of the goods, and which gave him a right of action against the servant for a conversion of the goods. But in this case the act of the servant was not tortious as against the owner of the horse and carriage. If the horse and carriage had got back safely to the stables, the owner would have had no right of action against the servant; for, although the servant, as against his master, would have committed a breach of the duty arising out of the relationship of master and servant, he would not have been guilty of any tortious act as against the owner. Such an act would certainly not have amounted to a conversion of the horse and carriage by the servant, nor, as against the owner, would it have amounted to a trespass, seeing that the person who was entitled to the possession of the horse and carriage during the period occupied by the journey was the hirer, and not the owner. Nor could the fact that the horse and carriage were injured during the journey give the owner a course of action against the servant, because it was not the owner who had intrusted the horse and carriage to the servant, but the hirer, his master, and consequently the duty of the servant to take care of them was a duty arising out of the rela-

tionship of master and servant, and owing to the master, and was not a duty owing to the owner, because there was no contractual relationship between the servant and the owner. The hirer could maintain an action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage by which they were damaged; but the owner could maintain no such action, because, as we have pointed out, there was no invasion by the servant of the letter's right of ownership, and no contractual relation between them. If we consider the case on the general principles of the public benefit, we arrive at the same result. Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. If, under these circumstances, the loss is to fall on the owner, who does not engage and cannot dismiss the servant, and who cannot recover over against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence, except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw needless impediments in the way of business, and to render the letting and hiring of horses and carriages more expensive. If the loss is to fall on the hirer, it falls on one who will thereby be led to exercise greater care in the selection of his servant, who can punish the servant for his misconduct by dismissing him, and who, theoretically at all events, has a right of action against the servant." This case was criticized by Collins, M. R., in *Sanderson v. Collins*, see note 2, *infra*.

ployment.² The same test of liability has been adopted by two American courts.³

² In *Abrahams v. Bullock* (1902) 86 L. T. N. S. 796, 50 Week. Rep. 626, 18 Times L. R. 701, the plaintiff, a manufacturing jeweler, hired from the defendant, a job master, a carriage with a horse and driver at an agreed weekly sum, for the express purpose of sending his traveler with a stock of jewels to go round to his customers. One day, while making his rounds, the traveler went into a hotel, and left the carriage with a stock of jewels inside it, in the charge of the driver. Before leaving the carriage the traveler locked the door. The driver then went into a coffee house, leaving the carriage unattended in the street. A thief drove the carriage away and stole the jewels. Held, that the defendant was liable for the loss suffered by the plaintiff. In *Cheshire v. Bailey* [1905] 1 K. B. (C. A.) 237, 1 Ann. Cas. 94, Collins, M. R., thus explained the remarks made by him in the above case: "I am there reported to have said: 'I think that the defendant was under an obligation to use ordinary care in looking after the carriage in Cohen's'—that is, the traveler's—'absence, and that his servant failed in that respect.' This seems to be substantially accurate. The proposition I was combating was that of the judge below, namely, that it was not in the scope of the driver's duty to protect the goods as the servant of the defendant, so that the latter was not liable for negligence in the performance of any duty owed by him; and I am reported to have said: 'It is a reasonable and proper inference to draw from the contract, and the circumstances under which it was made, that the defendant undertook to supply a driver who would take ordinary care of the carriage when Cohen was obliged to leave it.' Substitute for 'who would' in the above sentence, 'whose business it should be to,' and I think it would be verbally accurate. Again, lower down I say: 'The very thing contemplated by the obligation on the defendant to take care of the carriage in Cohen's absence was the guarding against the possibility of a thief taking the jewels.' I certainly did not intend to hold in that case that the defendant warranted that due care should be taken, though I did hold that he was responsible if his servant, act-

ing in the scope of his employment, did not take it."

In *Sanderson v. Collins* [1904] 1 K. B. (C. A.) 628, a carriage sent by the plaintiff, a coach builder, to the defendant, to be used while his own carriage was being repaired, was taken out by his coachman without his knowledge and solely for the purposes of the coachman himself. Held, that an action for damages caused to the vehicle while it was being so driven could not be maintained. Collins, M. R., said: "The obligation on the defendant as bailee was only to take reasonable care, and so far as the act of his servant was to be taken as the act of the defendant, he would be bound by it; and if the servant, in the course of his employment and acting within the scope of his authority, did not use reasonable care in the custody of the carriage, the master would be responsible. On the other hand, it is clear law that such a bailee as the defendant was is not responsible for the acts of persons who are not his servants in respect of particular acts,—that is, who are not acting within the scope of their employment in doing those acts. If a burglar broke into the coach house and took away the carriage and caused damage to it and brought it back, no liability would attach to the bailee, because the act would not be his, and he would not be responsible for the acts of a person between whom and himself there was no connection. But while not responsible in such case, yet if his servant whose duty it was to keep the carriage safely had been negligent in leaving the coach house open, and the carriage were taken away, the master would be liable, because of the negligence of a person for whom he is responsible. That, I think, illustrates the distinction between the two cases. Burglary is perhaps an extreme instance of something not done under any mandate from the master, but any other act outside the scope of the authority given by him would equally relieve the master. If the servant, in doing any act, breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master. The county court judge has by his judgment acquitted the defendant of neg-

ligence in employing as coachman the man who caused the mischief, and that ground of action does not exist. It seems to me that a satisfactory answer to the question raised on this appeal only involves a careful analysis of the facts, and when that is done it appears that there is no legal liability on the defendant. Coming to the judgment of the divisional court, from which this appeal is brought, it would appear to have been arrived at on the authority of *Coupé Co. v. Maddick* [1891] 2 Q. B. 413, 65 L. T. N. S. 489, 60 L. J. Q. B. N. S. 676. Without deciding whether that case can or cannot be supported, it is sufficient to say that I think that it is distinguishable. The fact that makes it distinguishable from the one before us may be slight, but at the same time it may make all the difference. In that case, as I understand it, the act done by the coachman was admittedly within the scope of his authority. He had received an order to drive the horse in a particular direction; he did drive the horse, but instead of doing so in the direction ordered, he drove in another direction. Still he was intrusted with the carriage and horses for the purpose of driving them, and they were injured owing to his negligent driving. Whether or not that is a sound distinction in point of law, is a distinction in point of fact; and I think it is one that goes to the root of the matter, because the ground of the decision appears to have been that the coachman was acting within the scope of his authority, so as to render his master liable. I cannot agree with the divisional court as to that case being an authority in the present one, and for the reasons that I have given I think the appeal must be allowed, and the judgment of the learned county court judge restored." Romer, L. J., said: "It is admitted that when the arrangement was made between the plaintiff and the defendant, no special contract was made with regard to the obligations to be undertaken by the defendant. What then are the obligations that must be implied? Certainly the insurance of the safe return of the carriage is not one of them. The case is one of an ordinary bailment for mutual benefit, and the defendant as bailee is under an obligation, now well settled in law, by which he was bound to take reasonable care of the chattel intrusted to him, but was not liable for

loss or injury which might happen to it during the bailment, unless caused by his negligence or that of his servants acting in the course of their employment. As to any negligence on his part, the judgment of the county court judge shows clearly that in his opinion there was none, and the servant who caused the accident was not at the time acting in the course of his employment. That being the state of the facts, the defendant is not liable." Mathew, L. J., said: "Under the contract of bailment in this case, if the defendant as bailee took reasonable care of the carriage he would incur no liability for what might happen to it. Suppose, for instance, that without any negligence on his part it had been destroyed by fire, he would clearly not have been responsible. No doubt, when the contract was entered into, something more was contemplated than the personal acts of the defendant, because the carriage was to be placed for certain purposes in the custody of the defendant's coachman. For his negligence while acting in the scope of his employment as servant to the defendant, the latter would be liable. But he would not be liable without negligence on his part for the acts of third persons, and the acts of the coachman acting outside the scope of his employment come within the same principle."

³In *John M. Hughes Sons Co. v. Bergen & W. Automobile Co.* (1907) 75 N. J. L. 355, 67 Atl. 1018, the trial judge was held to be justified in finding from the evidence that, as the servant was the manager of defendant's business, one detail of which was to assist customers when their machines should break down upon the road, it was within the range of his functions to follow a customer upon the road in order to be near at hand should an accident occur to the customer's car; that, for the purpose of thus attending customer, the use of an automobile was reasonably necessary, and that the servant therefore had implied authority from defendant to hire or borrow a car to be used in this way when the president's car was out of commission, as it was on the occasion in question; that the servant followed C., a customer, upon the road to T., in order to be at hand if an accident should occur to C.'s car; that he borrowed plaintiff's car for this use, and was so using it when, through his negligence, the machine became injured;

2341. Liability of bailees of things to be kept for a reward.—

a. Warehousemen.—In the cases cited below the liability of bailees of this description was explicitly treated as being conditional upon the ability of the bailor to show that the negligence complained of was within the scope of the tort-feasor's employment.¹

b. Agisters.—In a New Hampshire case where a servant of a bailee who had received the plaintiff's horse to be kept for a certain period, for a reward, fatally injured it while he was riding it with-

and that, in thus making the journey to T. in plaintiff's car, the servant was engaged in doing defendant's business, and was acting within scope of his employment.

In *Rexroth v. Holloway* (1909) 45 Ind. App. 36, 90 N. E. 87, the hiring of a horse by a traveling salesman to enable him to reach another town was held to be such a "necessary" and "reasonable" incident to the performance of his employer's business as would render his employer liable for an injury negligently inflicted by him upon the horse, although it appeared that the town could have been reached by other modes of travel. The court said: "To hold that the master could be held liable for the tort of his servant only while engaged in an act necessarily incident to his employment, and give the word 'necessarily' the strict definition of the term, would practically free the master from liability, since it is seldom that a servant commits a tort while performing an act that is indispensable or unavoidable in the performance of the principal act he is set to do. Here the principal act required of appellant Rexroth was to go to Buchanan. He could go by the train, he could go by a horse and buggy, or he could walk. No one was necessary in the sense of being indispensable, inevitable, or unavoidable. Either of the first two surely would be necessary in the sense of being appropriate, usual, or reasonable."

¹In *Aldrich v. Boston & W. R. Co.* (1868) 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74, it was held that warehousemen are not responsible for neglect of their servants to rescue goods in the warehouse from destruction by an accidental fire in the night, at which such servants are present, but not in the course of their employment. The evidence showed that while the warehouse was burning, "different persons in the

defendants' employment came upon the ground from time to time, and evidence was offered to show that with due care and diligence they might have saved the plaintiff's property. There was no evidence that the general agent who had charge of the freight house heard the alarm, or was present at the fire, or that he was in any fault for not being there. The servants of the company who were present were a clerk employed to check freight as it was received, and to help deliver it; a baggage master and brakeman, a road master and superintendent of the repairs of the track; another baggage master, who had charge of the freight house in the daytime, and locked it at night, but did not keep the key; and a clerk employed to receive freight." Commenting upon this state of facts, the court said: "The legal obligation of the defendants as warehousemen is well settled by the authorities, and there is no substantial difference between the parties respecting its nature and extent. They are responsible for due care in storing the goods in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment. They are not insurers against loss by an accidental fire. As the defendants furnished a suitable warehouse, properly secured, in which the goods were deposited, they had done their whole duty, until the time came when, upon reasonable notice of danger, an obligation should arise to remove them. *Tobin v. Murison* (1845) 5 Moore, P. C. 110. They were not chargeable with the negligence of any of their servants, unless it was negligence within the scope of the servant's employment. And a true test of this liability may be found in the question whether any one of the defendants' servants who were present at the fire would

out his master's permission for the purpose of driving home his master's cows, the decision of the court that his negligence was imputable to his master was sustained by reasoning which seems, if carried to its logical conclusion, to involve the consequence that a bailee of the description must answer for the negligent acts of his servant in respect of the thing bailed, irrespective of whether those acts are or are not within the scope of the servant's employment.² It must be admitted, however, that the decision may also be regarded as one

be answerable to his employers for a neglect of his duty. The answer to this question, upon the evidence reported, seems to us perfectly plain. It was no part of the service for which either of them was engaged, to attend to the removal of goods from the freight house in case of a fire in the night. Neither of them was under any obligation by reason of his employment, to rise in the night and be present at the fire. Neither of them had any custody, or responsibility for the safety, of the goods at that time. If they were under no obligation to be present, their voluntary attendance imposed upon them no legal liability for mere omission to do anything when on the spot. It is a mere confusion of terms to say that the servants of the company were present and neglected to remove the goods. They were not then and there, in any legal sense, the servants of the company. Whatever they did was done by them as volunteers, as neighbors and citizens. They had the full control of their own time and labors. They had the right to choose for themselves whom they would assist, and whose goods they would try to save; and, in making the choice, they in no manner implicated the railroad company, or assumed any of its obligations. As the clerks, brakeman, and baggage master, and superintendent of track repairs were under no legal liability to the defendants for their omissions at the fire, it follows, therefore, that the defendants are not chargeable with their neglect, any more than with the neglect or inefficiency of any other persons who were there; and the whole foundation of the action fails."

In *St. Louis & S. F. R. Co. v. Caven-*
der (1910) 170 Ala. 601, 54 So. 54,
where the injury complained of was inflicted upon the plaintiff's property under circumstances which rendered

the defendant railway company liable merely as warehousemen, the court, in considering a demurrer, laid it down that carriers are responsible, by reason of the duties imposed by law upon them as carriers, for the negligence of their servants in and about the carriage of freight, including its receipt for future carriage, and that, where the servant is acting within his authority, the carrier is responsible, though the wrong or damage be done inadvertently and with the purpose to accomplish its business in an unlawful manner.

² *Sinclair v. Pearson* (1834) 7 N. H. 219. The court said: "If, however, the mere relation of master and servant was in question, the argument of the defendant's counsel that the act of the servant in taking possession of the mare was a wilful trespass, so that the master is not answerable for that, or the subsequent negligence of the servant, might perhaps be maintained. . . . The defendant does not stand simply in the relation of a master whose servant has unlawfully interfered with the property of another without his consent. He was a bailee of the mare to keep for a reward, and as such, in addition to the ordinary responsibility of a master for the acts of his servants, the defendant had imposed on him a duty arising from his contract with the bailor, whereby he became answerable to a certain extent for the acts and negligence of himself and his servants about the property bailed; and the mare, while thus in his custody as bailee, was taken by his servant and used in that business of the defendant about which the servant was employed, and while so used was injured through the carelessness of the servant. And the question arises, whether, under such circumstances, the defendant may discharge himself from responsibility as bailee and as master, by alleging that the act of the servant,

which rested upon the narrower conception that the act of the servant in taking the horse for the purpose in question constituted a breach of duty intrusted to him. Notwithstanding the generality of the language used in the opinion, the court probably did not intend to go any further than to declare the master to be liable for such a default. In a case where the bailor's horse was burnt to death in a fire which occurred in a livery stable through the negligence of three drunken men who had, during the night, lighted their pipes in the

in using the property bailed, was not by his direction, but an unauthorized trespass of the servant." After referring to the statement in *Story on Bailments*, § 265, that if "a hired horse is ridden by the servant of the hirer so immoderately that he is injured or killed thereby, the hirer is personally responsible," the court proceeded thus: "If the hirer is bound to ride the horse moderately, and treat him carefully, and is answerable for the default of his servants as well as his own, he must be liable if the servant wilfully rides the horse immoderately or deprives him of suitable food. With what propriety could it be said that the master, who received the horse on an express or implied undertaking that he should be carefully used and fed, should escape from his contract because the servant whom he employed, and on whom he relied to carry his contract into effect, was malicious and wilful. The master undertakes in such case that his servant, as well as himself, shall exercise ordinary diligence and care. . . . If a servant intrusted by his master with the care of a hired horse, or of one taken to be dressed and fed in his master's stable, intentionally leave open the gates or doors, that is a wilful wrong; but is the care required by the contract, and which the owner had a right to expect, bestowed in such case? and if not, on whom ought the loss to fall, upon the master or the owner? The servant who carelessly leaves open the gate, so far from acting according to the authority given him by his master, or in the course of his duty as a servant, is perhaps neglecting the very duty intrusted to him; and yet the master is answerable, notwithstanding the servant, in leaving open the gate, may have violated his express command. It is evident, therefore, that the liability of a bailee for a loss occasioned by the

act of a servant cannot be made to depend upon the question whether the act was wilful or otherwise; or whether the servant, in committing it, was doing or forbearing what his master had directed; for if that were the criterion, the bailee would never be liable for the act or neglect of his servant unless done by his command, either expressed or in fact to be inferred; but it must depend upon the question whether the degree of care and diligence required about the preservation, safe-keeping, etc., of the thing bailed had been exercised by master and servant. . . . In the case now under consideration, although it does not appear that the loss of the mare was occasioned by anything done in pursuance of the express direction of the defendant, it is found that after the mare was in his custody as bailee, and while he was thus bound to ordinary care for her safe-keeping, he leaves her within the control of his servants, one of whom not only uses her in that part of the defendant's service which he was employed to perform, but is so careless and negligent in the management of her that she is injured and lost. The bailee is the person to exercise control over his servants in relation to the property bailed. It is apparent that the bailor cannot do it. And although the bailee may not be liable for a loss arising from a theft by a servant not specially intrusted by him with the property, nor for a personal conversion by such servant to his own use, separate and distinct from his employment, we are of opinion that the taking and using of the property by the servant, in the business of the bailee, is not such a conversion to the use of the servant personally that the bailor is precluded from treating the property as still in the custody of the bailee; and that the bailee is liable for the carelessness of the servant while so used. When the

hayloft, the right of recovery was assumed by the supreme court of Maine to be dependent upon the question whether the fire could be traced to the negligence of a servant acting within the scope of his employment.³ The same test was applied in a Maryland case where the liability of a livery stable keeper for the death of a horse which resulted from its having been immoderately ridden by a servant was denied on the grounds that the accident occurred while he was riding it for exercise in pursuance of instructions received directly from the plaintiff, and that such exercise was not provided for in the contract.⁴

master so far neglects a personal care and superintendence of the goods bailed, that they pass into the hands of his servants and are used in his business, and so carelessly managed as to suffer injury in consequence, we think he cannot shield himself under the plea that these things were without his knowledge or assent; but that this constitutes a case of negligence for which he is responsible. The defendant is not entitled to say that his servant, by taking the mare from his stable to use in his business, had so deprived him of the custody as to put an end to the bailment, and exonerate him from responsibility for any subsequent negligence of the servant. This could not terminate the contract of bailment, except at the election of the bailor. In this view of the case, it becomes unnecessary to decide whether the act of the defendant's servant in taking and using the mare in his master's service is not of itself sufficient to charge the defendant."

³ *Eaton v. Lancaster* (1887) 79 Me. 477, 10 Atl. 449. The right of recovery was based upon two grounds, viz.: (1) That two of the intoxicated men were in the employ of the defendants, and (2) that all the three men were permitted by McIntosh, the night watch, to go into the loft to sleep; that this act betokened a failure to exercise due care in respect of the plaintiff's property, and that by reason of this careless act the stable was burned. The court said: "They were liable for the negligence of their servants in the performance of any duty in regard to the care and custody of the plaintiff's property within the general scope of their own employment. As to the first ground of the plaintiff's claim, we think it entirely fails, as neither of the three men were in the

performance of any act for the defendants during the night, but were acting as they pleased for their own pleasure. Upon the second ground of plaintiff's claim there is more doubt. The plaintiff's claim is that McIntosh permitted the intoxicated men to go into the loft for the night; that this was within the scope of his general employment and in the performance of his duty as night watch; that it was a careless, negligent act on his part, for which the defendants are responsible, and was the proximate cause of the loss of plaintiff's property. These propositions are all controverted. . . . Are the defendants responsible for this negligent act of their servant McIntosh? We think so. It was an act directly in the line of his duty as a night watch in charge of the stable. The fact that his negligence was in violation of the defendant's orders, if it was within the general scope of his duties, does not relieve the defendants from responsibility. The case is not like *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 256, 602 [see § 2344, note 3, *post*], to which our attention is called, where a carpenter was employed by A with B's permission, to work for him in a shed belonging to B, and the carpenter set fire to the shed in lighting his pipe with a shaving. His act, though negligent, had nothing to do with his employment as A's servant, and was not within the general scope of his duties. Here, the negligent act is directly within the line and purpose of McIntosh's employment."

⁴ *Adams v. Cost* (1884) 62 Md. 264, 50 Am. Rep. 211. The court said: "If a bailee employs others to transact the business intrusted to him, it has been held that his liability only extends to the injury resulting from the negli-

2342. Liability of persons contracting for the performance of certain work.—Cases in which a master delegated to a servant the performance of some work which he had agreed to do for the benefit of a third person were, perhaps, among the exceptions to the general rule under which, during the earlier periods of the development of the common law, a master was deemed to be liable only for those tortious acts of his servant which were done in pursuance of his own orders.¹ However this may be, it seems clear that, at the present day, a person who contracts to do a certain piece of work must at his peril see that it is executed with reasonable skill and care. This principle is applicable whether the contract be for the erection of a structure which is to fulfil a certain purpose, or for the making of repairs, or the execution of some other casual work, upon the premises of the contractor or elsewhere.² The contractor, however, does not

gence of such persons while acting within the scope of their designated duties. If the injury complained of has been occasioned by the misconduct of the agents or servants of the bailee while not engaged in the performance of the services specially assigned to them by the bailee, the latter is not responsible in damages for any loss resulting to the bailor from such misconduct. *White v. Commonwealth Nat. Bank* (1866) 4 Brewst. (Pa.) 234; *Pelham v. Pace* (1833) Hempst. 223, Fed. Cas. No. 10, 911a. . . . In the defendants' second prayer, to the granting of which an exception has been taken, it is left to the jury to find whether the servant of the defendants was, at the time when the injury occurred, acting under the instruction and direction of the plaintiff. If this question of fact should be determined in the affirmative by the jury, then by no process of ratiocination could it be made demonstrable that he was acting under the authority of the defendants. On the contrary, we are irresistibly and logically led to the conclusion that he was then acting independently of that authority, and consequently not within the limits of his assigned employment as the defendants' servant."

¹ See *Anonymous* (1472) K. B. 2 Edw. IV., 6, pl. 10.

² In *Leviness v. Post* (1875) 6 Daly, 321, the plaintiff took his horse to the shop of a blacksmith whom he was in the habit of employing, and found there only two men working at the forge, one

of whom, at the request of the other, shod the plaintiff's horse. Held, that the blacksmith was liable for injuries sustained by the horse through the unskilful manner in which this work was performed. The *ratio decidendi* was that, as these two men were actually servants of the defendant, in charge of a shop where people came at all hours of the day to have horses shod, and they were willing to shoe the plaintiff's horse, the plaintiff had a right to presume that they were persons of sufficient skill, and employed by the defendant for that purpose; and that the defendant could not escape liability for their acts by showing that they were not employed by him for shoeing horses, but for other purposes. In this case the court seems to have proceeded upon the ground that his responsibility was predicable irrespective of whether such work was or was not within the range of their duties. But the precise doctrinal standpoint in this regard is not clearly defined in the opinion.

In *Consolidated Ice Mach. Co. v. Keifer* (1890) 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799, where the injuries in question were caused by the collapse of a tank, the defendant's liability was affirmed, although the defects which occasioned the accident would not have existed if the employee deputed to perform the work of construction had obeyed orders.

In *Lannen v. Albany Gaslight Co.* (1871) 44 N. Y. 459, affirming (1865) 46 Barb. 264, a gas company bound un-

der its contract to keep in repair the meter and service pipes in the plaintiff's house was held to be liable for injuries inflicted on the plaintiff's minor child by an explosion resulting from the negligent manner in which one of its mechanics attempted to locate a leak in a pipe. The court said: "The defendant was bound to send a competent agent to the cellar, who knew how to conduct himself in the presence of gas, as it was informed that the gas had escaped into the cellar before it sent him. And if the agent was incompetent and ignorant of the explosive nature of gas, then it was negligent in selecting such an agent, or in not properly instructing him before he was sent. If it selected a proper and competent agent, then it is responsible for the carelessness of its agent. If the agent went into the cellar upon the business of the company, to do a work beneficial to the company, and at the same time beneficial to the occupants, he was bound to exercise ordinary care and prudence, and the jury did not err in holding that lighting the match in the cellar filled with this explosive gas showed the absence of such care. If it should be held that Smith was sent by the company as its agent, to do a gratuitous service to plaintiff's father, he was still bound to some care, and he would certainly be liable for gross negligence."

In *L. W. Pomerene Co. v. White* (1903) 70 Neb. 171, 97 N. W. 232, judgment modified on rehearing (1904) 70 Neb. 177, 98 N. W. 1046, as to damages merely, an action was held to be maintainable where the occupant of a house was injured by falling through a trapdoor which a plumber had left open after having used it for the purpose of obtaining access to the place where his work was to be performed.

In *Crandall v. Boutell* (1905) 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122, the defendant was held liable where the vendee of a stove was suffocated through the negligence of the venders' workmen in failing to fulfil their promise to remove an obstruction from the chimney. The court said: "In this case the conduct of the men was immediately connected with and incidental to the putting up of the stove. The damage was the result of the manner of their performance of their duty. The wrong is not to be based on the violation of a new agreement made by the

plaintiff with these men to clean the chimney of certain refuse matter. Their conduct was in course of their employment in furtherance of their master's business, and did not constitute an independent tort." Rehearing and argument having been asked for, under the impression that the opinion had laid it down, as a matter of law and for all purposes, that the conduct of the men who undertook to clean the appellant's chimney was connected with and incidental to the putting up of the stove, the court explained that it had not considered nor predetermined that question, but that it was left to be decided by the jury.

In *McCauley v. Hutkoff* (1897) 20 Misc. 97, 45 N. Y. Supp. 85, a person who had made with an insurance company a contract to replace any glass insured under its policies, which required the insured to remove any gas fixtures or other obstruction to the replacing of the glass, was held liable for an injury caused by the explosion of gas through the unnecessary interference by his employees with a gas fixture in replacing a plate glass window, although such interference was against his express orders. The court observed that there was evidence "which warranted a finding that it was not necessary to remove the gas pipe as an obstruction to putting in the window glass, and therefore that no duty with respect to its removal devolved upon the assured under the terms of the policy; so that the interference of Hutkoff's employees was not an act done in the performance of a duty which rested upon the plaintiff, but was an act done in the course of their employment by Hutkoff. It also clearly appeared upon the trial that no notice was given to the plaintiff, either by the insurance company or by its contractor, Hutkoff, or by the servants of either, that it was necessary to remove the gas pipe as an obstruction to the insertion of the window glass. If the insurers or their contractor met with an obstruction which, under the policy, it was the duty of the insured to remove, they were bound to notify him of the fact, unless the circumstances showed that he knew, or must have known, the fact. If, instead of notifying him, and giving him an opportunity to remove the obstruction, the insurer and its contractor proceeded to remove it, they would be liable to him,

incur any responsibility with regard to any extraneous work which his servant performs for the contractee in pursuance of a separate agreement between the servant and the contractee.³

2343. Other illustrative cases.—The nature and extent of the responsibility ascribed to certain other classes of bailees is indicated by the cases reviewed in the footnote.¹

or to any party injured, for want of proper care in so doing. It is claimed by defendant that he is not liable for the acts of his employees, because they were expressly instructed not to touch the pipes, but to return with the glass if they could not put it in on account of obstructions. But this fact does not exonerate the defendant. He intrusted his servants with the work of putting in the glass; and the consequences of their disobeying or exceeding his instructions must fall upon him. . . . In this case the business upon which the defendant's servants were sent was to put a plate of glass in the plaintiff's show window. In order to do it, they attempted to remove a gas pipe. Though the removal was necessary, if the act of the servants in attempting to remove was not a wanton or wilful trespass, but was done in the exercise of their judgment, or for their convenience in performing the duty upon which they were sent, their master is liable, though his instructions were disregarded." On the first trial the master of the workmen had been declared not to be liable under a somewhat different presentation of the facts. See *McCauley v. Fidelity & C. Co.* (1896) 16 Misc. 574, 38 N. Y. Supp. 773.

In *Hardegg v. Willards* (1895; N. Y. C. P.) 12 Misc. 17, 66 N. Y. S. R. 524, 33 N. Y. Supp. 25, where a servant employed in the defendant's manufacturing room injured the plaintiff's picture while he was cleaning it, the right of recovery was put upon the ground that a master cannot avoid liability for an injury to property by his servant in the performance of an act for the benefit of the master, because the servant's duties were in another department of the business and he did the act without his express authority or direction. This decision apparently imports that the liability of the bailee for the acts of his servants was regarded as being wider than that of a person who does not

stand in any contractual relationship to the aggrieved party.

In *McGuire v. Grant* (1892) Rap. Jud. Quebec 2 C. S. 267, 16 L. N. 146, a blacksmith who, after having shod a horse, sent him back to the owner under the charge of a young boy, and without any bridle, was held to be liable for an injury sustained by the animal, the *ratio decidendi* being that he had, without consulting the owner, given the horse into the custody of an ignorant person.

³ In *Dells v. Stollenwerk* (1890) 78 Wis. 339, 47 N. W. 431 (master of workmen engaged to move a house was held not to be liable for their negligence in respect of constructing for it, at the request of the owner and after the close of their working hours, a flight of steps which their employer was under no obligation to furnish); *Fraser v. Hollenberg* (1888) 30 Ill. App. 163 (person who had agreed to furnish a competent millwright to set up a silver mill and its machinery,—not chargeable on account of defects in a flume which the millwright undertook to construct).

¹ (a) *Pawnbrokers.*—In *Jones v. Hart* (1699) 2 Salk. 441, Ld. Raym. 738, Holt, 642, it was ruled by Lord Holt at nisi prius that an action of trover was maintainable against a pawnbroker whose servant had lost a pawned article.

(b) *Persons furnishing servants to perform various duties.*—In *American Dist. Teleg. Co. v. Walker* (1890) 72 Md. 454, 20 Am. St. Rep. 479, 20 Atl. 1, a district telegraph company which, for a reward, furnished a boy upon application for that purpose, to take charge of and drive a team of horses to a livery stable, was held to be liable for damages caused by the running away of the team in consequence of the boy's incompetency and lack of skill. The *ratio decidendi* was simply that the defendant, "having assumed a duty for a re-

ward, was bound to furnish a driver both competent and careful."

The liability of employers of this description for the dishonesty of the messengers furnished is discussed in § 2489, note 5, *post*.

(c) *Depositaries*.—In *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168, a case in which the actual point involved was the liability of the defendant for the theft of a special deposit (see § 2489, note 3, *post*), the court observed, *arguendo*: "They may also possibly be answerable for notices to indorsers upon bills and notes left with them for collection, if there should be a failure by the neglect of any of their servants; because they have undertaken to give the proper notices." But it may perhaps be presumed, especially in view of the early date of the case, that the court did not use the phrase "any of their servants" in an unqualified sense.

(d) *Hirers of slaves*.—In *Jones v. Glass* (1852) 35 N. C. (13 Ired. L.) 305, it was held that a person who had hired a slave from the plaintiff was liable for an act of his overseer in permanently impairing the health of the slave by a violent and passionate blow with a block of wood. Nash, J., said: "The act, therefore, of whipping or chastising the boy, was, on the part of Massey, a lawful one, to the extent of compelling him to work, and the owner of the boy has no right to complain; but in the correction, it was his duty to do it properly, that is, in a proper manner and with a proper instrument. If he was negligent, or guilty of a want of care, in either particular, he is answerable for any permanent injury resulting to the boy. True, Massey was guilty of great negligence in the use of an instrument calculated, not to correct, but to kill. The responsibility, however, is not confined to Massey, but extends to his employer. He was his selection, held out by him to others as a man to whose skill and discretion slaves could safely be intrusted in carrying on the mining business; and the work was done for him. And the blow which caused the mischief was given by Massey in performance of the defendant's business, and to compel an attendance to it." Ruffin, Ch., J., said: "It is a question between bailor and bailee for hire; and the plaintiff's right to recover cannot be seriously doubted, upon the principles applicable to the re-

lation. Such a bailee is entitled to make such use, and bound to take such care, of the thing bailed, as persons of ordinary prudence usually do of their own. By that rule, the defendant must have been held liable to the extent to which the value of the slave was permanently impaired, if he had himself inflicted the unreasonable and dangerous blow with the deadly weapon, which his overseer gave, instead of resorting only to such moderate and usual correction as would have reduced the slave to subordination, and been of good example to other slaves. If the defendant would have been thus liable for the act, had it been that of his own hand, he is, as bailee, equally liable for it as the act of one to whose control and management he committed the slaves."

In *Echols v. Dodd* (1857) 20 Tex. 191, where the defendant was held to be liable for the negligence of his overseer in chastising a hired slave in such a manner as to cause his death, the court argued thus: "It is said that it is to be deemed the wilful and malicious act of the overseer, because the chastisement of the slave occasioned his death; and every homicide is presumed to be malicious, until the contrary appear. If the overseer were upon his trial for the homicide, that principle might apply; but it has no application in the present case. This is a case of civil, and not of criminal, responsibility. The law will not presume that the act of the servant was an unauthorized, wilful, and malicious trespass and departure from the course of the service in which he was engaged for his master, because of the destruction of the life of the slave, and the consequent damage to the plaintiff. There is no evidence that the overseer intended to take the life of the slave; or that he intended to do more than to chastise him for misconduct, as he was authorized by his employment to do. It only appears that he was engaged in doing his master's business; but for the want of due and proper discretion, skill, or care, or for some other unknown cause, he did it so very illly as to cause the loss to the plaintiff of his property. For that loss the defendant is responsible. If it were otherwise, there would be no case where the master would be responsible for an injury occasioned by the want of proper care, skill, and circumspection in his servant, to whose care and conduct he had intrusted the

D. LIABILITY INCIDENT TO SOME OTHER CONTRACTUAL RELATIONSHIPS.

2344. Liability of occupant of premises to the owner.—*a. Tenant.*

—The extent of the liability of a tenant to his landlord for damages caused to the demised premises through the negligence of his servant in respect of the keeping of fires is not entirely the same in all jurisdictions.

In Scotland, and perhaps in England, the broad doctrine seems to have been adopted that any negligence of this description, irrespective of its quality, is chargeable to the tenant, if it is within the scope of his employment.¹

property of another." It should be observed that in the present state of the law, the mere fact that the tort in question was a malicious one would not be a sufficient reason for absolving the master from liability. See, generally, the next two chapters.

In *Meekin v. Thomas* (1856) 17 B. Mon. 710, the actual effect of the decision was that, in a case where the hirer of a slave to work on a river steamboat made no special contract with the slaves's master by which restrictions were imposed as to the points at which the boat might land with the slave, it would be presumed that the boat would land wherever interest or duty might require; and, consequently, that, if the boat landed on free territory and the slave escaped, the hirer would not be liable unless he failed to exercise the care and diligence which a prudent man would exercise in respect to his own slave.

In *Allison v. Western North Carolina R. Co.* (1870) 64 N. C. 382 (action originally brought in 1860, while slavery still prevailed). Whilst a hired slave was working as a section hand on a railway, he was directed by an agent of the company to sleep in a certain house, in which (unknown to the company and to himself) there was an open keg of powder standing under one of the beds,—placed there a day or two before, for temporary purposes, by a servant of a bridge contractor with such company. The slave was killed by an explosion of the powder, caused, as was supposed, by fire from a torch whilst he was searching for his hat. Held, that the company was chargeable

with the negligence of the person who left the powder in such a position. The court said: "To put a number of slaves into a room to cook, eat, and sleep with an open keg of powder under their sleeping bunk, unknown to them, is negligence, and subjects the negligent bailee to damages for any injury to the slaves by reason of the explosion of the powder. It is objected that the bailee did not know of the presence of the powder. The answer is that his servant, in the regular course of his employment, put it there; and although the bailee had not that 'guilty knowledge' which would subject him to criminal liability, yet, civilly, the act of his servant is his act; *qui facit per alium*, etc. It makes no difference that the servant was not the immediate servant of the bailee, but was the servant of contractors who were the agents of the bailee." The proposition stated in the concluding sentence was clearly incorrect if the tort-feasor's master was in point of fact an "independent contractor." For the negligence of the servant of such contractor, the principal employer is, as a general rule, not responsible. See § 34, *ante*. But this phase of the matter is not material in the present connection.

¹ In *M'Kenzie v. M'Leod* (1834) 10 Bing. 385, where the defendant's servant burnt down a house demised to the defendant in Scotland, by lighting furze and straw with a view of cleansing a chimney which smoked, although she had been cautioned against the danger of such a proceeding, a verdict in favor of the defendant was sustained. Tindal, Ch. J., said: "With regard to the

The effect of a Massachusetts case is thus stated in the headnote: A tenant at will of a part of a building, the other part being occupied by the landlord, and in each part of which personal property of the landlord is contained, is liable for the destruction of the part in the possession of the landlord and its contents by fire caused by the negligence of himself or his servants in kindling or guarding fires in stoves used for heating the part of the premises let to him; but he is not liable for the destruction of the part so let from the same cause, if the burning is not intentional, and the negligence is not so gross as to amount to recklessness.² In this case, however, nothing was said that would justify the inference that the liability predicated was regarded as being imputable to the landowner, irrespective of the nature of the functions allotted to the servant whose negligence caused the fire in question.

b. Licensee.—In an English case where an artisan had, by carelessness in lighting his pipe, caused a fire which damaged a shed lent to his master by the plaintiff, the right of recovery was denied on the ground that the negligent act was not done in the course of his employment.³ From the extract which is given in the note from the

defendant's liability in respect of the house, I left it to the jury to say whether the damage had been occasioned by the servant acting within the scope of her employment. The jury found that it was not. It has been contended to-day that, as the object of the servant was to light a fire, she was acting within the scope of her employment. But she stated that her object was not merely to light a fire, but to clear the chimney; and she was well aware that it was not her duty to clear the chimney, because she had seen it done before by the carpenter and masons. I am unable, therefore, to reconcile my mind to the proposition that when she had a definite intention of clearing the chimney, she can be considered as acting within the scope of her employment, which was merely to light the fire."

The Scotch authority cited was *Keith v. Keir* (1812) 13 F. C. 679.

² *Lothrop v. Thayer* (1885) 138 Mass. 466, 52 Am. Rep. 286, the court said: "It does not seem to have been considered whether any distinction can be taken between a fire lawfully kindled on land for clearing it, or for other purposes, and a fire kindled in stoves, fire-places, or chimneys for the purpose of heating a building in the manner in

which, by its construction, it was intended to be heated. . . . Disregarding the use of fire in clearing land for other agricultural purposes, and confining ourselves to the case at bar, which is the use of fire in stoves for the purpose of heating the building, it is manifest that in many cases prudence might require a reconstruction of the chimneys and the purchase of new stoves. In many cases it would be difficult to determine how far the bad condition of the premises contributed to the injury occasioned by the fire. We think the reasonable rule is that, if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease with proper covenants; and that a tenant at will is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises; but that he is liable for wilful burning, and also for such gross negligence as amounts to reckless conduct."

³ *Williams v. Jones* (1865) 3 Hurlst. & C. (Exch. Ch.) 602, affirming s. c. (1864) 10 Jur. N. S. 852. Keating, J., who delivered the judgment of the majority of the judges of the exchequer

judgment of the lower court, it will be observed that one of the arguments submitted on behalf of the plaintiff was that the situation created by the loan of a shed was substantially similar to that arising from a bailment, and that the hirer was by consequence subject to an absolute obligation, as regards the exercise of a certain degree of care by his workmen, irrespective of whether they should or should not be acting within the scope of their employment. It is apparent from several of the cases cited in §§ 2338 *et seq.*, *ante*, that in the majority of jurisdictions the analogy thus relied upon would not avail plaintiff at the present day.

chamber, said: "That a master is liable for the negligence of his servant in the course of his employment admits of no doubt; and if it could be said that the act of lighting a pipe of tobacco for the purpose of smoking it was in any way connected with the making of the signboard, which alone Davies was employed by the defendant to do, there would be no difficulty in saying that the master would be liable; but we can see no such connection. It was not necessary that he should smoke in order to make the signboard, nor was the act of lighting the pipe in any way whatever for the benefit of his master, or in furtherance of the object of his employment. It is said he was negligent whilst using the shed, and that in a sense is true. It seems to us, however, that in order to make the master liable the servant must not only have been negligent in using the shed, but in using it for the purposes of his master and in the course of his employment. He was only licensed to use the shed for the purpose of making the signboard, and when he used it for other purposes, and those purposes exclusively his own, his license was at an end, and he became an independent wrongdoer. The act of lighting a pipe for the purpose of smoking tobacco may, under certain circumstances, be a harmless act, but in this case the facts show it was highly dangerous,—a circumstance, however, which in our view is only important as making it more difficult to connect it with the act of making the signboard, and less likely to have been in furtherance of the master's business. If, instead of bringing into shed tobacco and matches, the strangers had brought in squibs, or matches without tobacco, and instead of amusing themselves by smok-

ing, they had diverted themselves with setting fire to the squibs or matches, and Davies had carelessly thrown down or let fall a squib or a match and so caused the fire, could it be said the master would be liable for it as being an act done in the course of the employment? We do not think so, and yet the pastime of smoking, although more frequently indulged in by workmen than that of firing squibs or matches, is nevertheless not the less a pastime, and equally unconnected with making a signboard. . . . Nor can we perceive any analogy between this case and that put in argument of the drunken coachman who drives his master's carriage and horses furiously so as to cause damage. It is true the master does not authorize the servant to get drunk, nor does any master authorize the negligence in a servant for which he is made liable. The question is as to the employment; the fitness of the agent is always at the risk of the master. If, as was said in the court below, the damage had been occasioned by the boiling over of the glue pot whilst making the signboard, the defendant would probably have been liable, certainly not the less so had it been caused by Davies taking too much beer." Mellor, J., one of the dissenting judges, said: "It being conceded that the act of Davies was a negligent act, and that he was the servant of the defendant in making the signboard, does it not follow that such act, having been committed by Davies in the use of the shed during the time he was there for the purpose of making the signboard, although not at the time actually at work at the signboard, was a breach of the duty resulting from the permission given by the plaintiff to the defendant? Davies was

2345. Liability of landlord to tenant.— The doctrine that a landlord who is bound by his contract to do certain work with relation to the demised premises is absolutely liable for injuries caused by the defective manner in which the work is done by his servant would seem to be suggested by the language used in one case.¹ But the doc-

employed to make the signboard in the shed, and the consequence of the negligence to the plaintiff is the same whether he was actually at work or not, so long as it was committed in the use of the shed under the license given by the plaintiff to the defendant. The making of the signboard and the use of the shed cannot be disconnected, as it appears to me. The permission given by the plaintiff was to use the shed for the purpose of making the signboard, and negligence in the use of the shed appears to me to fall strictly with the course of Davies's employment, and that therefore the defendant was liable, and that the judgment of the court below ought to be reversed." Blackburn, J., the other dissenting judge, after laying down the general rules which define the liability of a master for the negligence of his servant, said: "In the present case the difficulty is to apply these rules to the facts. It is said that Davies, the servant, was not employed by his master to smoke or to light his pipe, and that is no doubt true; but the act of lighting a pipe was in itself a harmless act; it only became negligent and a breach of duty towards the plaintiff, because it was done when using his shed and working there amongst inflammable materials. Had the action been brought against Davies himself, it could not have been maintained for merely lighting his pipe, but that, under the circumstances, would have been evidence that he failed to take reasonable care when using the plaintiff's shed and working there, which would have been the true ground of action. The action would have lain against Davies personally for negligence in doing that very thing which he was employed by the defendant to do as his servant, and not otherwise. It seems to me, therefore, that it was negligence in the course of his employment, such as to be in law the negligence of his master, the defendant. The point is not one admitting of being elucidated by argument or by decided cases; in truth the whole

case depends upon whether this is a correct statement of the effect of the facts." The grounds upon which the decision in the lower court proceeded are indicated by the following remarks of Martin, B.: "We have much doubt in this case, but have all arrived at the conclusion that there is no liability. It was argued for the plaintiff that this was like a gratuitous bailment of personal property, and that the defendant was liable for every accident which happened through any negligence; but we think there is no analogy between the cases. This was no bailment, but merely a license to the defendant to use the shed, which might have been revoked at any moment. Whilst it existed the plaintiff could have used the shed for his own purposes also, if he had required it, as the defendant's work occupied but a small part of it. We are not aware of any authority which shows that there is any contract between the parties, except one not to be guilty of negligence. If Davies had been guilty of any negligence relatively to his employment, it may be that the defendant would have been liable; but we cannot think that, because a servant who is paid to work for hire does so ordinary a thing as light his pipe (which is in no way connected with his employment), his employer is therefore answerable."

¹ *Martin v. Richards* (1892) 155 Mass 381, 29 N. E. 591. In that case, where a verdict directed for the defendant in an action for injuries caused by noxious odors emitted by an old privy vault was set aside, the court said: "If the condition of the vault in 1886 was a dangerous one, and the defendant's attention was called to it, and he undertook to remedy it, and used means which were ineffectual for that purpose, and which he knew or ought to have known were ineffectual, he cannot escape liability by employing a servant to do the work, or escape the consequences of that servant's neglect to do the work properly."

trinal position of the court is scarcely defined with sufficient precision to warrant the supposition that it considered the defendant's liability to be predicable, irrespective of whether the injurious act was or was not within the scope of the servant's employment.

In a case where the landlord of a building who had agreed to furnish a tenant with heat was held to be liable to him for any damage which his person or property sustained by reason of the negligence of a servant deputed to attend to the heating apparatus, the right of action was determined, in one of its aspects, with reference to the test of the scope of the servant's employment.²

2346. Liability of vendor to vendee.—It is clear that, to the extent of his contractual obligations, whatever they may be, with respect to the subject-matter in question, a master is liable for the defective quality of an article sold by his servant, irrespective of whether the servant was or was not negligent in selling it under the given circumstances. But if, as is often the case, the testimony is such as to warrant the conclusion that the servant was in point of fact negligent, that negligence constitutes an additional and independent ground upon which the master's responsibility may be predicated.¹

² *Malcolm v. McNichol* (1906) 16 Manitoba L. Rep. 411. There the heating of a store leased by the defendant A to the plaintiff was found to be deficient, and the landlord's agent employed B, the other defendant, a plumber, to put in an additional steam radiator. The connections not being complete at the time when the plumber's workmen left off work for the day, they put a valve on the steam pipe in the store and closed it, so that, when the steam should be turned on, it should not escape into the store. When the steam was turned on, at the request of the care taker of the building, it was found that there was an escape of steam at a defective radiator in the room above, again turned on the steam. The plaintiff's store was then locked up, and nothing was done to ascertain whether the valve was still closed. It had, however, been opened in the meantime, but by whom the evidence did not show. The result was that, during the night, the plaintiff's goods were greatly damaged by the escaping steam. Held, (1) that it was no part of the plumbers' work to turn the steam on after putting in the additional radiator; (2) that, as between the plaintiff and the land-

lord, it was the duty of the person in charge of the heating, as the landlord's agent, to make sure that the valve in the plaintiff's store was closed before the steam was turned on the second time; (3) that the failure of such care taker to take appropriate precautions was negligence which rendered the landlord liable for the resulting damages; (4) that it was not necessary for the decision of the case, to determine who had opened the valve again, since the acts of the plumbers, in turning on and turning off the steam and again turning it on, should be regarded as those of the care taker, he being present and assisting in the performance of them; (5) that the defendant plumbers were not responsible for the negligence of their employee, if he was guilty of any, since his acts in turning on the steam in the evening at the request of the care taker were clearly outside the scope of his employment.

¹ A druggist is liable where a death or other injury results from the negligence of his assistant in compounding a prescription improperly. *McCubbin v. Hastings* (1875) 27 La. Ann. 713; *Brown v. Marshall* (1882) 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392;

The right of action for injuries sustained by customers in mercantile establishments, owing to the collateral negligence of salesmen, is, of course, determinable upon the same footing as in cases in which the element of a contract, existing or contemplated, is not involved. See § 2322, *ante*.

2346a. Liability of tenant for commission of waste by his servants.—

On the ground that the duty of a lessee to take due care of the leased premises is absolute, it has been held that he is liable to the lessor for acts of his servants which amount to waste.¹

Beckwith v. Oatman (1887) 43 Hun, 265.

In *Chaproniere v. Mason* (1905) 21 Times L. R. (C. A.) 633, an action for injuries alleged to have been caused by the defendant's servant having negligently sold to the plaintiff a bath bun which contained a stone or other hard substance, it was held that the presence of the stone in the bun was presumptive evidence of negligence.

¹*Campbell v. W. M. Ritter Lumber Co.* (1910) 140 Ky. 312, 140 Am. St. Rep. 385, 131 S. W. 20. The court said: "When the Ritter Lumber Company took possession of the property

under the written contract, it held as tenant, and the law imposed upon it the duty to take ordinary care of the property. It was bound to turn over the property at the end of its term in as good condition as when it received it (ordinary wear and tear excepted), so far as this could be done by ordinary care. When it put its servants in the houses, the servants held under it. It was its duty to see that its servants did not injure the houses that it had rented. The servants held under it; and it was responsible for the use of the property it had rented by those to whom it intrusted the property."

CHAPTER CI.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER APART FROM PRIVITY OF CONTRACT, FOR THE WILFUL TORTS OF HIS SERVANTS. TORTS INJURIOUS TO THE PERSON.

2346b. Introductory.

A. SIMPLE ASSAULTS.

2347. Generally.

2348. Official and nonofficial acts of servant, how far severable.

2349. Defenses to actions for assaults by servants.

2350. Assaults by servants of railway companies.

2351. Ejection from railway trains. Generally.

2352. Ejection of trespassers. Presumptive authority of conductors.

2353. Same subject. Presumptive authority of brakemen.

a. Generally.

b. Doctrine that a brakeman has no implied authority to eject trespassers.

c. Doctrine that a brakeman is presumptively authorized to eject trespassers.

d. Doctrine that a jury is warranted in inferring authority of brakeman to eject trespassers.

e. General remarks as to conflicting doctrines.

f. Authority of brakemen having full control of trains.

g. Ejection prompted by personal motive.

2354. Same subject. Authority of brakemen determined with reference to specific evidence.

2355. Same subject. Ejection of trespassers from trains by other descriptions of employees.

a. Locomotive engineers.

b. Porters.

c. Baggage-men.

d. Switchmen.

e. Flagmen.

f. Servants employed to clean out cars.

g. Special police officers.

2356. Same subject. Ejection of trespassers by employees of street railway companies.

a. Conductors.

b. Drivers of horse cars.

- c. Gripmen on cable cars.
- d. Motormen on electric cars.
- e. Car greasers.

- 2357. Simple assaults by servants of sleeping and palace car companies.
- 2358. —by servants in mercantile establishments.
- 2359. —by servants of warehousemen.
- 2360. —by servants of public service companies.
- 2361. —by servants in manufacturing establishments.
- 2362. —by servants of publishers.
- 2363. —by servants engaged in construction work.
- 2364. —by servants placed in charge of real property.
- 2365. —by servants deputed to assert rights in respect of real property in possession of a third person.
- 2366. —by servants deputed to assert rights in respect of personal property in the possession of a third person.
- 2367. —by servants deputed to collect debts.

B. ASSAULT WITH DEADLY WEAPONS. HOMICIDE.

- 2368. Master's liability predicated on the ground of the scope of the tortfeasor's employment.
- 2368a. Master's liability predicated on the ground of an absolute duty to protect the injured person.
- 2369. Decisions affirming the nonliability of the master.
- 2370. Master's liability as affected by statutory provisions.

C. LIBEL AND SLANDER.

- 2371. Responsibility of a master for a libel published by his servant.
Generally.
- 2372. Same subject. Libels published by servants engaged in newspaper work.
- 2373. Same subject. Libels published by servants engaged in other occupations.
- 2374. Same subject. Doctrine applicable where the employer is a corporation.
- 2375. Liability of an individual for slanderous words uttered by his servant.
- 2376. Same subject. Doctrine applicable where the employer is a corporation.

D. SOME MISCELLANEOUS TORTS.

- 2377. Wilful torts committed by servants while managing vehicles and horses.
- 2378. Torts committed by employees on ships.
- 2379. Acts intended to produce fear.
- 2380. Acts involving coercion or constraint of the person.
- 2381. Use of violent language.
- 2381a. Preventing access to witnesses.

For cases involving the liability of a master to a servant for injuries by the assaults of a fellow servant for whose torts the master is responsible, see §§ 1446, 1642.

As to the sufficiency of declarations in actions for assault, see chapter CIX., subtitle B.

2346b. Introductory.—The subject discussed in this and several of the following chapters is the liability of a master in respect of the wilful torts of his servants. To recover damages in an action for a tort of this description, the complainant must establish the following facts:

(1) That at the time when the tort was committed, the relationship of master and servant existed between the defendant and the tort-feasor. The decisions which bear upon the point are discussed in chapter II., *ante*.

(2) That the act complained of was done by the tort-feasor within the scope of his employment. This prerequisite to recovery constitutes the subject of the following sections.

(3) That the act complained of was wrongful.¹ For information regarding the appropriate criteria for the determination of this point, the reader is referred to general treatises on the law of torts. The quality of a servant's acts, in so far it depends upon the nature and extent of the duty owed by his master to the injured person, is discussed in chapter CVIII., *post*.

(4) That the act complained of was the proximate cause of the alleged injury. But a few decisions that illustrate it are collected with the view of supplementing the authorities referred to in the corresponding section (2290) in the chapter which deals with the negligent acts of servants.²

¹ *St. Louis & S. F. R. Co. v. Wyatt* (1907) 84 Ark. 193, 105 S. W. 72 (railway company not liable for an arrest made by its special agent, if he exercised ordinary care and there was reasonable and probable cause for the arrest); *Biggins v. Gulf, C. & S. F. R. Co.* (1908) — Tex. Civ. App. —, 110 S. W. 561 (person shot by a watchman in a railway yard not entitled to recover in an action for assault and battery, if the pistol which wounded him was discharged accidentally).

² In *Hayes v. Southern R. Co.* (1906) 141 N. C. 195, 53 S. E. 847, plaintiff, a trespasser on defendant's train, was forcibly ejected therefrom by defendant's brakeman while the train was moving rapidly, and in falling, struck a clearance post by the side of the track, the consequence being that he was thrown under the car wheels and in-

jured. Held, that the wrongful act of the brakeman was the proximate cause of the injury.

In *Schultz v. La Crosse City R. Co.* (1907) 133 Wis. 420, 113 S. W. 658, an action for injuries alleged to have been sustained in being kicked from a street car, plaintiff's finding that the kick was the proximate cause of plaintiff's injuries, was held to be warranted by the evidence of a physician who attended the plaintiff.

In *Burt v. Advertiser Newspaper Co.* (1891) 154 Mass. 238, 13 L.R.A. 97, 28 N. E. 1, where the liability of the defendant corporation for damage caused by the repetition by the parties of a libel which it had published was in review, Holmes, J., laid it down that "wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law

A. SIMPLE ASSAULTS.

2347. Generally.—A master who actually authorizes an assault by his servant upon a third person is, of course, liable for the resulting injury.¹ For an assault not so authorized, the aggrieved party cannot recover damages, unless he shows either (1) that it constituted a violation of an absolute duty owed to him by the master; or (2) that it was within the scope of the tort-feasor's employment.² Whether

as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual."

¹It is scarcely necessary to cite authorities for this proposition, which is merely a special application of the general rule stated in § 2220. *ante*. See, however, *Rogahn v. Moore Mfg. & Foundry Co.* (1891) 79 Wis. 573, 48 N. W. 669; *Bell v. Martin* (1893) — Tex. Civ. App. —, 28 S. W. 108.

²"The rule that carriers of passengers are liable for the negligent or wrongful acts of their servants or employees does not always depend upon the fact that the carrier owes a duty, or is under some obligation, to the party injured." *Johnson v. Chicago, R. I. & P. R. Co.* (1882) 58 Iowa, 348, 351, 352, 12 N. W. 340.

In *Missouri P. R. Co. v. Divinney* (1902) — Kan. —, 69 Pac. 351, it was laid down that, where one not a passenger is assaulted by the station agent of a railway company, the company is not liable for the resulting injuries, unless, at the time of the tortious act, the agent was either engaged in the performance of some duty imposed upon him by reason of his employment, or was acting in the exercise of some authority, express or implied. The court said: "Does the fact that the assault was made by the station agent in the employ of the company change the rule as to the liability of defendant? Obviously, this must be determined by the relation plaintiff and the agent bore to the company at the time the injury to plaintiff transpired. . . . As the jury, in finding No. 4, requested by defendant, found the agent was not engaged in the discharge of any duty imposed upon him by virtue of his employment at the time of the assault made upon plaintiff, it follows the assault must be regarded as the volun-

tary act of the agent, and he is alone liable to plaintiff for damages arising therefrom, unless plaintiff may be considered to have occupied the relation of a passenger to the company at the time of his injury, and to be entitled to the protection by law accorded to passengers from the carrier. . . . Hence, upon this branch of the case, it is sufficient to say plaintiff was neither a passenger at the time he received the injury of which he complains, nor does his petition allege him to have been such passenger. His cause of action, as alleged in the petition, is based upon the injury which he received from the assault made by Taylor as agent of the company in the discharge of his duty, and not upon a breach of the duty owed by a common carrier to protect its passengers from injury at the hands of its servants or third parties. It follows, from the finding made by the jury, that the agent at the time of the assault was not acting in the discharge of any duty imposed upon him by his employment."

In *Fletcher v. Willis* (1902) 180 Mass. 243, 62 N. E. 2, a servant of the proprietor of a race track thrust a shovel against the ankle of the plaintiff for the purpose of forcing him to get down from a picket fence on which he was sitting. The assault was admitted to have been unjustifiable, and the case went to the jury on the single question whether the servant was acting within the scope of his authority. The plaintiff asked for a ruling that the servant's conduct, taken in connection with the servant's employment and the fact that the defendant did not call him to deny his authority, was evidence of authority. Held, that the trial judge had properly ruled that the servant's acts were not evidence of his authority as against the defendant.

In *Jones v. Seaboard Air Line R. Co.*

it was an act of the latter description is ordinarily a question for the jury.³ If the question is answered in the affirmative, the assault is imputable to the master, although the servant may, in respect of its commission, have transcended the actual limits of his authority,⁴ or

(1909) 150 N. C. 473, 64 S. E. 205, the trial judge submitted to the jury two issues, *viz.*, whether plaintiff was injured by the wanton act of the servant as alleged, and whether the servant was at the time acting within the scope of his employment. Held, that the second issue was consistent with the first, and that, although the first was answered affirmatively, an affirmative answer to the second was essential to support the action.

³ See, generally, the cases cited in § 2275, *ante*.

In *Collins v. Butler* (1904) 179 N. Y. 156, 71 N. E. 746, reversing (1903) 83 App. Div. 12, 81 N. Y. Supp. 1074, an action for an assault alleged to have been committed by a clerk in a store, the instructions of the trial judge embraced three propositions: (1) That the act of the clerk in pushing the plaintiff out of the store, after her refusal to go upon his request, was an unlawful interference by the clerk with the plaintiff's person, and in law an assault. (2) That the clerk in doing this acted within the scope of his duty and employment, and his acts could be imputed to the defendant. (3) That the only question for the jury was one of damages or compensation. The court of appeal, however, was of opinion that "the defendant was entitled to have all three of these questions submitted to the jury. When a party is sued for an assault and battery committed by his servant upon another, the liability must depend either upon proof of some express direction or authority of the master, or upon facts and circumstances from which a direction or authority of the master may be inferred, and that inference must be drawn by the jury as one of fact. . . . The reason given for taking the question in this case from the jury is that, since the defendant did not in terms justify the assault in so many words, and as all agreed that the clerk put his hands upon the plaintiff and put her out of the store, there was no question left for the jury but that of damages. I think that was not a correct view of the

case. The defendant, in addition to the general denial, set forth facts which in substance corresponded to the common-law plea of *son assault demesne*, and all the facts appeared at the trial without any question having been raised as to the sufficiency of the pleading. After the proof was all in, its effect could not be restricted for any reason based upon a defective pleading, and the jury had the right to consider it on the question whether the act of the clerk under the circumstances amounted to an assault, and, if so, whether it was justified by the conduct of the plaintiff. In an action for assault and battery, the general denial puts in issue the whole case of the plaintiff on the fact, and admits proof to show either that there was no interference with the person, or, if so, that it was justifiable under the circumstances."

⁴ "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." *Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597.

In *Molloy v. New York C. & H. R. R. Co.* (1882) 10 Daly, 453, where the plaintiff was kicked by a brakeman who was standing on a moving car, the trial judge, upon request of plaintiff's counsel, thus instructed the jury: "Even if the plaintiff was not in fact attempting or intending to get on defendants' car to ride without paying fare, or at all, yet, if the defendants' agent or servant in charge of the car, in the exercise of his judgment and observation, thought the plaintiff was attempting or intending to do so, the defendants will be responsible for the act of their servant in kicking or pushing the plaintiff, as claimed, while the car was in motion. The defendants are

may have been specially instructed not to commit it.⁵ Nor is the

responsible for the mistaken judgment of their servant while acting in the line of his duty." Discussing this proposition, the court said: "The concluding paragraph . . . is unobjectionable, but the main proposition is unsound. Its only applicability to the facts of the case arises from the plaintiff's written statement, wherein he in substance said that he was running alongside the car when assaulted by the brakeman. The request further assumes the absence of any attempt or intention to board the train. In my opinion, the proposition involved is an advance beyond the limit of legal principle and adjudication. . . . If the brakeman of the car, standing upon the platform, kicked the plaintiff, who was making no attempt to board the train, and thereby caused the injury, the defendant cannot be held liable, because the act was not only wilful and intentional, but plainly outside the general limits of his duty, and without the line of business he was employed to do for the company. . . . The proposition charged is not strengthened by stating that the servant, in the exercise of his judgment and observation, thought the plaintiff was attempting or intending to get on the car. The mistaken judgment for which the master is held liable must be exercised in the commission of an act within the employment, and not in relation to a trespass which may or may not be committed by a third person, who does not exhibit by his action either intent or effort to commit it."

⁵ In *McClung v. Dearborne* (1890) 134 Pa. 396, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698, where an assault was committed by a servant who had been sent to reclaim a chattel then in the possession of the injured person, an instruction of the trial judge, that "whether the defendant was responsible for it or not depended on the instructions he gave him when he started out on the expedition," was held to be erroneous. The court said: The master "knew that the invasion of McClung's house in the manner contemplated was likely to excite indignation and resistance on the part of the inmates, and that what ought to be done might have to be determined under excitement, and without time for consultation or reflection

by his employees. Under such circumstances, he puts them in his own stead, and he is bound by what they do in the effort to do the thing which was committed to them. . . . Here Fox and his helpers were sent to bring away the organ. The acts complained of were committed in the course of, and as a means to, the accomplishment of that for which they were sent. Let it be conceded that they were instructed to do no wrong, and that they did what they were warned not to do. The master is nevertheless liable. When he sends them upon an errand that exposes them to resistance and danger, and the excitement consequent upon the presence of such a state of things, he must take the chances of their self-control and ability to obey. If he finds the risk inconveniently expensive, he may conclude to respect the homes of inoffensive citizens, and rely on his legal remedies for the recovery of any property to which he may claim title hereafter. The jury should have been told that the defendant was liable for what the learned judge aptly characterized as an 'unjustifiable outrage' by his employees, and they should have been allowed to assess adequate damages for the breach of the plaintiff's close, if the entry was forcible, and for all the injury done him by any and all the defendant's servants while engaged in the business of seizing and carrying away the organ."

A similar decision was rendered in *Grant v. Singer Mfg. Co.* (1906) 190 Mass. 489, 6 L.R.A. (N.S.) 567, 77 N. E. 480, where a man whom an employee of the defendant had, in the exercise of his authority, hired to assist him in retaking a cased sewing machine, committed an assault upon the lessee, and the trial judge was held to have properly refused an instruction of the same tenor as that involved in the last-cited case. The court said: "It is settled that the defendant would be liable for force used by Andrews as a means of retaking the machine, even if he had been told not to use force. *Roberge v. Burnham* (1878) 124 Mass. 277; *George v. Gobey* (1880) 128 Mass. 289, 35 Am. Rep. 376. The defendant's liability does not depend upon his having been authorized expressly or impliedly to

action any the less maintainable, because an assault is a criminal offense as well as a civil wrong.⁶

The *ratio decidendi* in one case was the nonliability of a master for acts done by a servant for the sole purpose of amusing himself.⁷

use force, but upon his having used force as a means of doing what he was employed to do. *Howe v. Neumarch* (1866) 12 Allen, 49; *McCarthy v. Timmins* (1901) 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Perlstein v. American Exp. Co.* (1901) 177 Mass. 530, 52 L.R.A. 959, 59 N. E. 194. There is no difference between hiring a man to retake a machine with instructions not to use force, and instructing an officer in hiring men to retake machines to hire them to retake machines without using force."

For a general discussion of the master's liability in respect of acts done by his servant in disobedience to his orders, see § 2285, *ante*.

⁶ This doctrine was laid down categorically in *Dyer v. Munday* [1895] 1 Q. B. (C. A.) 742, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week. Rep. 440, 59 J. P. 276, and was obviously taken for granted in all the cases cited in this and the following subtitle. See also the cases reviewed in §§ 2483 *et seq. post*.

These authorities show clearly that the following statement is not correct: "If a conductor knowingly and willingly participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive on the cars for transportation, he, and not the company, would be liable for his conduct. The master is not liable for the criminal acts of his servant, not authorized or sanctioned by him, nor 'for his acts of wilful and malicious trespass.'" *Jackson v. St. Louis, I. M. & S. R. Co.* (1885) 87 Mo. 422, 56 Am. Rep. 460. There the action was brought by the widow of a man who, while suffering from a severe wound, had been placed upon a railway car by a constable and two assistants by whom he had been taken into custody. The ground upon which damages were claimed was that the conductor of the train had wrongfully received the wounded man, or he had wrongfully received him against his protest, and that his death had been hastened by his journey. An instruction given by the

trial judge, to the effect that the defendant was liable if the conductor's acts had hastened the prisoner's death, was held to be improper for reasons thus stated: "There was no proof in this case that the conductor, or any of the trainmen, assisted, or in any manner participated in, or countenanced, the act of the three men who lifted Jackson into the baggage car. It is also a fact, testified to by the sheriff of the county in which it occurred, that the conductor remonstrated with Barham against carrying Jackson off. The evidence tends to prove that, until the train had started, he did not know that Jackson was aboard, and that, when he discovered him in the baggage car, he said he could not carry him, and stopped the train, and was then told by Barham that he was an officer who had Jackson under arrest, and showed him his badge of office, and told him he had papers authorizing the arrest. If the jury had been properly instructed and found the above facts, they should, and no doubt would, have found a verdict for the defendant." The decision, therefore, must rest, not upon the general principles laid down above by the court, but upon the special ground that the wounded man had been arrested for crime, and that the conductor of the train was not bound to inquire into the cause of the arrest, and the authority of the officer who had him in charge, but was justified in receiving him upon the train.

⁷ In *International & G. N. R. Co. v. Cooper* (1895) 88 Tex. 607, 32 S. W. 517, where a locomotive engineer perpetrated the practical joke of turning a jet of scalding water on a man who had been allowed to ride on the locomotive, the court observed: "It is true that circumstances might have required the discharge of hot water from the boiler by means of the appliances used in this instance, but upon this occasion the evidence shows that the act done was not for the purpose of discharging a duty, but simply as one of sport and mischief on their part towards the injured party. The distinction lies in

The decisions which illustrate the doctrine, now discarded in most jurisdictions, that a master could not under any circumstances be sued in respect of the wilful trespasser of his servants, are reviewed in § 2239, *ante*.

2348. Official and nonofficial acts of servant, how far severable.—

The fact that an assault committed during an altercation between a servant and the aggrieved party was separated by an appreciable and well-defined period of time, from certain antecedent acts of the servant which were undeniably within the scope of his employment, is not necessarily decisive as to the nonliability of his master. But wherever such a period intervened, the inference that the assault was a merely personal trespass is always indicated very strongly, and in the majority of instances conclusively.¹

There is a conflict of opinion regarding the right to recover for an

this: That, if the act done,—that is, the discharge of the hot water,—was one authorized to be done by the servants, and was at the time being done in the discharge of their duty as such servants, then the master would be responsible for the consequences to the plaintiff, although the servants might, in the discharge of their duty, maliciously or mischievously have thrown the water upon the plaintiff. It cannot be said that the act of putting the water upon the plaintiff must have been authorized, because such an act would never be authorized by a master; but it is the act itself of discharging the hot water that must have been done in the course of the employment of the servant, and for the purpose of forwarding the business of the master. It does not matter that the servant might have used the same appliances in the discharge of a duty to the master, but the question definitely and distinctly presented is, Was the servant in the particular case in the discharge of such duty?"

¹ In *Illinois C. R. Co. v. Ross* (1888) 31 Ill. App. 170, where a railway flagman at a street crossing committed an assault upon an insolent boy (see § 2350, note 8, *post*), it was urged that liability might be imputed to the company on the ground that the flagman had recently committed another assault in chastising the same boy for having, several days previously, bedaubed the station house with mud, and that the second assault should for this reason

be viewed as a part of an entire transaction commenced with a view of protecting the company's property. The opinion was expressed, however, that the first assault was not within the scope of the flagman's authority, because "it was no part of his duty to chastise anybody for a trespass on the company's property, ten days after its commission." This language seems to indicate the adoption of the view that assault must be taken, as a matter of law, to be outside the scope of the tortfeasor's employment, whenever it is committed several days after the event which induced it. The correctness of such a theory is, to say the least, an arguable point; but the decision was not left to depend upon it alone, for the court thus proceeded to show that, apart from the element of the lapse of time, the dissociation of the two assaults was necessarily inferable upon less disputable grounds. "The proof is clear," said the court, "that before he threw the coal Tucker had done and ended all that he supposed to be his duty or intended to do on account of anything the plaintiff had done affecting the company. He had actually turned away from the scene of the difficulty, and was going back to his place on the street, without any attempt or any show of purpose to remove anybody from these grounds, when the new provocation, having no relation to the company or any of its affairs, induced the wrongful act in question. Manifestly it was not done to clear the right

assault which, if it had been an isolated act, would not have been imputable to the master, but which was connected with and immediately succeeded another act belonging to the imputable class. In some cases it has been held that under such circumstances the nonliability of the master should, generally speaking at least, be predicated on precisely the same footing as if two acts had been separated by an appreciable interval of time. In this point of view, the element of continuity is entirely disregarded, and the quality of the later act, as being official, or nonofficial, is to be settled with reference solely to its own incidents.² That the doctrine is logically unimpeachable can-

of way, nor otherwise in furtherance of appellant's business, but in purely personal resentment of a purely personal affront. . . . Then, if everything previously done by Tucker had been within the line of his employment, and the act in question in fact grew out of it, and would not have been done but for what had previously been so done, still, if it was separated from all that preceded, and clearly distinguishable as to time, motive, and object, and was on purely personal account of the servant, the company would not be liable for it upon any authority implied from its relation to him."

In *Chicago & A. R. Co. v. Randolph* (1895) 65 Ill. App. 208, the ticket agent and telegraph operator in a railroad station had ejected from the waiting room a person who had entered it in an intoxicated condition, conducted himself improperly, and vomited on the floor. Shortly afterward a quarrel occurred on the platform between this person and the station agent. The latter was knocked down, and shot the former as he was running away. Held, that the railway company was not liable for the wound so inflicted. The court observed that, under the evidence, "it appeared beyond dispute the altercation upon the platform occurred after Moffett had accomplished all that his sense of duty as agent of the company prompted him to do, and that the appellee brought on what was in fact a second difficulty by his own highly provoking and unjustifiable language and conduct."

In *Alabama & V. R. Co. v. Harz* (1906) 88 Miss. 681, 42 So. 201, it was held that no action could be maintained where the chief clerk in the office of a railway company, having had a dispute

with a stenographer in regard to a business matter, procured his discharge, and three days afterward met him on the station platform and assaulted him.

See also *Roberts v. Southern R. Co.* (1906) 143 N. C. 176, 8 L.R.A. (N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375, and *Spencer v. Kelley* (1887) 32 Fed. 838, cited in § 1466, notes 7, 8, *ante*, and involving assaults by a superior employee upon a subordinate.

² In *Rudgeair v. Reading Traction Co.* (1897) 180 Pa. 333, 36 Atl. 859, the motorman on a street car jumped off, and, approaching the wagon of the plaintiff which was being driven along the track, launched at him an abusive epithet, and cried out: "If you don't get off the track, I will knock you off." The plaintiff then got down from his wagon, and, coming toward the motorman, asked him why he had used the insulting words; whereupon the motorman knocked him down. As only a short opinion was delivered, it may be supposed that the case was deemed too clear for discussion. But it seems indisputable that the act of the motorman in leaving the car, and the threatening words addressed by him to the plaintiff, were incidental to his discharge of an official function, *viz.*, the removal of an obstacle from the track; and it was perhaps an unwarrantable refinement to treat these elements as being separable from those which formed the remainder of the chain of events which led up to the assault.

In *Johanson v. Pioneer Fuel Co.* (1898) 72 Minn. 405, 75 N. W. 719, where an employee in charge of a coal yard attacked a customer upon the latter's denial that he was attempting to commit a fraud by using larger sacks for carrying away the coal than had

not well be denied. But the subtle and refined process of differentiation which it must frequently involve in actual practice is a serious drawback to its application in jury trials. Under another and perhaps preferable theory, the two acts are treated as being single indivisible tort, which, for the purposes of the master's liability, takes its color and quality from the earlier act.³

been previously used, the tort was held not to be within the scope of his authority, for the reason that, before the assault occurred, the employee had refused the customer permission to take away the coal. The court said: "McKee had been acting for his master when he filled plaintiff's sacks with coal, and ascertained the weight thereof to be 620 pounds, and when he compelled plaintiff to take the sacks away, as being of the same weight as the former sacks of coal. But when plaintiff returned the third time, he did not attempt to take any more coal, either by force or otherwise; and there was no danger of its being taken, or in any manner interfered with, by plaintiff. Nor was McKee attempting to compel plaintiff to take any or a less amount than he had bargained for. The altercation arose as to the alleged act of plaintiff whereby McKee charged him with having procured larger sacks than those which he had previously used. The refusal to furnish more coal in the sacks which plaintiff brought on his last trip might possibly be considered an act in furtherance of the master's interest, because he probably thought plaintiff was attempting a dishonest act to the master's disadvantage. That refusal evidently ended the business relations between them. Then arose the question of honesty and veracity,—not as between plaintiff and the fuel company, but as between plaintiff and McKee, and the assault was not intended by the latter to aid his master's business, nor could it in any manner have that effect. It was purely a personal matter between plaintiff and McKee, and it was this quarrel which led to the assault,—an act done outside of the scope of McKee's employment. Suppose that, on a day subsequent, these parties had met at some other place, and the same charges had been made by McKee and denied by plaintiff, and this altercation had resulted in a similar assault upon plaintiff by McKee; could it be

reasonably said that the latter was then acting in the line of his master's business, or in the scope of his employment? And, if not, then the master would not be liable."

In *Georgia R. & Bkg. Co. v. Wood* (1894) 94 Ga. 124, 47 Am. St. Rep. 146, 21 S. E. 288, it was held that a railroad company was not liable for an injury to a third person caused by a stone thrown by a brakeman at a boy who had attempted to climb on the train, after he had ceased doing so and had retreated to private premises. The *ratio decidendi* was that no evidence had been offered as to the duties of the brakeman, and consequently that there was no presumption that he was acting within the scope of his employment.

Southern P. Co. v. Kennedy (1894) 9 Tex. Civ. App. 232, 29 S. W. 394, where a conductor of a train shot a trespasser while he was complying with an order to get off, the court rejected the contention of defendant's counsel that the company was not liable, because the shooting was done while the trespasser was in the act of getting off, but said that the action would not have been maintainable if the plaintiff had been shot after he got off.

In *Cincinnati, N. O. & T. P. R. Co. v. Rue* (1911) 142 Ky. 694, 34 L.R.A. (N.S.) 200, 134 S. W. 1144, where the members of a freight train crew followed a trespasser as he fled from the train, and inflicted on him personal injury after he ceased to be a trespasser, it was held that, as the acts of the crew were not done for the purpose of protecting the company's property, nor in the performance of any duty which they owed to it, it was not liable. This case seems essentially inconsistent with the two Kentucky decisions cited in the following note. But they were not referred to by the court.

³ In *New Ellerslie Fishing Club v. Stewart* (1906) 123 Ky. 8, 9 L.R.A. (N.S.) 475, 93 S. W. 598, an employee of a fishing club, who was authorized

As to the distinction between the official and nonofficial acts of vice principals in cases where the plaintiff is a servant of the defendant, see § 1466, *ante*.

As to the element of continuity in cases where a passenger has been subjected to violence both on the vehicle of transportation and after he has left it, see § 2449, notes 13 *et seq.*

to eject all persons who should fish upon the premises of the club without its permission, attempted to prevent the plaintiff from fishing, and in an altercation which ensued, drew a knife and wounded him. Held, that the club was liable for the injury thus inflicted. The court said: "It is difficult to define with accuracy the point at which the master's liability for the acts of his servant ends; but, under the facts of this case, Proctor, when he attempted to prevent appellee from fishing, and when the altercation between them commenced, was clearly acting within the scope of his employment, and the assault and battery complained of was merely a continuation of the first act. There was no appreciable length of time between them. Everything that was done happened on the premises under the control of the fishing club, and where Proctor had authority as its agent. Where the agent begins a quarrel while acting within the scope of its agency, and immediately follows it up by a violent assault, the principal will be liable, as the law, under the circumstances, will not undertake to say when, in the course of the assault, he ceased to act as agent and acted upon his own responsibility." It seems scarcely possible to reconcile this decision with the Kentucky case cited in the last note.

The same criticism applies to *Elliott v. Louisville & N. R. Co.* (1899) — Ky. —, 52 S. W. 833 (no off. rep.) There the evidence tended to show that a brakeman, immediately after frightening a trespasser off the train, pushed him against a moving car so that his feet were crushed under the wheels, and an instruction that there could be no recovery unless plaintiff was still holding to the car when the brakeman seized him was held erroneous on the ground that the whole series of events constituted a continuous transaction, and the removal of trespassers from the train was within the apparent scope of the brakeman's duty.

In *Girvin v. New York C. & H. R. R. Co.* (1901) 166 N. Y. 289, 59 N. E. 921, affirming (1900) 52 App. Div. 562, 65 N. Y. Supp. 299, the evidence showed that plaintiff was stealing a ride on defendant's freight train; that, being pursued on the train by a brakeman, he jumped from it, and that the brakeman jumped from the car on top of him, breaking his leg and otherwise injuring him. Held, that the question whether the assault of the brakeman was commenced before he left the car, and was therefore in the line of his employment, so as to render defendant liable, was for the jury.

In *Marcum v. Missouri, K. & T. R. Co.* (1909) 139 Mo. App. 217, 122 S. W. 1148, where the plaintiff, a trespasser on a freight train, left it in obedience to a brakeman's demand, it was held that the jury were entitled to consider evidence that plaintiff was injured by a lump of coal thrown by a brakeman after plaintiff alighted.

In *Richberger v. American Exp. Co.* (1895) 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922, a declaration was held not to be demurrable which alleged that a customer went to the defendant's office to complain of having been required to pay an overcharge on a package, and that the local agent who made the overcharge, on refunding the excess and taking his receipt therefor, immediately thereafter, while he was still in the office, "wilfully, wantonly, oppressively, and wrongfully curses, abuses, insults and maltreats him," because he has demanded a refund. The court said: "It is impossible to say, on the allegations of this declaration, that the tort committed immediately upon the delivery of the receipt to the agent, and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and

2349. Defenses to actions for assaults by servants.—In an action against a master for an assault committed by his servant, a master is obviously entitled to rely upon any grounds of justification which would have been available as defenses if the assault had been committed by himself. For information regarding such defenses generally, the reader is referred to treatise on the general law of torts. But it may be advisable to refer briefly to some special classes of cases.

The doctrine which is commonly accepted, that the mere fact of the claimant's having provoked the servant's assault by his own abusive language or irritating behavior does not preclude him from recovery,¹ was at one time not accepted in Georgia.² But the supreme

was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt, and immediately upon its delivery, and because of the demand for his rights in that matter, and while plaintiff was in appellee's office to transact, and transacting, this very business."

See also *Hamilton v. Chicago, M. & St. P. R. Co.* (1903) 119 Iowa, 650, 93 N. W. 594, § 2352, note 1, *post*.

¹ For the general rule, see Cooley on Torts, *167. For cases in which the rule was applied in an action to enforce a master's vicarious liability for assaults, see *Baltimore & O. R. Co. v. Norris* (1896) 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554 (passenger, during altercation which preceded his ejection for nonpayment of fare, accused conductor of having violated a rule of the company in a former occasion); *Bergman v. Hendrickson* (1900) 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304 (instruction inconsistent with the general rule, held to have been properly refused, and principal affirmed "neither insult nor vituperation can fully justify assault and battery, though they may properly mitigate damages in civil actions or punishment in criminal prosecutions).

² In *City Electric R. Co. v. Shropshire* (1897) 101 Ga. 35, 28 S. E. 508 (insulting language of plaintiff here was followed by a blow dealt before servant actually assaulted him; but the broad phrase, "grossly improper conduct," is used in the syllabus written by the court); *Columbus & R. R. Co.*

v. Christian (1895) 97 Ga. 56, 25 S. E. 411.

In *Georgia R. & Bkg. Co. v. Hopkins* (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965, a new trial was moved for on the ground that the trial judge, after having given the following requested charge: "If you believe that the plaintiff was guilty of immoral conduct in his acts in the depot of the defendant, and that, as a result of the discovery of such conduct, words followed between the plaintiff and the watchman, and that the plaintiff used insulting and opprobrious language to the watchman which naturally enough resulted in a difficulty, the company should not be held responsible for alleged assault by the watchman," added "that the assault by the watchman must not be disproportioned to the insult offered; it being still left a question of fact for you to determine whether the battery was disproportioned to the insult." Held, that the charge as requested should have been given without the qualification. The court said that the *Shropshire Case*, *supra*, and the decisions cited in it, "establish the proposition that where a person is injured under such circumstances as the testimony of the defendant in the present case shows the plaintiff to have been injured, he is to be regarded as having forfeited his right to immunity from unnecessary violence by inviting the servant of the company to disregard and abandon his official duty, and enter into a personal encounter on his own account and upon his own responsibility; and when the conduct of the plaintiff is such as to thus relieve

court of that state has now abandoned its isolated position in this regard.³

The rule that contributory negligence is not a valid defense to an action for an injury caused by a wilful tort⁴ has frequently been applied in cases involving the vicarious liability of a master.⁵

In one of the states in which the doctrine prevails, that damages cannot be recovered for an injury occasioned by a negligent act to a person who was violating the Lord's Day act when he was injured,⁶ it has been held that the fact of such violation is not a bar to a claim for any injury resulting from wilful tort committed by the defendant's servant within the scope of his employment.⁷

2350. Assaults by servants of railway companies.—The right of action has been affirmed in cases where the assault was incidental to the discharge of the servants' appointed function of protecting the property or other interests of the railway company;¹ where a conductor in charge of a train made up to go to the aid of a wrecked passenger

the company from liability on account of the assault committed by its servant upon the plaintiff, it is immaterial, so far as the question of the liability of the company is concerned, whether the battery was disproportioned to the insult or not."

³ *Mason v. Nashville, C. & St. L. R. Co.* (1911) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225.

⁴ See *Shearm. & Redf. Neg.* § 64.

⁵ *Alabama G. S. R. Co. v. Frazier* (1890) 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303; *Birmingham R. & Electric Co. v. Pinckard* (1899) 124 Ala. 372, 26 So. 880; *Gaynor v. Louisville & N. R. Co.* (1903) 136 Ala. 244, 33 So. 808; *Central of Georgia R. Co. v. Partridge* (1903) 136 Ala. 587, 34 So. 927; *Birmingham Southern R. Co. v. Powell* (1903) 136 Ala. 232, 33 So. 875; *Southern R. Co. v. Yancy* (1904) 141 Ala. 246, 37 So. 341; *Southern R. Co. v. Srensdens* (1910) 13 Ariz. 111, 108 Pac. 262; *Wabash, St. L. & P. R. Co. v. Rector* (1882) 104 Ill. 296; *Lake Shore & M. S. R. Co. v. Bodemer* (1891) 139 Ill. 607, 32 Am. St. Rep. 218, 29 N. E. 695; *Indianapolis Union R. Co. v. Boettcher* (1891) 131 Ind. 82, 28 N. E. 551; *Emmons v. Quade* (1903) 176 Mo. 22, 75 S. W. 103; *Deady v. Coble* (1906) 112 App. Div. 296, 98 N. Y. Supp. 452; *Galveston, H. & S. A. R. Co. v. Zant-zinger* (1898) 92 Tex. 365, 44 L.R.A. 553, 71 Am. St. Rep. 859, 48 S. W. 563.

⁶ See *Cooley on Torts*, 2d ed. pp. 175 *et seq.*

⁷ *Wallace v. Merrimack River Nav. & Exp. Co.* (1883) 134 Mass. 95, 45 Am. Rep. 301, where one of the courts alleged that a yacht, which plaintiff was sailing for pleasure, was wantonly and maliciously run into by a steamboat. The court said: "Upon such a state of facts, although the plaintiff was in violation of the law forbidding traveling upon the Lord's Day, his title to an action would be independent of his unlawful act. He would not thereby forfeit the general protection of the law, and the injury in such supposed case would proceed solely from the wrongful act of the defendant."

¹ In *Hewett v. Swift* (1862) 3 Allen, 420 (action against the president of the company, who had given the directions under review, and the railway company itself), a freight agent who had been directed to keep children out of the depot ordered a boy to leave it, and, upon his refusal to do so, proceeded to remove him forcibly, and in doing so kicked him and severely injured him. Held, that the action was maintainable.

In *Johnson v. Chicago, R. I. & P. R. Co.* (1882) 58 Iowa, 348, 12 N. W. 329, it was held that damages were recoverable by a person whom a station agent ejected with excessive force from a waiting room, while he was waiting for

train, insulted and assaulted a person who had come upon the train to ask permission to ride to the wrecked train, in order that he might

a train operated by a company other than the defendant.

In *Redding v. South Carolina R. Co.* (1871) 3 S. C. 1, 16 Am. Rep. 681, it was held to be a question for the jury whether or not a person employed to attend to the ladies waiting room in a railroad station was acting within the scope of his authority in attempting to eject a supposed negro from it.

Evidence that it was part of the duty of an employee to keep loafers out of waiting room in one of its stations justifies a finding that he had authority to eject drunken men therefrom. *Gray v. Boston & M. R. Co.* (1897) 168 Mass. 20, 46 N. E. 397 (plaintiff was knocked down while a man was being ejected).

In *Canfield v. Chicago, R. I. & P. R. Co.* (1894) 59 Mo. App. 354, an employee who had been engaged to eject strikers from the offices of a railway company, and instructed to use physical force, if necessary in his own judgment, assaulted a striker for the purpose of compelling him to leave the premises. Held, that his employers were liable.

In *McKernan v. Manhattan R. Co.* (1887) 22 Jones & S. 354, an action was held to be maintainable, where a ticket seller, after having refused to furnish a ticket to a man wrongly supposed to be drunk, ordered him to leave the station, and afterwards pushed him so forcibly while he was going down stairs that he fell over the railing onto the pavement below. The defendant's contention that, under the evidence, it was apparent that the ticket seller was employed to sell tickets, and this was the whole extent of his duties, was thus discussed by the court: "If the plaintiff had not begun to go out of the station, the defendant would have had a right, after he had been requested to leave, and after he refused to go, to use such force, not illegal in its kind, as was necessary to enforce a compliance with the request. The defendant acts through its agents. It had the right to empower agents to enforce the right that has been described. If an agent employed to enforce this right did an act which was in fact done towards enforcing it, the defendant is responsible for the act and for the particular manner in which it was done, although

the agent selected the manner, for a purpose of his own, in passion or willfulness. . . . As I understand the testimony here, the jury could have found that the push, which is the act complained of, was done for the purpose of compelling the plaintiff to leave the station more quickly than he was leaving, or not to loiter there. The defendant was responsible then for the act, if the person who did it was shown by the testimony to be one employed by them to keep the station clear of persons not there on business, or improperly remaining there. The defendant was responsible for the selection, by such a servant, of the occasion on which it would be proper to eject such person. And the question is, Was there any testimony tending to show that the ticket seller was a servant under such an employment? . . . The ticket seller could not make himself the agent of defendant by his declarations. Apart from them, he was evidently employed to sell tickets, and therefore to refuse to sell them. It was evidently within the scope of his employment to require a person to whom he had refused a ticket to move away, and to compel him to move if that were necessary, and to provide in a proper way that he should not immediately return, and the jury might have found that he determined that the complete removal from the station of the plaintiff was a proper provision against the plaintiff returning and making reiterated demands for a ticket. I am further of opinion that the conduct of the ticket seller in the whole course, from the time he left his place in the office and then following the plaintiff to the stairs, was some evidence as to the character of his employment, *prima facie*, happening as it did on the premises of the defendant."

In *Bernadsky v. Erie R. Co.* (1908) 76 N. J. L. 580, 70 Atl. 189, it was held that in beating a trespasser with a stick, for the purpose of driving him from the railway premises, a watchman was acting within the scope of his employment.

In *Central of Georgia Ry. Co. v. Morris* (1904) 121 Ga. 484, 104 Am. St. Rep. 164, 49 S. E. 606, the position was

taken that the official designation of an employee styled a "train master" did not warrant the inference that he was placed by the company in charge of its premises, and had either express or implied power to determine who were intruders, and to protect the company's interests by ejecting persons whom he believed to enter the premises for the purpose of interfering with the employees placed under his control. As the complainant's entry upon the railway premises from which the train master had forcibly ejected him had been made merely upon the invitation of a policeman, who had requested him to point out a railway employee whom the policeman wished to arrest, he was a trespasser to whom the company did not owe that affirmative duty of protection which is imposed upon common carriers in respect of their passengers. The right of recovery, therefore, was conditional upon its being shown that the train master, when he committed the assault, was acting within the scope of his employment. Discussing this point, the court said: "The plaintiff simply alleges that the train master's duty was to exercise a general supervision over all train men and operators, and to report all neglect of duty on the part of employees." There is in the petition no hint that O'Dell was held out by the company as an agent authorized to deal, in its behalf, with the general public in any manner whatsoever, or to perform for it any service save that of exercising a general supervision over a particular branch of its internal affairs. The company had a right to thus limit the field of his usefulness; it was not bound to appoint him its 'casual ejector.' That it ever, in point of fact, clothed him with authority to take any action with respect to persons coming upon its premises, at or without its invitation, does not appear."

In *Winoker v. Warfield* (1911) 136 Ga. 742, 71 S. E. 1051, a petition in an action against the receivers of a railroad company alleged that plaintiff went to defendants' freight warehouse to pay a freight bill, and that, while he was waiting for the agent, who was busy and talking with another person, to whom he stated that he was temporarily acting as station agent for the road, one B. ordered plaintiff off the premises, and told him never to come around any of the offices again, attempt-

ed to eject him by force, and finally knocked him down and beat him. The petition further alleged that B. was a "special agent" of defendants, whose duty was generally to investigate and report delinquencies of defendants' agents, and to investigate and take proper steps to prevent and punish any wrongs committed against the road; that B. was at the place in question for the purpose of investigating the opening of a switch at a point close by; and that B., in assaulting plaintiff, proceeded on the ground that plaintiff was an intruder and trespasser, and acted in the line of his duty in ejecting plaintiff. Held, that, as against a general demurrer, the petition was sufficient to show that B. was acting within the scope of his employment when he committed the assault.

In *Houston & T. C. R. Co. v. Bell* (1903) — Tex. Civ. App. —, 73 S. W. 56 (judgment affirmed (1903) 97 Tex. 71, 75 S. W. 484, but only points of procedure considered), a man who, while getting goods out of a freight shed, was assaulted by the freight handlers, was held entitled to recover on the ground that their object, on the evidence showed, was to protect the goods.

In *Hammond v. Grand Trunk R. Co.* (1904) 9 Ont. L. Rep. 64, the company was held liable where a watchman employed to lower and raise the bars at a street crossing injured, with a missile, a boy who had climbed upon one of the bars, and by his weight was preventing the watchman from lifting it after the passage of a train. The *ratio decidendi* was that the act had been done not out of mere malice or ill-will, or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so of enabling the watchman to perform the duty required of him.

In *St. Louis, I. M. & S. R. Co. v. Grant* (1905) 75 Ark. 586, 88 S. W. 582, 1133, recovery was allowed in a case where the evidence showed that a special agent in the defendant's detective department fell upon and beat a man who, in pursuance of the directions of the officers of a competing company, was standing upon a public highway and taking the numbers of the various cars standing upon the defendant's sidings. The court said: "That this assault was to stop by force and intimidation a method of securing infor-

render aid to his mother, who was traveling on it;² where the driver of a street railway car ran a car against a horse-drawn vehicle for the purpose of clearing the track;³ where the motorman of a street railway car was guilty of a similar tort;⁴ and where an inspector em-

mation of the company's business by a competitor which the company considered injurious to its interest, and unfair competition, is a fair and legitimate conclusion for the jury to draw from the facts, and would tend to prove that the act was intended for the principal's benefit. . . . Burke's duties were to detect and prevent crimes against the company's property. His chief says that it was his duty to investigate robberies of cars and other troubles with freight cars and sometimes other depredations. Whether Burke and those under whom he acted considered Grant's action within the depredations and infringements on the company's property rights the special duty of guarding which rested on the detective force is unimportant, for the evidence clearly tends to prove that he was acting under directions to stop the practice. The general agent regarded it as unfair competition and the man engaged in it a trespasser. Whether he exceeded his instructions in the means and force used in stopping this practice is immaterial; the evidence is sufficient to justify the jury in finding that he was acting in the course of his employment, for the benefit of his principal, and within the line of his duty."

² *Yazoo & M. Valley R. Co. v. Shelby* (1909) 95 Miss. 155, 48 So. 403.

³ *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170, affirming (1876) 8 Jones & S. 374. There plaintiff, while traveling in a buggy along a street in the city of New York, was stopped by a blockade of vehicles just as he had crossed defendant's track. The rear of his buggy was so near the track that a car could not pass without hitting it. A car came up, the driver of which, after waiting a moment or two, ordered plaintiff to 'get off the track.' Plaintiff was unable to move either way, and so notified the driver, who replied with an oath that he was late, and that, if plaintiff did not get off, he would put him off. Immediately afterwards he drove on, striking and upsetting plaintiff's buggy, and injuring him. Held, that the evidence did

not authorize a finding, as matter of law, that the act of the driver was with a view to injure plaintiff, and that therefore a dismissal of the complaint was error. The court said: "If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts."

⁴ *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940. In that case plaintiff testified that, while he was driving in a buggy after dark, on a country road, his horse became frightened and ran down the track of the defendant's electric railway, in front of a car; that he finally stopped his horse, and the car stopped behind him; that the motorman then exclaimed that he would give plaintiff a "shot anyhow;" started up the car and ran into plaintiff's buggy, rendering plaintiff unconscious from the shock; and that the horse began again to run down the track closely pursued at a high rate of speed by the car. He also stated that he believed the motorman purposely ran into him. Defendant's evidence was that as soon as the motorman saw plaintiff on the track he used every effort to stop the car, and that the buggy was struck by a light blow. The court said: "If this motorman had jumped off his car and gone to the plaintiff and then struck him on the head, the effect of such an act on the liability of the master would

ployed by a street car company, who had authority to see and converse with injured persons, and inquire as to the extent of their injuries, made a physical examination of an injured woman, by placing his hands on her person and loosening her clothing.⁵

The cases in which an assault was committed in connection with an act of which the primary purpose was to create alarm are reviewed in § 2379, *post*.

In one case the theory that a railway company is under an absolute obligation to afford protection against the misconduct of its employees was applied in favor of a person who had entered its premises with a view to the transaction of business.⁶ In another, the court went still further, and proceeded upon the ground that, under the peculiar circumstances presented, such an obligation was owed to a person who had been a passenger on one of its trains; but who, at the time when he was assaulted, was not transacting any business with it.⁷

The cases cited in the footnote illustrate the operation of the prin-

also be clear, as the fact that he had departed from his employment would be marked; and if there was uncontradicted evidence that, after stopping the car, he deliberately started up again, using language such as the plaintiff attributed to him, and ran into the vehicle occupied by the plaintiff, rendering him unconscious, without any evidence or circumstances to show that he was acting in furtherance of his master's business, within the scope of his employment, the master might be equally exempt. For it would be making an unreasonable distinction to say that he would not be responsible if the motorman used his brake handle, for example, in making the assault, but would be if he, with the same deliberation and intent, used the whole car to accomplish his unlawful purpose. But as the motorman's business was running the car, if there were any circumstances from which it could be fairly inferred that he was simply endeavoring to clear the track so he could proceed with his car, or do something in furtherance of his master's business, it would be a question for the jury."

⁵ *South Covington & C. Street R. Co. v. Cleveland* (1907) 30 Ky. L. Rep. 1072, 11 L.R.A.(N.S.) 853, 100 S. W. 283.

⁶ In *Southern R. Co. v. Chambers* (1908) 126 Ga. 404, 7 L.R.A.(N.S.) 926, 55 S. E. 37, the law was thus laid

down: "A railway company is liable to one who goes to a depot of the company to deal with the depot agent as to matters connected with the business of the company, who while in the course of the transaction is insulted and humiliated by the language and conduct of the agent at a place other than that to which the public is invited by the establishment of the agency, and such conduct is neither authorized nor ratified by the company."

⁷ In *Krantz v. Rio Grande Western R. Co.* (1895) 12 Utah, 104, 30 L.R.A. 297, 41 Pac. 717, the plaintiff, a traveling peddler, after having alighted from a train at a station in a sparsely settled desert country, went towards the section house, for the purpose, as he testified, of selling his wares. Before he reached the house, the section foreman who, it appeared, was under the impression that he was a "spotter" and spy of the company, assaulted him with a shovel, and drove him back to the station house. The foreman pulled him out of the station house, and ordered him to leave, saying that he would give him five minutes to get away, and threatening him with death unless he obeyed. The ticket agent was present, and saw the foreman assaulting the appellant outside the station house, and saw them go back to the waiting room.

ciple that a master cannot be held responsible for the tortious act of his servant if it appears to have been induced solely by a personal motive.⁸

Plaintiff fearing further bodily injury, or worse, started to walk on the track away from the station, and towards Grand Junction, some 30 miles away. He was followed by two unknown persons, designated in the testimony as "tramps," who assaulted and robbed him after he had proceeded about a quarter of a mile upon his journey. Thereupon he returned to the station house, complained to the ticket agent of what had happened, and was talking with him about sending telegrams giving information of the robbery, when the foreman interfered, and directed the ticket agent not to send the telegram. Immediately afterward the foreman crossed the track and joined the two "tramps." The three men then came over to the station and assaulted the appellant. He appealed to the agent and bystanders for assistance, which was finally rendered by a stranger, the ticket agent making no effort to protect him except to order them all out of the waiting room. The ticket agent testified that he knew the section foreman, for some reason or other, was bent upon injuring the appellant, and that he did not interfere to protect him because he was sick; that he would have had to fight to protect him; that the foreman was subject to his orders in the station house, but would not mind him, because they were at outs; that his authority as station agent would not have been sufficient to protect appellant. The court argued thus: "It is a matter of common knowledge, of which the court may take notice, that these railroad station houses, scattered along the line of railroads in a sparsely settled country, such as the locality here is proven to be, are thrown open for the use of the public, which, by invitation of the company, is permitted to use them at all times, before and after the arrival and departure of trains; that there was and is an implied invitation to all persons intending to avail themselves of the railroad service to enter and occupy the premises, and at any time, in the absence of reasonable regulations to the contrary, made by the company. And the offer

to pay fare, or the announcement of the intention to pay fare, and the acceptance by or on behalf of the company, is not necessary to be made, by a person entering the station with such or other legitimate purpose, to entitle him to protection against violence by the company's servants. This case does not even depend upon this question. When the appellant was assaulted and beaten in the waiting room of the station, the company itself was present, in the person of the ticket agent in charge, who was its vice principal, and the injuries inflicted upon the appellant by one servant of a company, aided by strangers, in the presence of and under the very eye of the vice principal, who tamely acquiesced, and failed to exercise his authority for the protection of the appellant, were inflicted by the company itself. The agent should have protected appellant, or, at least, should have made an earnest effort to do so. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds* (1866) 53 Pa. 512, 91 Am. Dec. 224; *New Orleans, St. L. & C. R. Co. v. Burke* (1876) 53 Miss. 227, 24 Am. Rep. 689. We are not prepared to sanction the proposition that a man in the situation of the appellant, driven by the unprovoked and brutal violence of the company's own servants to seek the protection of its station house and waiting room in charge of its agent, has no recourse against the company for the wilful and malicious acts of its employees, under circumstances which make them the acts of the company. We think such contention is not only against public policy, but the settled rules of law."

⁸ In *Everingham v. Chicago, B. & Q. R. Co.* (1910) 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912 C, 848, it was held that no recovery could be had in respect of an assault which followed a retort which the plaintiff, the owner of an elevator, made to some insulting word uttered by a switching foreman who had taken offense at the manner in which the plaintiff had sent in an application for cars.

In *Illinois C. R. Co. v. Ross* (1888) 31 Ill. App. 170, a flagman at a street crossing, exasperated by the abusive

language of a boy, threw a lump of coal at him while he was on the premises of the company, but outside the limits of the street. Held, that the company was not liable for the injuries so caused. The statute in pursuance of which the flagman had been appointed declared that "it shall be the duty of such railroad company to place . . . a flagman at such crossing, who shall perform the duties usually required of a flagman; and such flagman is hereby empowered to stop any and all persons from crossing a railroad track, when, in his opinion, there is danger from approaching trains or locomotive engines." Starr & C. Ill. Stat. chap. 114, § 99. Discussing the contention of the defendant, that as the altercation and the assault had occurred on the company's right of way, at a place which was beyond the territorial range of the flagman's duties, and that the assault was consequently not within the scope of his employment, the court said: "Appellee claims that flagmen at street crossings usually give attention to the tracks and right of way half way to the next crossings on each side, for that purpose dividing the intervening territory between themselves; and some proof was introduced to show that such was the fact at the crossings mentioned in Bloomington, and also in some other cities, but none that such attention was 'required' of them anywhere. No authority directly in point has been cited, nor is there any within our knowledge; but the language and the reason of the statute would seem to limit his duties to the crossing, and there, as a rule, he should remain. Where the street is so bounded by structures up to the right of way that the crossing can be made only within its lines, we think his duty is limited territorially by those lines; but where it is not so bounded, and adjoining land is actually used by the public, and crossing made thereon, his duty and authority are also extended to cover the ground so used. And if he should see beyond those limits a dangerous obstruction upon the track, or animals or persons about to go upon it who were apparently unaware or insensible of the danger, or incapable of taking due care for their safety, and his actions were necessary in order to avert such danger, and no more important and urgent occasion required him at the time to remain at his place

on the crossing, undoubtedly he ought to remove that obstruction, or to do whatever would be necessary, with respect to such animals or persons, to prevent the threatened injury; but this would be a moral obligation only, growing wholly out of his relations as a man, and so important and urgent as to override or suspend for the time that of his contract to be at his place on the crossing. While this would be the duty of any other person having like knowledge, ability, and opportunity, it would perhaps be more especially that of an employee of the railroad company, by reason of his special relation to it, though not more so of a flagman than of any other employee. We are further of opinion that flagmen stationed at different street crossings cannot, by any agreement or other voluntary action of their own alone, extend the area or scope of their duties. The statute imposes only such 'as are usually required of flagmen,' and confers no greater or other right or power than is usually required for their performance, together with the special authority to stop persons in the cases therein prescribed. And if the mere fact that a flagman has actually performed, with more or less frequency, and in view from a station house, other acts than those mentioned in the statute, would charge the railroad company as requiring or authorizing his performance of them, there is no evidence that any flagman of this or any other company ever assumed, for any reason, to exclude or remove anybody from such grounds as these."

In *Hudson v. Missouri K. & T. R. Co.* (1876) 16 Kan. 470, the grounds upon which the complaint was held demurrable were thus stated: "If in the supposed performance of this duty and in ejecting plaintiff from the depot he [*i. e.*, the tort-feasor] had improperly ejected him, or had used unnecessary force in ejecting him, the company would have been liable, because he was doing that which the company had employed him to do, acting in the very line and course of his employment, and any mistake or violence on his part was the mistake or violence of his principal, the company. But it is not pretended in the petition that this assault was committed in ejecting or attempting to eject plaintiff. Neither is it pretended that the assault was made in preventing

The doctrine now almost universally repudiated (see §§ 2239, and 2239a, *ante*) that a master could not be held liable for the wilful trespass of a servant is illustrated in one case.⁹

2351. Ejection from railway trains; generally.—The circumstances under which a passenger is entitled to sue for injuries resulting from his ejection from a railway train are discussed in chapter *CHH. post*, in so far as the master is deemed to be relevant in a disquisition upon

or attempting to prevent the plaintiff from improperly taking away goods, or from committing any injury to the property of the plaintiff, or from transgressing any of its rules for the regulations of its depot or transaction of its business. It is merely charged that the assault was committed by Trotter upon plaintiff while he was asking and demanding freight which he was entitled to receive. . . . Trotter was employed to deliver freight; plaintiff came and demanded freight; Trotter replies to his demand with an assault. Was such assault in the course of Trotter's employment? Did it grow out of any services he was engaged in, or was it in the line of his duty? It seems to us it was clearly disconnected therefrom, and a mere volunteer assault. True, the employment may have given the opportunity and occasion, but it was not an act in which in any fair sense the company could have been said to have employed him to do, or to have anticipated that he would do, nor an act which was the act of the company."

In *Lynch v. Florida, C. & P. R. Co.* (1901) 113 Ga. 1105, 54 L.R.A. 810, 39 S. E. 411. There it appeared that the plaintiff had repeatedly persisted in driving his wagon within the cut next the side track, which the agent insisted he must not do, as it was in violation of a rule established by the company. Paying no heed to the repeated remonstrances of the agent, he sought advice from another employee of the railroad company, not shown to have had any connection whatever with the care of the station and ground, and then apparently defied the authority of the agent. He afterwards left the car in which he was placing his wood, and went and told the agent's father, who was engaged in the same work some hundred yards down the track, telling the latter how he had been treated. Then, at the request of the father, they both walked up to the

warehouse, and the agent was asked by his father whether he had insulted the plaintiff, and, receiving a reply that he had not, the father and the plaintiff became engaged in an altercation in which the agent participated. Upon this state of facts, the court was of opinion that the settlement of the dispute was purely a personal matter between the three participants, and that, if the plaintiff had any cause to complain, it was against the individuals who inflicted the injuries upon him, and not against the railroad company, who at that time owed him no duty of protection.

The right of recovery has also been denied in cases where a trainman wantonly threw a lump of coal at a person near the track. *Louisville & N. R. Co. v. Routt* (1903) 25 Ky. L. Rep. 887, 76 S. W. 513 (evidence showed that fireman threw the missile merely for the purpose of injuring the plaintiff); *St. Louis, I. M. & S. R. Co. v. Laven-dusky* (1908) 87 Ark. 540, 113 S. W. 204 (act was that of a yard master, done in violation of an express rule of the company, merely for the purpose of amusing himself).

And where a motorman on a street car left his post and assaulted a man who was driving a team along the railway track. *Rudgeair v. Reading Trac-tion Co.* (1897) 180 Pa. 333, 36 Atl. 859 (see § 2348, note 2, *ante*).

And where the driver of a street car struck at a person near it with the reins. *Chicago City R. Co. v. Mogk* (1892) 44 Ill. App. 17, second appeal (1898) 80 Ill. App. 411 (evidence showed that trespass was committed merely to prevent an annoyance to the driver himself).

⁹ *Ryan v. Hudson River R. Co.* (1871) 1 Jones & S. 139 (driver of a street car struck at a boy near it with his whip, the consequence being that the boy was entangled in the whip and drawn under the car).

the doctrine, *respondet superior*. An examination of the decisions there cited will show that the right of action has in some of them been determined with reference to the scope of the employment of the servant by whom the injuries were inflicted, and in others with reference to the theory that a contract of a carriage imposes upon the carrier an absolute duty to protect a passenger against the misconduct of the servants.¹

An essentially different situation is presented where the person ejected was a trespasser, and the gravamen of the claim is that he was ejected in an improper manner. In this instance, as the element of a contract is absent, it follows that, irrespective of whether the theory of an absolute contractual duty in respect of passengers is or is not accepted in the given jurisdiction, he cannot recover unless it appear that the servant who ejected him was authorized to deal with trespassers.²

¹ The cases illustrating both these views are collected in §§ 2445 *et seq. post*. The state of the law in such jurisdictions may be ascertained from the summary of the decisions in §§ 2407-2443.

² In *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, the court, after referring to the obligations of a carrier to a passenger, said: "In the case of a trespasser, no duty except abstinence from wanton injury and gross negligence lies upon the carrier, and the rule is different, for to make the carrier liable the wrong must be one done by the servant within the scope of his duty and in the course of his business. . . . Outside of the exception as to passengers, the employees of a railroad company may be divided into two classes. For the wilful wrongs of one class, though done to even a trespasser, the company is liable, because the act is done in the course of their employment, and within the scope of their authority; whereas for the same act done by a servant falling within the other class it would not be liable. A company might be held liable for a trespass by a conductor to a trespasser on his train, but not for the same act of and by a clerk in the business office or one of a body of repair hands. . . . Thus, then, it being the law that for this wilful trespass the defendant would only be liable, if the employee in doing the act was act-

ing in the course of his business within the scope of his authority, look at answer to interrogatory 5, and it tells us that both the name and the business of the man who did this act were unknown. If, as several answers of the jury say, the man's name was unknown, it seems difficult to say how it could be known that he was a company employee except from some evidence tending to show he had on blue clothes; but passing that, still as his business is unknown, how could the jury say that he was acting in the course of that business and within the scope of the authority conferred upon him when that authority was unknown? Thus we have the certificate of the jury that a vital element necessary to the plaintiff's case was wanting; this certificate shows that the general verdict ought not to have been found, because an indispensable element to sustain it was wanting."

In *West Jersey & S. R. Co. v. Welsh* (1898) 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736, the court made the following remarks: "The company could intrust the ejection of such a trespasser to one or more of its servants by a particular direction in a particular case, or by general instructions respecting a class of trespassers. Authority thus expressly given would charge the company with liability for the act of a servant in ejecting a person not a trespasser, or in using excessive or inappropriate force in removing one who was a tres-

In a case where the action would otherwise have been maintainable, it is a good defense that the injured person was traveling on the train in pursuance of an arrangement made fraudulently in respect of the company between him and the employee who ejected him.³

passer, and this notwithstanding the authority conferred was limited to the removal of trespassers, and the use of any but reasonable and necessary force was prohibited. The responsibility of the corporation is that of a master, who, under the maxim *respondet superior*, must answer for injuries done by acts of his servant in the prosecution of his business and within the scope of his employment."

In *Texas & P. R. Co. v. Hayden* (1894) 6 Tex. Civ. App. 745, 26 S. W. 331, it was held to be error for the court to charge the jury, in effect, that, if the defendant's conductor consented that the plaintiff should ride, or if he knew that the boy was upon the freight train in question, the company would be liable for the act of the brakeman in striking him and causing his injuries, regardless of whether the act was done within the scope of his employment or not.

In *Smith v. Louisville, E. & St. L. R. Co.* (1890) 124 Ind. 394, 24 N. E. 753, the complaint in an action for assault was held demurrable on the ground that, where a trespasser is concerned, the averment must show that the servant in question had, in respect of the assault, acted within the scope of his employment, and that this requirement was not satisfied. It was observed that if a person assaulted was not a passenger, it was immaterial whether he was there as a trespasser or by the permission of the conductor, as in either case the company was not liable.

See also the cases cited *passim* in the following sections.

³ In *Alabama & F. R. Co. v. McAfee* (1893) 71 Miss. 70, 14 So. 260, the court thus explained its reasons for rejecting the claim of a man who had been pushed off, while he was being robbed by the crew of a train: "On the testimony of the plaintiff himself the verdict should have been for the defendant. He shows that he fell among thieves, and in being robbed was pushed off the car and hurt. He had made an arrangement with the crew in charge of the train to work his way to Bran-

don, and suffered wrong at their hands; but he has no claim on the railway company from the wrong resulting from the disastrous consequences of his own venture. The people who wronged him were not serving the company in what they did. The whole thing was an unauthorized arrangement to suit the views of the participants, and not to serve the company, and it is not responsible for what happened by design or accident. The first instruction for the plaintiff is wrong, as applied to this case. It is true that even a trespasser on a train must not be knocked off by the servant of the company engaged about his master's business in putting him off, but that rule has no application here, where the plaintiff suffered injury from his own comrades, engaged, not in serving the railway company, or about its business, but illegally engaged in a scheme of their own, in violation of duty to the company, participated in by the plaintiff. He has no claim against the company he wronged by attempting to ride on its train without paying fare, and must look for redress for the wrong done him to the person who did it."

In *Brevig v. Chicago, St. P. M. & O. R. Co.* (1896) 64 Minn. 168, 66 N. W. 401, it was held that a brakeman does not act under his implied authority to eject trespassers, so as to render the company liable for his act in ejecting a person whom he was bribed to allow to ride on the train, unless it was done under a subsequent express authority. The court said: "We are also of the opinion that the brakeman, who conspired with plaintiff to commit a trespass against defendant, had no implied authority, subsequently, to represent defendant in ejecting plaintiff, and that, if he was the brakeman who did eject plaintiff, it was simply the assault of one joint trespasser upon the other, for which defendant is not liable. This is true whether the conductor had locked the plaintiff up or not. By plaintiff's own procurement, the brakeman had ceased to be the disinterested servant of the defendant, or, as far as that transaction was concerned, its servant at all.

2352. Ejection of trespassers. Presumptive authority of conductors.—

As one of the normal duties of a railway conductor is that of seeing that no persons are carried on the train under his control except those who are legally entitled to transportation, it is clearly within the scope of his employment to eject anyone who, in his opinion, is not so entitled.¹ The general principle illustrated by these cases

His motive in driving plaintiff off the train while in motion might have been not to serve his master, but to cover up his offense against his master. If there is any doubt as to that, the doubt must be resolved against the wrongdoer. Plaintiff and the brakeman became joint trespassers at the beginning of the transaction, and it must be presumed that they continued such to the end. The brakeman's implied authority to represent the defendant in ejecting his confederate had ceased; and if he was subsequently given express authority to eject him, the burden was on plaintiff to prove it. Then, if the same brakeman whom he bribed to let him into the car drove him out of it, he is not entitled to recover. But, whether or not it was the same brakeman, or another brakeman, was, on the evidence, a question for the jury."

In *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 106 Minn. 51, 54, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047, the contention that recovery was precluded by the operation of the rule established by the above case was rejected on the ground that there was no evidence which tended to show that the plaintiff either bribed or offered to bribe the brakeman.

¹"It is necessary, as well for the protection of the interests of the company as for the security of the persons and property intrusted to his care, that he [the conductor] should have authority to eject trespassers from the cars under his control." *International & G. N. R. Co. v. Anderson* (1891) 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039.

In *Kline v. Central P. R. Co.* (1869) 37 Cal. 400, 99 Am. Dec. 282, where a trespassing boy had been pushed off a moving car, his right to recover was affirmed on grounds thus stated: "In our judgment the act was within the scope of the conductor's general authority, and the testimony also shows that, aside from his general authority, he had special authority for what he did; and

hence, upon both grounds, the defendant must be held responsible for the manner in which he acted. The truth of the first proposition is established by that which follows, from what had already been said as to the authority and power of the conductor to put the plaintiff off the cars. We have said that, under the circumstances of this case, he had authority to prevent the plaintiff from getting upon the cars, in the first instance, and to put him off in the second. This authority was incident to his position as chief officer of the train, and necessarily came, by implication, from the defendant, with his appointment to the place. It is the duty of the defendant, arising from the nature of its business, to admit into its cars all persons who seek admission as passengers and are willing and offer to pay legal fare, provided they are fit persons to be admitted and there is room for their accommodation. To itself and its stockholders it owes the contrary duty of excluding all persons who do not come as passengers, or are not fit persons to be admitted, and the conductor is charged, by virtue of his position, with the performance of both, and is, necessarily, vested with the requisite power. It cannot be said that he is acting outside of his authority while he is engaged in the performance of either duty; on the contrary, he is acting strictly within the scope of his employment. In a conductor's excluding a person who is not entitled to be admitted or to remain in the cars, the relation of master and servant is as clear and apparent as it is in his receiving and providing for those who are entitled to admission. The relation being established, all else is mode and manner, and, as to that, the master is responsible."

In *Highland Ave. & Belt R. Co. v. Robinson* (1900) 125 Ala. 483, 28 So. 28, where a trespasser was injured by being pushed from a moving freight train, the fact that the person who shoved him was the conductor of the

which have been determined with reference to this doctrine is that, "where a master employs a servant to do an act which involves the use

train, taken in connection with common knowledge of the duties of a conductor, was held to be sufficient to authorize submission to the jury of the question whether the conductor was acting within the scope of his employment.

In *Hamilton v. Chicago M. & St. P. R. Co.* (1903) 119 Iowa, 650, 93 N. W. 594, a trespasser on a passenger train, after having been twice ejected, again climbed to the rear steps of the rear coach, whereupon the conductor, coming from inside the vestibule door, seized him by the collar, and slapped and beat him with his hand. The train was again stopped, and plaintiff ejected. Held, that the beating administered by the conductor was within the scope of his authority. The court said: "There is no question that if, in removing plaintiff as a trespasser, the defendant's conductor, who was charged with the duty of removing trespassers from the train, caused him to suffer personal injury by reason of attempting to put him off at a dangerous place, or by using unreasonable and unnecessary violence, the defendant would be liable for his acts, even though they were wanton, wilful, malicious, and unlawful. *Marion v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 568, 21 N. W. 86; *Johnson v. Chicago, St. P. M. & O. R. Co.* (1902) 116 Iowa, 639, 88 N. W. 811; *Hoffman v. New York C. & H. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 337. This proposition is conceded by counsel for appellant, but he contends that the evidence shows the beating of the plaintiff to have been a separate and distinct transaction from that of putting him off the train. So it appears from the testimony of the conductor, but according to the testimony of plaintiff, he was struck and beaten and put off as a part of one continuous transaction, and we think it was for the jury to say whether this was so. But even if the beating was a distinct transaction, it was not as the result of any personal malice or ill-will of the conductor, but because, as conductor, he was irritated by the conduct of plaintiff, and, as he declares, was actuated with the purpose of teaching the plaintiff a lesson, so that when he was put off he would stay off. There is nothing to indicate that the conduct-

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or, under pretense of discharging his duty as conductor, was taking the opportunity to injure plaintiff on account of his own personal ill-will. He was confessedly acting throughout as conductor,—discharging the duty of preventing plaintiff, as a trespasser, from riding on the train."

In *Higgins v. Southern R. Co.* (1896) 98 Ga. 751, 25 S. E. 837, where the conductor of a freight train had used undue force in putting off a trespasser, the court observed: "Undoubtedly it is the duty of railroad conductor to determine what persons are entitled to ride upon a train committed to his care, and to expel any person found upon such train who has no right to be there. In so doing, his acts are, in legal contemplation, the acts of his master, for the reason that they are performed in the line of his duty. For the purpose of expelling such a person from a train, the conductor may lawfully use whatever amount of force is reasonably proper and necessary; but he certainly cannot commit, even upon a trespasser, a malicious, wanton, and murderous assault."

In *Sanders v. Illinois C. R. Co.* (1900) 90 Ill. App. 582, where a trespasser, being frightened by threats, had jumped from a moving freight train, an instruction that there was no evidence from which the jury would be warranted in finding that the employees of the train had authority to eject trespassers therefrom was held to be erroneous, for the reason that the conductor, being intrusted with control of the entire train, had implied authority, as a matter of law, to eject trespassers.

In *Meyer v. Pacific R. Co.* (1867) 40 Mo. 151, the conductor of a passenger train found the plaintiff's husband standing in an intoxicated condition on the platform of the baggage car, just after the train had started. The man, having in some way fallen off, was run over and killed. It was not disputed that the company's liability might warrantably be inferred, from the evidence given for the plaintiff, which tended to show that, in attempting to put the decedent off the train, the conductor had, either from carelessness or with a criminal intent, forced him onto the track between the cars. But the verdict

was set aside on account of an erroneous instruction.

In *Chicago, R. I. & P. R. Co. v. Kerr* (1905) 74 Neb. 1, 104 N. W. 49, where the plaintiff had been assaulted by the conductor of a freight train, the special ground upon which it was sought to take the case out of the general rule, that such an assault is imputable to the company if made for the purpose of putting a trespasser off the train, or of resisting his attempt to get on the train, was that it was apparent from the plaintiff's own testimony that, at the time of the alleged assault, he had left the train, and was manifesting no purpose or intention of repeating the trespass he had committed. In the opinion of the court, however, this conclusion could not be deduced, as a matter of law, from that testimony which, it was thought, fairly warranted the inference "that, as the plaintiff was removing himself from under the car where he was riding, and after he had alighted on the ground in a position not altogether upright, but approximately so, and before he had freed himself from the train, and while his hands were hold of the bars or rods where he had been riding, and as he was moving forward with the train, he came in contact with the conductor, who was traveling toward the rear of the train in order to drive him away, and who, seizing hold of him while yet in the position described, by throwing him around, threw his foot or limb on the rail and under the wheel."

In *Southern P. R. Co. v. Kennedy* (1894) 9 Tex. Civ. App. 232, 29 S. W. 394, where a conductor, while attempting to expel a trespasser from a coal car, shot at and wounded him, the court rejected the contention that the railway company was not liable, because the trespasser, at the time of the shooting was obeying the conductor's orders, and there was no further necessity of any act of violence to effect the expulsion. The act of expulsion continued until he reached the ground.

In *Southern Kansas R. Co. v. Sanford* (1891) 45 Kan. 372, 11 L.R.A. 432, 25 Pac. 891, it was held that the ejection of a passenger from a slowly moving car was not negligence or wantonness, as a matter of law.

In *Arnold v. Pennsylvania R. Co.* (1887) 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213, a person whose ticket did

not entitle him to travel on the train in question was put off by its conductor at a station where there were no lights, and was run over by a passing train, Held, that he was entitled to recover damages.

In *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 13 N. W. 415, the court observed: "If in this case the conductor had forced the plaintiff from the train while in motion and while crossing a bridge, the act very clearly would, under the evidence, be deemed to be in the course of his employment, and that, too, even if it were shown that he had been expressly instructed to eject no person from the train when in motion, and especially when crossing a place as dangerous as a bridge. In one sense, the specific act would not be in the course of his employment, but his general employment to remove trespassers from the train would be sufficient to render the company liable."

In *Crocker v. New London, W. & P. R. Co.* (1855) 24 Conn. 249, a case of ejection for nonpayment of the extra amount of fare demanded from passengers who did not buy tickets, the plaintiff alleged that, for the purpose of removing him from the train car, the conductor called to his assistance certain other servants of the company, and that in the effort to remove him a struggle ensued, during which, one of those servants intentionally kicked him in the face. The defendants claimed that such kick, if given, was without the knowledge, and without any particular, or express, direction of the conductor, or any other agent of the corporation. Held that the jury had been wrongly instructed upon the facts as alleged by the plaintiff, and the defendants were liable in that action. (Two judges dissented). The court said: "The jury should have been instructed in substance, that, if the kick was given by the servant, for the purpose of keeping the plaintiff off from the car, and was, under the circumstances, but the exercise of necessary and proper force for that purpose, the defendants were responsible for it, provided the plaintiff had been wrongfully put out and had a right to re-enter; . . . but, if such kick was not necessary, and proper, for the purpose of keeping the plaintiff off, and was by the servant intentionally given, without the knowledge or direction of the conductor, or any other offi-

cer or agent of the company, the defendants were not liable for it. . . . In this case, the servant was called to assist the conductor, and may be considered as having a general order, or command, to keep the plaintiff off; but that order authorized the employment of none but usual, and legal, means for the purpose, and the intentional employment of such an unusual, unnecessary, and unjustifiable measure as a kick in the face, could not have been contemplated by the conductor, and, in the absence of proof, the law will not deem it authorized by him."

In *Rowell v. Boston & M. R. Co.* (1895) 68 N. H. 358, 44 Atl. 488, the court laid down the law as follows: "If the plaintiff, when the conductor attempted to eject him from the freight car, was there without right and was a trespasser, yet he had a right to have the case submitted to a jury, if there was any evidence from which it was competent for them to find that the act of the defendants' servant, in ejecting or attempting to eject the plaintiff from the car, was within the scope of the servant's employment, and that he ejected or attempted to eject the plaintiff without giving him sufficient opportunity to leave the car, or if in so doing more force was used than was necessary." Under the circumstances it was held that the defendants' motion for a nonsuit had been properly denied.

In *Fordyce v. Beecher* (1892) 2 Tex. Civ. App. 29, 21 S. W. 179, evidence showed that the conductor began the expulsion of the plaintiff with an assault; that he followed the assault with a demand for his fare from the plaintiff; that, after it had been paid or offered, he continued the use of violence by striking and cutting plaintiff; and that he finally threw the plaintiff out of the cars, and left him dangerously wounded and senseless. Held, that in respect of these acts, he was exercising his functions as conductor, and that, whether the relation of carrier and passenger existed or not, his employers were liable.

In *Perkins v. Missouri, K. & T. R. Co.* (1874) 55 Mo. 214, the right of recovery was considered with reference to the provision in 1 Wagner Mo. Stat. 307, § 28, authorizing the expulsion of passengers for certain reasons, and was affirmed on grounds thus stated: "This statute gives the authority to eject a

passenger from the cars who refuses to pay his fare, and directs the manner in which it shall be done, and places the matter within the line of the duties of the conductors of the train, and there can be no doubt in reference to the liability of the company for any injury which might result to a passenger from the negligent or improper manner in which the conductor should perform the duty. But it is insisted that, for wilful or malicious injuries inflicted by the conductor in the performance of this duty or right, the company is not liable. I do not think that this position is tenable. Corporations only act by agencies, and whatever their agents do within the scope of their authority is really the act of the corporation; and if the agents, in acting within the scope of their authority, act in a wilful or malignant manner, and damage ensue, they are certainly responsible, and particularly in cases where they are acting with reference to those to whom the corporation are under obligations by law to treat in a different manner."

In *Farber v. Missouri P. R. Co.* (1893) 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, the court approved the statement in Wood, Railway Law, § 316, regarding a conductor's authority. See § 2353, note 2, *post*.

In *Clark v. New York, L. E. & W. R. Co.* (1886) 40 Hun, 605, where the defendant was held liable for injuries sustained by a man in whose face water was thrown for the purpose of compelling him to jump from a moving caboose, the nature of the functions performed by the tort-feasor is not mentioned; but probably the tort was committed either by, or under the direction of, the conductor.

The right of a trespasser to recover for injuries resulting from the improper manner in which his removal from a train was effected by a conductor has also been affirmed in *Toledo, St. L. & W. R. Co. v. Gordon* (1906) 74 C. C. A. 289, 143 Fed. 95; *Smith v. Savannah, F. & W. R. Co.* (1896) 100 Ga. 96, 27 S. E. 725; *Chicago, R. I. & P. R. Co. v. Brackman* (1898) 78 Ill. App. 141; *Louisville, N. A. & C. R. Co. v. Dunkin* (1883) 92 Ind. 601; *Indiana, D. & W. R. Co. v. Ditto* (1902) 158 Ind. 669, 64 N. E. 222; *Lake Erie & W. R. Co. v. Matthews* (1895) 13 Ind. App. 355, 41 N. E. 842; *Benton v. Chicago, R. I. & P. R. Co.* (1881) 55 Iowa, 496, 8 N. W.

of force against the person or property of another, and the servant, in the course of his employment, uses force in a manner or to an extent unlawful and unjustifiable, both are answerable as trespassers." ^{1a}

For injuries inflicted upon a trespasser by a brakeman acting under the order of a conductor liability is prima facie imputable to the railway company on the same footing as in cases where the tort fea-

330; *Atchison, T. & S. F. R. Co. v. Gants* (1888) 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; *Cincinnati, N. O. & T. P. R. Co. v. Rue* (1911) 142 Ky. 694, 34 L.R.A.(N.S.) 200, 134 S. W. 1144; *Brown v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 588; *Hibbard v. New York & E. R. Co.* (1857) 15 N. Y. 455 (arguendo); *West Jersey & S. R. Co. v. Welsh* (1898; Err. & App.); 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736; *Folley v. Chicago, R. I. & P. R. Co.* (1906) 16 Okla. 32, 84 Pac. 1090; *Pennsylvania R. Co. v. Vandiver* (1862) 42 Pa. 365, 82 Am. Dec. 520; *Pennsylvania Co. v. Toomey* (1879) 91 Pa. 256; *Moore v. Columbia & G. R. Co.* (1892) 38 S. C. 1, 16 S. E. 781; *Gulf, C. & S. F. R. Co. v. Kirkbride* (1891) 79 Tex. 457, 15 S. W. 495; *Stone v. Chicago, St. P. M. & O. R. Co.* (1894) 88 Wis. 98, 59 N. W. 457; *Daley v. Chicago & N. W. R. Co.* (1911) 145 Wis. 249, 32 L.R.A.(N.S.) 1164, 129 N. W. 1062.

In many cases where the right of recovery was affirmed, the authority of the conductor to eject the claimant was taken for granted. See for example, *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116; *St. Louis & S. F. R. Co. v. Brown* (1896) 62 Ark. 254, 35 S. W. 225; *Havens v. Hartford & N. H. R. Co.* (1859) 28 Conn. 69; *St. Louis, A. & C. R. Co. v. Dalby* (1857) 19 Ill. 353; *Chicago, St. L. & P. R. Co. v. Bills* (1885) 104 Ind. 13, 3 N. E. 611; *Louisville, C. & L. R. Co. v. Sullivan* (1884) 81 Ky. 624, 50 Am. Rep. 186 (man so drunk as to be helpless was ejected, and afterwards severely frozen); *Ruebsam v. St. Louis Transit Co.* (1904) 108 Mo. App. 437, 83 S. W. 984; *Randell v. Chicago, R. I. & P. R. Co.* (1903) 102 Mo. App. 342, 76 S. W. 493; *Ickenroth v. St. Louis Transit Co.* (1903) 102 Mo. App. 597, 607, 77 S. W. 162; *State v. Ross*, (1857) 26 N. J. L. 224; *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590; *Burns v. Glen Falls R. Co.* (1896) 4 App. Div. 426, 38 N. Y. Supp. 856;

Pennsylvania R. Co. v. Vandiver (1862) 42 Pa. 365, 82 Am. Dec. 520; *Moore v. Columbia & G. R. Co.* (1892) 38 S. C. 1, 16 S. E. 781; *Richmond, F. & P. R. Co. v. Ashby* (1884) 79 Va. 130, 52 Am. Rep. 620; *Richmond Traction Co. v. Wilkinson* (1903) 101 Va. 394, 43 S. E. 622; *Davis v. Chesapeake & O. R. Co.* 61 W. Va. 246, 9 L.R.A.(N.S.) 993, 56 S. E. 400 (arrest in this case).

^{1a} *Holmes v. Wakefield* (1866) 12 Allen, 580, 90 Am. Dec. 171. There it was shown that among the "special instructions" given to the conductor by the railroad superintendent was this: "The conductors will not allow any person to ride in any freight car attached to their train." It was insisted on behalf of the defendant that this direction was intended as a security for the freight; that the conductor had no charge of passengers; and that, at the utmost, it only authorized him to prevent persons from getting onto the cars, and did not require him to remove them, especially after the train was in motion. But this contention did not prevail. The court said: "We do not think the effect of the instruction can be so limited. It plainly made it his duty to prevent any person's riding on a freight car. This he might do in any lawful and proper manner; by the use of reasonable force to prevent getting upon the car, or in removing a person who had got upon the car in violation of the rule. The wrong to the plaintiff consisted in using force unreasonably; that is, at a time and under circumstances which made it dangerous to his life or limb. A test of this may be found by inquiring whether the plaintiff could have maintained his action against Wakefield merely for ejecting him from the car, without proof of personal injury; and we think it clear that he could not." It was accordingly held that the company was responsible for the act of the conductor in question who had put a person off from a freight car while the train was in motion.

or was the conductor himself. The rule is of course equally applicable, whether the orders were general;² or given with reference to the particular person who was ejected.³ The mere fact that, in carrying out the orders, the brakeman employed methods which had been expressly forbidden by the conductor will not prevent recovery.⁴

2353. Same subject; presumptive authority of brakemen.—a. Generally.—Under the regulations of any given railway company, the powers of brakemen on passenger and on freight trains may be, and in point of fact frequently are, different with respect to the disposal of trespassers.¹ But for practical purposes it would seem that this

² *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328; *Southern R. Co. v. Wildman* (1898) 119 Ala. 565, 24 So. 764 (liability of the company held to be a question for the jury, where the evidence tended to prove that the conductor of the train had ordered the brakeman not to let any tramps ride on it).

In *Southern P. R. Co. v. Svendsen*, (1910) 13 Ariz. 111, 108 Pac. 262, it was held that a complaint alleging that while plaintiff was riding on defendant's freight train, which was moving at a high rate of speed, one of defendant's brakemen, without cause and acting under instructions from the conductor and from defendant, assaulted plaintiff, and by threats, etc., compelled plaintiff to jump from the train to the ground, whereupon plaintiff was injured, was not demurrable.

³ In *Alabama G. S. R. Co. v. Frazier* (1890) 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303, the general principles applicable to this case were thus stated: "It was the brakeman's duty to put the plaintiff off the train. Whatever he did to that end was within the range of that duty and authority. He had a right to use such force as was reasonably necessary to the discharge of that duty. If he employed more force than was necessary, and injury resulted, the company is liable. If during his effort to discharge this duty he wilfully assaulted and beat the plaintiff—not in self-defense against an assault made, or to reasonable apprehension imminent and impending by the plaintiff—the company is liable." Discussing an instruction requested by the defendant to the effect that the company was not liable if the brakeman wilfully struck and injured the plaintiff

without any command or direction from the conductor so to do, the court said: "To have given this instruction would have been the emasculation of the salutary and well-established doctrine that whether the wilful misconduct of the employee was authorized or ratified by the company or not, and whether it was directed by a superior employee or not, the company is responsible, if it was committed in the line, or within the range of the authority, of the employment, as that authority or duty existed on the facts incident to the particular transaction. Here the conductor had determined to put the plaintiff off. It became at once, according to the uncontroverted evidence, the brakeman's duty to assist in putting him off, and, to use the necessary force to that end, he undertook to discharge that duty in the presence and with the concurrence of the conductor. In discharging it, he wilfully beat the plaintiff, according to one aspect of the evidence. The company was manifestly liable, whether he was directed or commanded by the conductor to beat him or not, and the charge was well refused."

In *Mobile & O. R. Co. v. Seales* (1893) 100 Ala. 368, 13 So. 917, a railway company was held liable for injuries to a trespasser who was shot by a brakeman, while he was riding upon a car truck, and thus caused to fall under the wheels.

⁴ *Coleman v. New York & N. H. R. Co.* (1870) 106 Mass. 160 (complainant has been struck by the brakeman).

¹ That cases involving brakemen on freight trains are not necessarily valid precedents in cases involving brakemen on passenger trains was pointed out in *McKeon v. New York, N. H. & H. R. Co.* (1903) 183 Mass. 271, 97 Am.

dissimilarity can possess a material significance only in those instances where specific evidence as to the functions of the brakeman employed by the defendant company is introduced. (See § 2354, *post.*) In none of the cases which have turned upon the presumptive extent of a brakeman's ordinary powers has it been treated as a differentiating factor. Under these circumstances it would seem to be unnecessary, in a review of the decisions which bear upon the subject of the present section, to classify them with reference to the description of the train from which the aggrieved party was ejected.

b. Doctrine that a brakeman has no implied authority to eject trespassers.—By several courts the position has been taken that evidence which goes no further than to show that the tort-feasor was employed as a brakeman will not warrant the conclusion that he was invested with authority to eject trespassers.² This doctrine has been

St. Rep. 437, 67 N. E. 329. (See note 10, *infra*.)

² *Federal courts.*—In *Corcoran v. Concord & M. R. Co.* (1893) 6 C. C. A. 231, 5 U. S. App. 453, 56 Fed. 1015, the evidence was that plaintiff was riding on top of a freight car without having paid any fare; that he was ordered off by a person whom he assumed to be a brakeman; and that the brakeman seized him and threw him off while the train was in rapid motion, whereby he was injured. A verdict directed in favor of defendant was sustained by the court of appeals, on the ground "that plaintiff should have offered some evidence showing the scope of the alleged brakeman's authority."

Alabama.—In *Southern R. Co. v. Wildman* (1898) 119 Ala. 565, 24 So. 764, where the case was held to have been properly left to the jury, the court seems to have proceeded upon the assumption that, in the absence of certain specific evidence which had been adduced as to the authority of the brakeman in question, the action would not have been maintainable.

Arkansas.—In *St. Louis, I. M. & S. R. Co. v. Hendricks* (1886) 48 Ark. 177, 3 Am. St. Rep. 220, 2 S. W. 783, and in *St. Louis & S. F. R. Co. v. Kilpatrick* (1899) 67 Ark. 47, 54 S. W. 971, where the decisions in favor of the plaintiffs were rendered upon the ground that the specific evidence as adduced was sufficient to show that the brakeman in question was authorized to eject trespassers, the court seems

to have proceeded upon the assumption that, in the absence of such evidence, the actions would not have been maintainable.

Georgia.—In *Georgia R. & Bkg. Co. v. Wood* (1894) 94 Ga. 124, 47 Am. St. Rep. 146, 21 S. E. 288, it was denied that any presumption could be entertained that the removal of trespassers from freight trains was within the scope of a brakeman's duties. Yet in *Fink v. Ash* (1895) 99 Ga. 106, 24 S. E. 976, a verdict against receivers was held to be warranted by evidence that employees of railroad company ordered plaintiff's son, who was a trespasser upon its train, to get off; that without stopping the train, they threw missiles at him, and that, in attempting to avoid them, he fell under the train and sustained fatal injuries. No opinion was delivered, and it is not apparent in what grounds a decision which seems to conflict with the earlier one cited was intended to rest.

Illinois.—The doctrine stated in the text was applied in *Illinois C. R. Co. v. King* (1899) 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 352, affirming (1898) 77 Ill. App. 581; *Chicago & W. I. R. Co. v. Ketchum* (1902) 99 Ill. App. 660 (freight train); *Chicago, R. I. & P. R. Co. v. Moran* (1906) 129 Ill. App. 38, former appeal (1904) 117 Ill. App. 42 (trespassing newsboy thrown from a passenger train); *Illinois C. R. Co. v. Black* (1905) 122 Ill. App. 439 (freight train).

In *Chicago, R. I. & P. R. Co. v. Brack-*

said to be referable to the consideration "that it is well established, as a matter of rule and of common observation, that the conductor is

man (1898) 78 Ill. App. 141, the court argued thus; "If a clerk or a ticket agent or a baggage master had done the act here complained of, we think it would not be claimed the company would be liable for the result. It is true this brakeman had a right to be upon the train, and in the discharge of his duty might have occasion to be upon all parts of it, but he was there as a brakeman, to set brakes on signal and when approaching stations, to couple cars in making up the train, and in leaving and taking on cars at stations, and generally to perform the duties which are recognized as belonging to the position of a brakeman on a freight train, and he was not there to manage or control the train. He was subordinate to the conductor. His duty was to report to the conductor any defects he discovered in the machinery of the train, and the presence of trespassers thereon, and the conductor alone was given authority to decide what should be done. If a servant with such limited duties can, by a wilful and wanton act outside the line of service he was hired to perform, impose a liability upon his master in favor of a mere trespasser, then the rule that the master is only liable for the acts of his servant which he expressly directed, or which have been done in the line of the servant's duty and within the scope of his employment, must, as it seems to us, be considered as abandoned. We have reached the conclusion that the prevailing rule, and the one supported by the greater weight of authority and by the better and stronger reasons, is that a freight train brakeman has no implied authority to eject passengers. The proof in this case did not show any such express authority, but on the contrary showed that it did not exist." The statements in Wood's Railway Law, § 316, and Elliott on Railroads, vol. 4, § 1255, were referred to with approval.

Indiana.—For cases that proceeded in the doctrine stated in the text, see *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85 (passenger train); *Lake Shore & M. S. R. Co. v. Peterson* (1895) 144 Ind. 214, 42 N. E. 480 (freight train) (rehearing denied in [1895] 144 Ind. 225, 43 N. E. 1). A

railroad company is not liable for the ejection of a passenger by a brakeman, while a conductor is in charge of the train, without directions from the latter, unless he has been expressly authorized to make ejections. *Lake Shore & M. S. R. Co. v. Peterson* (1895) 144 Ind. 225, 43 N. E. 1, denying rehearing in (1895) 144 Ind. 214, 42 N. E. 480.

Iowa.—The doctrine stated in the text was originally held in this state, but has now been abandoned. See note 7, *infra*.

Michigan.—In *Randall v. Chicago & G. T. R. Co.* (1897) 113 Mich. 115, 38 L.R.A. 666, 71 N. W. 450, the plaintiff's contention was based upon the rules of the company, which were put in evidence. It was urged that, inasmuch as the rules provided that freight trains should not carry passengers, and the brakemen of the defendant company were required to familiarize themselves with these rules, the brakeman must have known that it was his duty, and that he was authorized by the company, to eject the plaintiff from this train, and that, in ejecting him, he was in the discharge of a duty which the company had imposed upon him. On the other hand, it is argued on behalf of the defendant that, under one of the rules, brakemen of freight trains were subject at all times to the orders of the conductors of the trains; that the rules nowhere implied that a brakeman had authority to eject, or that the company had placed upon the brakemen the duty of ejecting, even trespassers from freight trains, but that they were subject to the orders of the conductors of such trains; that, since, in the case under review, the brakeman was not shown to have received any such orders, his act in ejecting the plaintiff was not the act of the defendant company. It was conceded that there was no specific proof that the brakeman was authorized to do that act, unless the rules of the company were to be construed in the sense contended for by the plaintiff. The court said: "We think the rules cannot be so construed. It is true that passengers are not permitted to ride upon this class of freight trains, and that brakemen are required to familiar-

in control of the cars, and that it is his duty to see that the cars are protected from trespassers; that it is the brakeman's duty to exercise

ize themselves with these rules; but under rule 172 the brakemen must take their orders from the conductor. There is consequently no proof in the case that the brakeman here had authority from the company to do the act complained of." But in *Verlinde v. Michigan C. R. Co.* (1911) 165 Mich. 371, 130 N. W. 317, this court seems to have gone very far in the direction of the doctrine discussed in the next paragraph. See § 2354, note 2, *post*.

Missouri.—In *Farber v. Missouri P. R. Co.* (1893) 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, where a brakeman had pushed a minor off a moving freight train, the court made the following remarks: "It is assumed by plaintiff that this court should take judicial notice that it was within the line of the brakeman's employment to put trespassers off of the train from which he was expelled, and the defendant is necessarily liable for the reckless performance of this duty by the brakeman. The learned counsel cites us to no well-considered case in which such a presumption is indulged. . . . On the contrary, in Wood's Railway Law, § 316, it is said 'the conductor of a train, being in charge of it and having full control over it for the time, represents the company as to any matter connected with its management and control, and for an act done by him in the line of his duty, as the ejection of a trespasser from the train, etc., the company would unquestionably be liable; but for the act of a brakeman of the train who, without the direction of the conductor, should remove a trespasser from the train, the company would not be liable, unless express authority to do an act to which the act complained of is incident is shown, because the act is not one which comes within the scope or line of his duty.' . . . We think that the powers and duty of the brakeman were matters of fact, to be determined by evidence, and we are not justified in taking *ex officio* notice of their extent or character. Moreover, there is no reason for assuming, in the absence of proof, that the brakeman on a freight train has been clothed with the power to remove persons who shall endeavor to take passage on the train.

It was not to be presumed that anyone would violate the law, and attempt to ride in the first place, and hence, require his services for such purpose; nor that this subordinate would be so invested when he had a superior present in person of the conductor, upon whom such duties usually devolve. *International & G. N. R. Co. v. Anderson* (1891) 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039. Having reached this conclusion, it must be apparent that there was no evidence whatever tending to show that the brakeman was employed, either generally or specially, to remove passengers from the train." The same doctrine had previously been applied by the court of appeals in an action brought by the father of the plaintiff in the above case. See (1888) 32 Mo. App. 378.

See also *Krueger v. Chicago & A. R. Co.* (1900) 84 Mo. App. 358 (plaintiff was struck in the face with a lantern and kicked out of a freight car); *Curtis v. Chicago, R. I. & P. R. Co.* (1903) 99 Mo. App. 502, 508, 73 S. W. 1133 (passenger train); *Marcum v. Missouri, K. & T. R. Co.* (1909) 139 Mo. App. 217, 122 S. W. 1148 (freight train).

Ohio.—In *Whistler v. Cowan* (1903) 26 Ohio C. C. 511, affirmed without opinion in [1904] 70 Ohio St. 514, 72 N. E. 1167, it was held that, where a regular freight train is in charge of a regular crew, consisting of a conductor, engineer, fireman, and necessary brakemen, the authority of a brakeman to eject trespassers from it could not be implied in the absence of evidence as to custom, course of conduct, or instructions.

Pennsylvania.—The doctrine now under discussion is apparently adopted in this state. See *Towanda Coal Co. v. Heeman* (1878) 86 Pa. 418. But in that case there was affirmative evidence negating the right of recovery. See § 2354, note 1.

In *Enright v. Pittsburg Junction R. Co.* (1901) 198 Pa. 166, 168, 169, 53 L.R.A. 330, 82 Am. St. Rep. 795, 47 Atl. 938, the gist of the evidence, was that a brakeman, "while in the line of his duty," caused a trespassing boy, by his threats, to make an attempt to leave the train while it was moving

this control only when he is authorized by the conductor to do so, and that, in the absence of proof of such authorization, he will not be re-

rapidly. The only question actually discussed was whether the brakeman had been guilty of negligence. The court said: "The simple proposition to be determined here is the right of the defendant by its employee to endanger the life of a child of tender years by compelling him to alight from a freight train while it is moving at a rapid speed. The boy was not injured by reason of the dangerous position in which he placed himself, but because of the careless and reckless act of the brakeman in causing him to alight while the train was in motion. The cause of the boy's injury, therefore, is directly attributable to the negligent act of the defendant's employee in frightening him so that he attempted to quit the train in the face of imminent danger. We think the defendant company was negligent, and should answer for its conduct." The assumption entertained in this instance, that the brakeman's act was within the scope of his employment, seems to render this decision essentially inconsistent with the one just cited, unless the court intended to predicate an absolute duty as regards seeing that young children are not removed from a train in an improper manner. But, as the attention of the court was not directed to the earlier case, it is impossible to say upon what ground it may hereafter undertake to explain away the apparent conflict.

Texas.—In *International & G. N. R. Co. v. Anderson* (1891) 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039 (brakeman forced a man off a freight car while he was attempting to mount the ladder), there was testimony to the effect that the brakemen on defendant's road were seen to put persons off the train and to keep them from getting on. The only other testimony bearing upon the question of the authority of the brakeman who was alleged to have put the plaintiff off the train was that of a conductor in the service of the defendant company, who testified that it was the duty of the company's conductors to eject trespassers from the train; that if they wished, they could delegate this authority to the brakeman, but that without such delegation a brakeman had no authority to do so;

that some conductors enforced the rule in person, and others through their brakemen. The jury were instructed "that a railway company is not responsible for the wilful trespass or unlawful acts of agents done clearly outside of the scope of their employment; but when a brakeman on a train undertakes to keep persons from getting on his train, or to expel them, in the absence of proof to show that this was outside of the scope of his duties, there would be no presumption that such was the fact." The court said: "The practical effect of this instruction was to induce the jury to believe that the burden was upon the defendant to show that the brakeman who ejected the plaintiff from the car was not acting within the scope of his authority. The burden was upon the plaintiff to prove the facts which would entitle him to recover. When a recovery is sought of the master for an injury inflicted by his servant, the plaintiff must show that the servant did the wrong while acting within the scope of his employment. It follows that, unless we can say that a brakeman has an implied authority to eject trespassers from the train upon which he is employed, the charge was error, for which the judgment must be reversed. . . . We fail to see that any necessity exists for conferring authority upon a brakeman to eject trespassers from the cars. The conductor has this power, and it is to be presumed power also to call to his aid the other servants of the company upon the train. The name 'brakeman' would imply that it is the principal duty of that servant to attend to the brakes, and it is not to be inferred that he has control over the train or any particular car or set of cars. Accordingly, we find it distinctly held that a brakeman has no implied authority to eject trespassers from the cars. *Towanda Coal Co. v. Heeman* (1878) 86 Pa. 418. We have found no case which, when carefully analyzed, justifies a holding that a brakeman has such implied authority. We conclude that, for the error in the charge quoted, the judgment must be reversed."

For other Texas cases in which the same general doctrine was recognized,

garded as acting within the scope of his authority.”³ It may also be regarded as deducible from the general rule of evidence, that “a court cannot take judicial notice of the extent and character of the duties required of or performed by “the various servants of a railway company.”⁴ In one case it was laid down that the fact that the brakeman’s object in removing the trespasser was to serve his employer would not of itself suffice to bring the act within the scope of his employment.⁵

The right of recovery has been denied in a case where a specific rule of the defendant company provided that brakemen were “in general the servants and guardians of the train, to do all the work required during its trip and to protect it from danger.”⁶ This decision, it will be observed, amounts implicitly to a disapproval of the conception to which the second doctrine noticed below has been referred.

c. Doctrine that a brakeman is presumptively authorized to eject trespassers.—According to another group of authorities, a brakeman is presumed, merely by virtue of his position and functions, to be invested with authority to eject trespassers.⁷ The rationale of this doc-

see *Texas & P. R. Co. v. Black* (1894) 87 Tex. 160, 27 S. W. 118 (boy knocked off moving train by a missile); *Texas & P. R. Co. v. Mother* (1893) 5 Tex. Civ. App. 87, 24 S. W. 79 (boy killed in trying to comply with threatening order to get off a moving freight train); *Texas & P. R. Co. v. Moody* (1893) — Tex. Civ. App. —, 23 S. W. 41 (trespasser kicked off a moving train); *Texas & P. R. Co. v. Hayden* (1894) 6 Tex. Civ. App. 745, 26 S. W. 331; *Houston & T. C. R. Co. v. Grigsby* (1896) 13 Tex. Civ. App. 639, 35 S. W. 815, rehearing denied in (1896) 13 Tex. Civ. App. 643, 36 S. W. 496 (trespasser was frightened into jumping from a moving train); *Galaviz v. International & G. N. R. Co.* (1896) 15 Tex. Civ. App. 61, 38 S. W. 234 (ejection from moving freight train); *Texas & P. R. Co. v. Black* (1900) 23 Tex. Civ. App. 119, 57 S. W. 330; *Houston & T. C. R. Co. v. Rutherford* (1901) — Tex. Civ. App. —, 62 S. W. 1069, affirmed in (1901) 94 Tex. 518, 62 S. W. 1056 (ejection from moving freight train); *Houston & T. C. R. Co. v. Bowen* (1904) 36 Tex. Civ. App. 165, 81 S. W. 80 (trespasser shot and killed while in course of being ejected).

Virginia.—The doctrine stated in the text was recognized in *Chesapeake & O. R. Co. v. Anderson* (1896) 93 Va. 650, 25 S. E. 947.

³ *Dixon v. Northern P. R. Co.* (1905) 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620.

⁴ *Farber v. Missouri P. R. Co.* (1893) 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, affirming (1888) 32 Mo. App. 378.

⁵ *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415. As to the general rule here applied, see § 2287, *ante*.

⁶ *Lake Shore & M. S. R. Co. v. Peterson* (1895) 144 Ind. 214, 42 N. E. 480 (rehearing denied).

⁷ *Federal courts.*—The doctrine stated in the text was taken for granted in *Johnson v. Chicago, St. P. M. & O. R. Co.* (1899) 94 Fed. 473, the action being dismissed by Shiras, J., on the ground that the facts were not such as to call for the application of the rule as to the liability of the company for an ejection made in such a manner as to show “a wilful or reckless disregard of the safety of the person evicted.” As to the disposition of this case in the supreme court of Iowa, see *infra*.

trine is that a brakeman, being one of the servants to whose custody and care a train is committed, may properly be regarded as having an implied authority to do whatever may be necessary for the purpose of

Iowa.—In *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415, the court said with reference to an instruction: "It appears to us that the act of an employee of a railroad company in removing a trespasser from a train cannot be considered the act of the company, unless he was engaged generally to remove trespassers, or specifically to remove the particular trespasser. The court below appears to have thought otherwise." On the second appeal (1884) 64 Iowa, 568, 21 N. W. 86, the plaintiff was held to be entitled to recover under Iowa Code, § 2071 (1307), which provides that all railroad companies "shall be liable for all damages sustained by any person in consequence of the wilful wrongs, whether of commission or omission, of their agents and employees, when such wrongs are in any manner connected with the use and operation of any railroad . . . on or about which they shall be employed." From the language used by the court it would seem to be a reasonable inference that it had changed its views since the first appeal was heard, and was of opinion that brakemen are presumptively authorized, as an incident of their functions, to eject passengers. But there was also specific evidence that the brakeman in question had such authority. See § 2354, *post*.

In *Johnson v. Chicago, St. P. M. & O. R. Co.* (1902) 116 Iowa, 639, 88 N. W. 811, where the plaintiff had been forced by the kicks of a brakeman to drop from the ladder of a rapidly moving train, the direction of a verdict for the defendant was held to be error, for the reason that the brakeman, "in the line of his duty," could lawfully expel a trespasser. A verdict rendered for the plaintiff on the second trial was sustained in (1904) 123 Iowa, 224, 98 N. W. 642. These decisions show an unmistakable departure from the rule applied on the first appeal of the *Marion Case*, *supra*. Commenting on the dismissal of the action by Shiras, J. (see *supra*), the court said that the evidence submitted to him must have been materially different from that under review.

Kansas.—In *Kansas City, Ft. S. &*

G. R. Co. v. Kelly (1887) 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, where the defendant was held liable for the act of a brakeman in compelling a boy to jump from a freight train running at the rate of about 8 miles an hour, the court said: "The evidence does not disclose what the duties of a brakeman are on the defendant's road. In the absence of a rule defining his duties, we presume that, under the general scope of his employment as a servant of the company on the train, concerned in its management and aware of the fact that a person who goes upon the train with the intent to ride thereon without paying fare is a trespasser, the implied authority in such case is an inference from the nature of the business and its actual daily exercise according to common observation and experience."

In *O'Banion v. Missouri P. R. Co.* (1902) 65 Kan. 352, 69 Pac. 353, the question whether a brakeman who had forcibly ejected a trespasser from a freight train had done so in the discharge of his duty, or for the purpose of extorting money from him, or out of resentment toward him for his failure to pay a sum of money demanded by the brakeman for the privilege of riding on the train, was held to have been properly left to the jury.

Kentucky.—In *Smith v. Louisville & N. R. Co.* (1893) 95 Ky. 11, 22 L.R.A. 72, 23 S. W. 652, the court proceeded upon the ground that, in the absence of specific evidence showing that the tort-feasor had no power to eject intruders, the only question left for submission to the jury was whether his expulsion of a boy from a moving freight train was done for the purpose of ejecting him, or merely with the malicious object of injuring him. The *Hoffman Case*, note 10, *infra*, was relied upon, but that decision can scarcely be regarded as a perfectly clear authority for the doctrine of a conclusive presumption which it was supposed to embody.

In *Illinois C. R. Co. v. West* (1901) 22 Ky. L. Rep. 1387, 60 S. W. 290, the court emphasized the fact that "there is really more necessity for his acting promptly in keeping trespassers

off a long freight train in many cases than on passenger trains, where the conductor is more accessible, and to stop the train is less difficult."

See also *Louisville & N. R. Co. v. Bernard* (1896) 18 Ky. L. Rep. 672, 37 S. W. 841 (trespasser prevented from climbing on to a slowly moving freight car); *Thuman v. Louisville & N. R. Co.* (1896) 17 Ky. L. Rep. 1343, 34 S. W. 893 (ejection from moving freight train); *Elliott v. Louisville & N. R. Co.* (1899) 21 Ky. L. Rep. 630, 52 S. W. 833 (no off. rep.) (similar facts); *Illinois C. R. Co. v. McManus* (1902) 24 Ky. L. Rep. 81, 67 S. W. 1000 (similar facts); *Williams v. Southern R. Co.* (1903) 115 Ky. 320, 73 S. W. 779 (similar facts). *Cincinnati, N. O. & T. P. R. Co. v. Brandenburg* (1911) 142 Ky. 814, 135 S. W. 296 (ejection from passenger train).

Louisiana.—In *Dersey v. Kansas City, P. & G. R. Co.* (1901) 104 La. 478, 52 L.R.A. 92, 29 So. 177, the defendant was held liable, where a trespasser was pelted with stones by a brakeman in order to make him get off the rods under a freight car, and, in trying to escape, fell under the wheels. The court approved an instruction to the effect that "the removal of trespassers from cars is, as a matter of law, within the implied authority of the company's servants, including the brakemen." The court said: "The brakeman was not, at the time, seeking to protect his own, or resisting the act of a trespasser in so far as he was concerned, but was acting for the employer, seeking to get rid of a trespasser who had placed himself in an exposed position, dangerous to himself, and against every requirement of the rules regulating the business and operations of the defendant company. The act complained of was done in the course of his employment. We understand that the first duty of the brakeman is to apply the brakes, either to enable the car to move onward or to stop; but there are, we take it, other duties he is at times called upon to perform. He is under the direction of the conductor, who is himself responsible for the proper management of the train. Without an express order, we take it that, in aiding to man the train properly, he may, of his own motion, see to the removal of a trespasser who is stealing a ride, suspended under the car on very near the running

gear of the cars, in the condition of which, the brakeman, as an employee, must to some extent be concerned. . . . We are decidedly of the opinion that the character of the employment placed the onus of proof on the defendant, showing that its brakeman was not expected to and never exercised any supervision over the appliances under the cars."

Minnesota.—The doctrine stated in the text was affirmed in *Brevig v. Chicago, St. P. M. & O. R. Co.* (1896) 64 Minn. 168, 66 N. W. 401 (threats caused plaintiff to jump from a moving freight train); *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047; *Penas v. Chicago, M. & St. P. R. Co.* (1910) 112 Minn. 203, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926.

Mississippi.—In *Illinois C. R. Co. v. Latham* (1894) 72 Miss. 32, 16 So. 757, the court seems to have proceeded on the hypothesis that the ejection of a trespasser from a freight train is *prima facie* within the scope of a brakeman's employment. But the ruling is an indecisive one in the present connection, as the actual ground upon which the company's liability was denied was that the tort-feasor had acted for the accomplishment of an independent purpose of his own.

Montana.—In *Golden v. Northern P. R. Co.* (1909) 39 Mont. 435, 436, 34 L.R.A.(N.S.) 1154, 104 Pac. 549, 18 Ann. Cas. 886 (where a brakeman threatened and pursued plaintiff till he fell off a moving freight train), the court, in discussing an exception taken by the defendant to the admission of parol evidence and printed rules bearing upon his duties, made the following remarks: "Counsel for plaintiff contends that these rulings could not have been prejudicial, for the reason that there is a presumption arising out of the relations of a brakeman to the railway company and its trains, and the character of the employment,—which are matters of common knowledge,—that he has such authority, and that it was not incumbent upon plaintiff to adduce any evidence on the subject. Hence the evidence was wholly immaterial, and could not have affected the result. If this presumption obtains, and the court would have been justified in so instructing the jury, the contention of defend-

ant's counsel is without merit, without regard to the form in which the evidence was adduced. . . . The duties of a brakeman are less extensive than those of a conductor, who has general charge of the train; but it would be going too far to say that the brakeman's duty extends no further than to turn brakes, couple cars, and the like, and that he may stand by, unless expressly authorized and required by the company to protect its property from trespassers, and allow them to commit trespasses without restraint. A brakeman who would do this would not long retain his place after knowledge of his conduct came to his superior officers. On the other hand, if, after ejecting a trespasser, he were charged with an assault upon him, it could not be doubted that the fact that the act charged as unlawful was committed for the purpose of protecting the property of the company, no more force having been used than the circumstances required, would be a complete defense. Under some of the foregoing authorities, the presumption is only *prima facie*, while under others it is conclusive. We are inclined to follow the former. Revised Codes, §§ 7961, 7962. For the purposes of this case, however, it is immaterial which rule is applied. The defendant offered no evidence as to the duties of a brakeman. Therefore it cannot complain of the rulings in question."

New Jersey.—The doctrine stated in the text was affirmed in *West Jersey & S. R. Co. v. Welsh* (1898; Err. & App.) 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736 (freight train).

North Carolina.—In *Pierce v. North Carolina R. Co.* (1899) 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399, where the company was held responsible for the misconduct of a brakeman who threw coal at a boy on the tender of an engine which was shunting cars in the yard, and frightened him so that he jumped off and was run over, the precise position of the court with regard to the onus of proof is not clearly defined. But the language used in the later case of *Cook v. Southern R. Co.* (1901) 128 N. C. 333, 38 S. E. 925, seems to import a definite adoption of the theory now under consideration. The company was there held liable for injuries received by a man at whom, while he was clinging to a rod under a box car, a

flagman and a brakeman threw a missile, thus frightening him so that he tried to get off while the car was moving. The court said: "It can make no difference to him whether the chief in charge of the assault wore the epaulet of a conductor, the sergeant's chevron of a flagman, or the corporal's stripes of a brakeman, or, indeed, if the stone thrower had been a lesser servant, a private perhaps, in the carrier hierarchy. It was within the scope of the authority of a flagman or brakeman to eject or expel the plaintiff. Indeed, the flagman was asked by defendant's counsel what he did with tramps when he found them on the train. To which he replied that it 'depended on where he found them.' But independent of this, the flagman and brakeman were there in the service of the company, and if, as plaintiff testified, by assault and threats, they made him get off a car moving 4 or 5 miles an hour, and the conductor did not restrain them, the company is liable for this wrongful act of its servants, if such wrongful act caused injury to the plaintiff. The conductor, by his standing orders and supervision of those under him, should have prevented the assault by them upon the plaintiff, even upon a trespasser. The plaintiff could have been legally ejected by any employee, if done with no more force than was necessary, and in a proper manner. It is the manner in which the plaintiff was ejected, and not the rank of the servant ejecting him, of which he has cause to complain, and which makes the master liable. If the conductor had thrown the rocks at the plaintiff, it would in the same sense have been outside the scope of his employment, for the conductor had no more authority to assault the plaintiff than the flagman or brakeman had."

See also *Hayes v. Southern R. Co.* (1906) 141 N. C. 195, 53 S. E. 847 (ejection from moving freight train).

Oklahoma.—In *Moore v. Atchison, T. & S. F. R. Co.* (1910) 26 Okla. 682, 110 Pac. 1059, the court took it for granted that the act of a brakeman in wilfully kicking the plaintiff and causing him to fall from a moving train which he was attempting to enter was within the scope of his authority.

Washington.—In *Dixon v. Northern P. R. Co.* (1905) 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79

protecting the property intrusted to his guardianship.⁸ In any jurisdiction where it prevails, the railway company is charged with the onus of proving by affirmative evidence that the brakeman in question transcended his authority.⁹

Pac. 943, 2 Ann. Cas. 620, the position taken was that the railway company will be liable for injuries caused by a brakeman's wantonly and wilfully kicking a trespasser from a moving car to his injury, unless entire absence of such authority is shown by the company. The court, after referring to the class of cases cited in notes, *supra*, said: "There is, however, another line of authorities, most of which are of a more recent date, holding that it is a matter of common knowledge and observation, of which courts will take judicial notice, that it is the duty of a brakeman to exercise supervisory control over the cars,—a control which includes within its limits the right to protect the cars by ejecting trespassers therefrom; and we are inclined to yield our allegiance to this doctrine. It must be evident to everyone who travels on railroad trains that, while it may be true theoretically that the conductor is in charge of the cars, his special duties are more of a business character; that he looks out for the business of such train,—if a passenger train, for the collection of fares and the proper exercise of the duties of the company towards passengers; if of a freight train, for the proper handling and transmission of freight, and for the direction of the movements of the train in a general way. The business of a brakeman, while it may have originally been restricted to the operation of brakes, has grown into a supervision, to a certain extent, of the cars. . . . It may be that these powers have increased with the changing conditions incident to railroading, and that the observation of this increase in his powers is the cause of the change in judicial decision on this question, for it is noticeable that most of the cases holding to the theory that the brakeman is not acting within the scope of his authority or employment when ejecting a trespasser from the train were decided many years ago, while the great majority of the cases holding to the other doctrine are of very modern announcement. While this authority of which we have been speak-

ing may not be strictly conferred upon the brakeman by the terms of the employment contract, we think that it must be a matter of common observation that such authority is an inference from the nature of the business and its actual daily exercise." The court cited with approval Patterson, *Railway Acci. Law*, p. 109, and Baldwin, *Am. Railroad Law*, p. 254.

⁸ *West Jersey & S. R. Co. v. Welsh* (1898; Err. & App.) 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736, where the court relied upon the general principle formulated by Blackburn, J., in *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week. Rep. 127, 11 Cox, C. C. 621. See § 2465, note 1, *post*.

The same principle was also relied upon in *Brevig v. Chicago, St. P. M. & O. R. Co.* (1896) 64 Minn. 168, 66 N. W. 401, where the court remarked: "While the authority of a freight train brakeman is quite limited, his duties do not consist merely of turning the brakes. By universal custom he has police duties as to cars immediately under his charge." "The court quoted a passage in Patterson's *Railway Acci. Law*, 111, where the learned author formulates, on the basis of the principle of Blackburn, J., a rule specially applicable to trespassers on trains.

⁹ The justice of throwing upon the brakeman's employer the burden of proving the actual extent of his powers was thus dwelt upon in *Dixon v. Northern P. R. Co.* note 7, *supra*: "The railroad company, which has the knowledge of its contractual relations with its servants, can show lack of actual or implied authority, or usage or custom which would raise the presumption of implied authority, if such authority or custom does not exist in the management of its business; while the party who is injured has not the benefit of this knowledge, and can only judge of who is in authority on a railroad train by appearances. Railroad employees, as a rule, are dressed in certain garbs that distinguish them as railroad men, and

d. Doctrine that a jury is warranted in inferring authority of brakeman to eject trespassers.—Another doctrine is that the fact of the tort-feasor's having been employed as a brakeman warrants the jury in inferring that he was impliedly authorized to eject trespassers.¹⁰ But for practical purposes the distinction between this doctrine and the one adverted to in the preceding subsection is not important. In view of the well-known proclivity of juries to favor plaintiffs in actions for personal injuries, especially where the defend-

when a demand is made upon a passenger, or even upon a trespasser, by one of these men so distinguished, the presumption is that he speaks with authority, and the other party has no way of determining that he does not, except at his peril. It would be an impracticable thing to ask of a person, when a demand is made upon him by a brakeman in regard to something which was connected with the business of the operation of the train, that he should go the length of a train to find a conductor to ask him if the employee with whom he was in controversy had authority to make the demands which he was making."

¹⁰ *Massachusetts*.—In *Planz v. Boston & A. R. Co.* (1892) 157 Mass. 377, 17 L.R.A. 837, 32 N. E. 356, where the contributory negligence of the plaintiff was held to be a bar to an action for injuries caused by expulsion from a moving freight train, the court made the following remarks: "It does not expressly appear to have been within the scope of the brakeman's employment to order persons found riding on the train without leave to get off, and it has sometimes been held that an ordinary brakeman of a freight train has no authority to give such an order. *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415; *Towanda Coal Co. v. Heeman* (1878) 86 Pa. 418. But in considering this case we prefer to assume in favor of the plaintiff, without deciding, that it was a question of fact for the jury whether Walton, from his general employment as a brakeman, had authority to represent the defendant in ordering a trespasser to leave the train. If he had, the defendant is liable for his negligence or misconduct in regard to the time or manner of doing it."

In *McKeon v. New York, N. H. & H. R. Co.* (1903) 183 Mass. 271, 97 Am.

St. Rep. 437, 67 N. E. 329, where a boy, when stealing a ride on the front platform of the baggage car of a passenger train, was recklessly pushed off by a brakeman while the train was in motion, the court said: "A brakeman has less authority than either [a conductor or engineer.] His duties primarily relate, as his name implies, to the management of the brakes. But common observation shows that on passenger trains they embrace much more, and that, so far as the management of the brakes on such trains is concerned, their duties have been largely superseded by the appliances in use. On passenger trains brakemen are required to look after the safety and comfort of the passengers, to protect the property of the company, and to see that fares are not evaded. The rules of the defendant company, as well as common observation, show this. And while the brakeman in question was not in any just sense a conductor or even a subconductor, we think that the jury were warranted in finding, as they must have found under the instructions of the judge, that it was within the scope of his authority to remove the plaintiff in a lawful manner from the platform, if he was there for the purpose of evading his fare. *Hoffman v. New York C. & H. R. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 337. . . . Unless brakemen upon passenger trains have, as incident to their employment, the power to remove trespassers, it would seem that the companies would not receive the full benefit from their services, to which they were entitled, and that the brakemen would or might be embarrassed in the discharge of their duties. We think that the jury were warranted in finding that the brakeman was justified in believing, from the circumstances under which he found the plaintiff and his companies on the platform, that they

ants are railway companies, it is seldom material whether a presumption of fact or a justifiable inference is taken as the basis of the rule of procedure under which the right of recovery is to be determined. It is also apparent that in this, as in other similar instances, any deduction which a court of last resort has pronounced to have been properly drawn from a certain fact or group of facts cannot, in any subsequent case, be treated as merely optional on the part of a jury. The effect of such a pronouncement, so far as the given jurisdiction is concerned, is that the appropriate conclusion from the supposed evidential elements is removed from the category of those which are

were there for the purpose of evading their fare, and that, in doing what he did, he was acting upon that belief, and within the general scope of his authority."

New York.—In *Hoffman v. New York C. & H. R. R. Co.* (1881) 87 N. Y. 25, 41 Am. Rep. 337, affirming (1878) 12 Jones & S. 1, where a boy eight years old was kicked from the steps of a passenger car by the conductor or brakeman, while the train was moving 10 miles per hour, a verdict against the company was sustained. The court said: "The regulations defining the duties of brakemen, introduced by the defendant, are not printed in the case and there is no proof before us of any specific authority given to brakemen to remove trespassers from the cars. It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train, concerned in its management, and fully cognizant of the obvious fact that intruders who jump upon the train for a ride, without intention of becoming passengers, are wrongfully there. Suppose a train standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault, that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case

is an inference from the nature of the business and its actual daily exercise, according to common observation and experience. But assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains, whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car, while the train is running at a speed of 10 miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless, and illegal; but the point is, was the act within the scope of the employment and authority? If it was, and the servant in doing what he did undertook to act for the company, and not for himself or for his own ends, the company is not exonerated, although the servant may have deviated from instructions in executing the authority, or may have acted without judgment, or even brutally. The removal of trespassers from the cars was, as we hold, within the implied authority of the defendant's servants on the train. The fact that they acted illegally in removing the plaintiff while the train was in motion does not exonerate the defendant. In some cases, where the existence of an authority in the servant to do a particular act is in controversy, and the authority is sought to be established by inferences and implications, it may be a material circumstance bearing upon the nonexistence of the authority sought to be implied, that the act was one which the master could not do himself without a violation of law. But this fact would not be decisive. No doubt, the kicking of the boy off the car was not

merely justifiable, to the category of those which are *prima facie* obligatory.

e. General remarks as to conflicting doctrines.—Of the three doctrines stated above, the most reasonable, it is apprehended, is that which treats the brakeman's implied authority as being the subject of a presumption favorable to the plaintiff. The broad consideration to which it is referred, *viz.*, that such an employee may properly be regarded as one whose ordinary duties include the protection of the cars against the intrusion of trespassers, would seem to constitute a satisfactory basis for such a presumption. There is, however,

only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in executing the authority confided to them; but in most cases where the master has been held liable for the acts of a servant, the tortious act was a breach of the servant's duty. In this case, the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own. This case was followed in *Molloy v. New York C. & H. R. R. Co.* (1882) 10 Daly, 453. (The description of train involved is not mentioned in the report.)

Some years before the decision in the *Hoffman Case* was rendered, it had been held that, where a brakeman stationed to prevent passengers from entering the cars without tickets seized, struck, and thrust from the car one attempting to enter without a ticket, the brakeman and the company were jointly and severally liable for the assault. *Priest v. Hudson River R. Co.* (1870; N. Y. Super. Ct.) 40 How. Pr. 456, 10 Abb. Pr. N. S. 60.

In *Lang v. New York, L. E. & W. R. Co.* (1889) 51 Hun, 603, 22 N. Y. S. R. 110, 4 N. Y. Supp. 565, the plaintiff's testimony was to the effect that one of the brakemen of the train threw coal at him, and that, as he was about to get off, he was hit in the back of the neck by a large lump of coal and knocked from the car. The complaint was dismissed on the ground that the brakeman was not shown to have any express authority from the defendant to

remove intruders from the train, and that none could be implied from his position or the nature of his employment, and the correctness of that ruling was the only question presented for review. The court was of the opinion that the case in all its aspects was for the jury.

In *Girvin v. New York C. & H. R. R. Co.* (1900) 52 App. Div. 562, 65 N. Y. Supp. 299, where a brakeman had, after ejecting a boy from a moving car, struck and kicked him, it was held to be error to rule, as a matter of law, that the master was not liable. The court was of opinion that he was engaged in the business of trying to drive the boy from the train, and was not engaged in effecting any purpose of his own. *McLennan, J.*, dissented on the ground that the brakeman had exceeded his authority in jumping after the boy, after he had left the train,—a manifest misconception. The decision of the majority of the appellate division was affirmed in (1901) 166 N. Y. 289, 59 N. E. 921.

In *Hill v. Baltimore & N. Y. R. Co.* (1902) 75 App. Div. 325, 78 N. Y. Supp. 134, 11 N. Y. Anno. Cas. 418, where a brakeman threw a lump of coal at a boy who was stealing a ride on a freight train, the only point disputed was whether the method adopted for expelling the trespasser was a proper one.

In *Clark v. New York, L. E. & W. R. Co.* (1886) 40 Hun, 605, affirmed in (1889) 113 N. Y. 670, 21 N. E. 1116 (Mem.), where the company was held liable under evidence which permitted the conclusion that the removal of the plaintiff from the platform or steps of the caboose of a freight train was caused by the act of an employee of the defendant on the car, in suddenly throwing water into his face, and that it was

no adequate warrant for the suggestion of one of the courts that it should be preferred on the ground that it represents the distinctively modern, as contrasted with the older, view of a brakeman's position.¹¹ Several of the cases in which it has been rejected are of so recent a date that the theory of a general and well-defined trend of judicial opinion toward its adoption is not sustainable.

f. Authority of brakemen having full control of trains.—By courts which have adopted the first and third theories explained in the preceding subsection, verdicts in favor of plaintiffs who had been ejected by a brakeman in a yard from a train of cars of which he was in full control have been sustained.¹² But it seems not improbable that, if the point should be presented, it would be held that, in the case of such an employee, the inference of the possession of authority as regards ejection is no less peremptory than in the case of a conductor.

g. Ejection prompted by personal motive.—Under the general principle discussed in § 2288, *ante*, it is clear that, irrespective of whether the ejection of the plaintiff was or was not an act within the scope of the authority of the brakeman in question, the resulting injury cannot be imputed to the railway company, if his conduct was prompted by a purely personal motive.¹³

done to remove him from the car, the tort-feasor was apparently a brakeman; but the report does not state this expressly.

The cases above cited have evidently destroyed the authority of *Hughes v. New York & N. H. R. Co.* (1873) 4 Jones & S. 222, where the liability of the company for the misconduct of a brakeman who threatened to kick a boy who was clinging to a moving car, and thus frightened him so that he jumped off and was run over, was denied on the ground that "it was unlawful to eject any trespasser so long as the train was . . . moving at a rate which rendered the ejection dangerous to life and limb," and consequently that, "although the facts create a presumption that the defendant had authorized the brakeman to remove intruders, this authority was not presumed to cover a case where it would be unlawful to remove a trespasser." One of the authorities relied upon was *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 127, 7 Am. Rep. 418. But that decision itself is no longer good law, in so far as it conflicts with the *Hoffman Case*, *supra*. Another case cited was *Sanford v.*

Eighth Ave. R. Co. (1861) 23 N. Y. 343, 80 Am. Dec. 286, where the tort-feasor was a conductor.

¹¹ See *Dixon v. Northern P. R. Co.* note, 7, *supra*.

¹² *Gulf, C. & S. F. R. Co. v. Kirkbride* (1891) 79 Tex. 457, 15 S. W. 495 (verdict for plaintiff sustained on the ground that the employee whose threats had frightened the plaintiff into jumping off a train of freight cars moving along a sidetrack in a yard was in charge of the train); *Bjornquist v. Boston & A. R. Co.* (1904) 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53 (jury justified in finding that a brakeman in sole charge of cars in a yard was authorized to eject trespassers.)

¹³ In *Illinois C. R. Co. v. Latham* (1894) 72 Miss. 32, 16 So. 757, a brakeman demanded money from a trespasser on the condition of his being permitted to remain on a train, and when he failed to get it, made no report to the conductor, as the rule prescribed, but cursed the trespasser and shoved him off the train while it was in motion. The court said: "In no just and reasonable view can it be held that, in the

2354. Same subject. Authority of brakemen determined with reference to specific evidence.— Specific evidence regarding the extent of a brakeman's authority to eject trespassers may fall under one or the other of the following categories:

(1) Evidence corroborative of the inference which would otherwise be drawn under the theory that no implied authority to eject trespassers is vested in a brakeman by virtue merely of his employment as a brakeman.¹

(2) Evidence which tends to rebut that inference, as, for example, that the ejection complained of was effected by a brakeman acting in conformity with general instructions issued by the defendant,²

acts of the brakeman thus done, was he acting in his master's business, or with intent to perform any duty due to the master. He was not demanding 'fare,' but money to put in his pocket. He did not eject him under the orders of the conductor, nor when, aside from any orders of the conductor, he first discovered him, nor at the next station. He was plainly attempting to extort money for his private use. . . . The question here is whether the brakeman, in doing what he did as he did it, was acting for the company, or in the accomplishment solely of his own independent, wilful, malicious, and wicked purposes; using his authority to eject trespassers, if any there was, as a mere cover under which to extort money from appellee, not for fare, but for his pocket."

¹In *Towanda Coal Co. v. Heeman* (1878) 86 Pa. 418, where a brakeman had undertaken to expel a boy from a moving coal train by throwing lumps of coal at him, the right of recovery was denied, on the ground that the only affirmative proof showed that the brakeman was not acting in pursuance of any authority conferred upon him, the assistant superintendent of the defendants having testified: "The duty of the conductor is to take charge of the running of the trains, and he may admit or exclude passengers therefrom; the brakemen have nothing to do with passengers; they do the general business of the train as far as labor is concerned,—putting on brakes and the general work of handling a train of cars."

In *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415, the court said that the circumstance of the brakeman's

having ejected the trespasser for the purpose of serving his employers was immaterial, if, in point of fact, the ejection was outside the scope of his employment. An instruction to the opposite effect was disapproved.

In *Chicago, R. I. & P. R. Co. v. Moran* (1906) 129 Ill. App. 38, a verdict in favor of a newsboy ejected from a moving passenger train was set aside on the ground that the evidence showed that the brakeman was empowered to eject trespassers only when he was directed by the conductor to do so.

In *Hartigan v. Michigan C. R. Co.* (1897) 113 Mich. 122, 71 N. W. 452, a verdict for plaintiff set aside on the ground that the evidence showed affirmatively that a brakeman of a freight train had no authority. The report does not show what the nature of the evidence was.

²In *Illinois C. R. Co. v. King* (1899) 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552, affirming (1898) 77 Ill. App. 581, the testimony of a brakeman on a freight train that his instructions were "to stop and put them off if we find someone beating their way; when you put a man off, you do not mean that you jerk him off,—put him off; it means we instruct him that he can't ride, and gets off,"—was held to show that it was within the scope of his directions and duties to put trespassers off the train.

In *Verlinde v. Michigan C. R. Co.* (1911) 165 Mich. 371, 130 N. W. 317, the defendant's rules required employees to render every assistance in their power in carrying out the rules and special instructions. Among such special instructions to freight conductors was one to the effect that tramps

or with a common practice known to and acquiesced in by his superiors.³

or other persons without legitimate business on trains must not be allowed to ride, and that every precaution must be taken to prevent cars being robbed while in transit. Held, that these facts justified the inference that a freight brakeman had implied authority to order trespassers off the cars.

In *Curtis v. Chicago, R. I. & P. R. Co.* (1903) 99 Mo. App. 502, 73 S. W. 1103, one of the defendant's rules stated that it was the "legal duty" of conductors and trainmen to eject persons found upon a train without ticket or pass, and refusing to pay fare, this duty to be performed in a reasonable manner and at a proper place, and that "trainmen must not under any circumstances eject a tramp or tramps or other trespassers upon a train while it is in motion, nor without first conferring with the conductor, who may delegate special authority to trainmen." It was contended for the defendant that under this rule no trainman had authority to eject a passenger without the consent of the conductor, that in doing so he acted outside of the line of his employment, and that in no event was he authorized to eject a passenger while the train was in motion. But the court was of opinion that the case came within the rule that the master, "by putting the servant in his place, becomes responsible for all his acts within the line of his employment, even though they are wilful and directly antagonistic to his orders." . . . It was a part of the duty of a brakeman to put a trespasser off the train, and in so doing he was in the course of his employment; and the fact that he exceeded his authority, or acted contrary to the rule which forbade him from ejecting a passenger from a moving train, did not excuse the defendant.

In *St. Louis & S. F. R. Co. v. Kilpatrick* (1899) 67 Ark. 47, 54 S. W. 971, the court held that where one of the duties of a brakeman is to see that persons do not enter the cars without a ticket, he is acting within the scope of his employment when he forcibly ejects a passenger who has entered upon the platform of a car without a ticket, and that it was competent to introduce parol evidence of the contents of a placard at-

tached to the car defining the duties of a brakeman in this respect.

In *Galveston, H. & S. A. R. Co. v. Lester* (1900) 24 Tex. Civ. App. 467, 59 S. W. 946, certain evidence, the purport of which is not stated, was held to warrant finding that a brakeman on a passenger train had power to eject trespassers.

³In *St. Louis, I. M. & S. R. Co. v. Hendricks* (1886) 48 Ark. 177, 3 Am. St. Rep. 220, 2 S. W. 783, evidence that brakemen were in the habit of ejecting tramps who refused to pay fare was held admissible on grounds thus explained: "It was the legal right of the company to eject persons attempting to ride on its trains without paying fare, and the legitimate object of the testimony was to show that the right was commonly enforced through the class of employees that ejected the plaintiff. It was a legitimate method of showing the duty of the employee, just as the fact of employment, as we have ruled above, could be shown by the exercise of duties in the master's service. The fact that a brakeman commonly performed the duty of ejecting such persons from the appellant's freight trains afforded reasonable presumption of inference that the brakeman who ejected the plaintiff acted in the line of his duty, if the jury chose to believe that he was ejected by a brakeman for the nonpayment of his fare." This decision was followed in *St. Louis, I. M. & S. R. Co. v. Pell* (1908) 89 Ark. 87, 115 S. W. 957.

In *Chesapeake & O. R. Co. v. Anderson* (1896) 93 Va. 650, 25 S. E. 947, one of the instructions asked for by the defendant enunciated the proposition that if a certain conductor was in charge of defendant's freight train at the time of the accident, with sole power, under defendant's rules and regulations, to determine who should be expelled from the train, and if one of the brakemen on the train, without authority from the conductor to expel the plaintiff, kicked the plaintiff from the train and thereby caused the injury complained of, the act of the brakeman was outside the scope of his duties, and did not render the defendant liable for the injuries resulting from the act. It was held that this instruction had been

(3) Evidence corroborative of the inference which would otherwise be drawn, either under the theory that a brakeman is presump-

properly refused. The court said: "It, in effect, excluded from the jury the right to take into consideration any evidence tending to show that while, under the rules of the company, no authority was conferred upon a brakeman to expel a trespasser from the train, it had been the custom of the brakeman to do so, and that this custom was known by the company, and it acquiesced in it. . . . In the case at bar it was proved by all the employees of the defendant company on duty on the train number ninety-nine, from which the plaintiff alleged that he had been kicked, and by Carlisle, superintendent of that division of the company's road, that the custom of its brakemen was to obey the rules of the company, and to report trespassers to their conductors respectively, and that the custom at the time of this accident was not for brakemen to violate the rules, and to put trespassers off themselves. The law in Virginia, as elsewhere, holds railroad companies, as common carriers, to the strictest responsibility in the selection of their servants and agents, and for the exercise of care and vigilance and skill on the part of all persons employed by them. Consequently, their servants and agents should be employed with a view to their intelligence, integrity, experience, and fitness to perform the duties that may be required of them by the rules and regulations of the company. To say that the railroad company shall not be allowed to prescribe the duties that the servant or agent it employs shall or shall not perform would be to establish a harsh rule indeed, and one under which the master might be held liable for an injury inflicted upon one to whom he owes no contractual duty, simply from the fact that the injury was inflicted by the wrongful act of a person who happens to be in his service. We think that the defendant's instruction number two was properly rejected, but, while we are of opinion that the expulsion of trespassers from the cars by a brakeman is not a duty incident to the position he occupies, and that authority to do so does not arise by implication, we are also of opinion that if it was the custom of the brakeman to

eject trespassers, and the railroad company know or ought to have known of the custom, authority to do so might be inferred, and the company be held liable for damages resulting from an improper and unlawful exercise of the authority by the brakeman." The opinion was expressed, however, that if, upon another trial of the case, the evidence to which the instruction was directed should be substantially the same as at the former trial, an instruction should be given in the form following: "If the jury believe from the evidence that the brakeman on the trains run by ex-conductor J. N. Karnes were in the habit of expelling trespassers from said trains without orders from said Karnes, but in his sight or hearing, they are instructed that all expulsions so made within the sight or hearing of said Karnes must be construed to be the acts of said Karnes, and must not be construed as a violation of the rules and regulations of the defendant that require its brakemen to report such trespassers to their conductors."

In *Houston & T. C. R. Co. v. Rutherford* (1901) 94 Tex. 518, 62 S. W. 1056, it was held (1) that, under an allegation that a brakeman of defendant railway acted within the scope of his authority in attempting to expel the plaintiff from a train, evidence was admissible of a custom of the defendant's conductors, known to its general officers, to delegate such authority to brakemen, in contravention of certain written instructions to the contrary; and (2) that proof of the toleration of a general custom of employees to disregard a published rule of the railway was sufficient to establish its waiver, although the particular employee whose act was in question was not shown to have been permitted or instructed to disregard it.

For other decisions which recognize the rebutting significance of evidence as to custom, see *Krueger v. Chicago & A. R. Co.* (1902) 94 Mo. App. 458, 462, 463, 68 S. W. 220; *Marcum v. Missouri, K. & T. R. Co.* (1909) 139 Mo. App. 217, 122 S. W. 1148; *Texas & P. R. Co. v. Mother* (1893) 5 Tex. Civ. App. 87, 24 S. W. 79; *Texas & P. R. Co. v. Black* (1900) 23 Tex. Civ. App. 119, 57 S. W. 330; *Houston & T. C. R. Co. v. Bow-*

tively authorized to eject trespassers, or under the theory that a jury is warranted in finding that he is so authorized.⁴

(4) Evidence which tends to rebut the inference which would otherwise be drawn under either of those theories. The opinion has been expressed that, "in view of the general nature of the occupation of brakemen, the evidence that authority to eject trespassers had been expressly withheld or forbidden should be clear and full, in order to overcome the presumption of the existence of such implied authority."⁵

The *ratio decidendi* in one case was that, as the master is liable for the acts of his servant within the apparent scope of the business intrusted to him, the mere fact that the company had given instructions

en (1904) 36 Tex. Civ. App. 165, 81 S. W. 80; *Texas & N. O. R. Co. v. Buch* (1907) — Tex. Civ. App. —, 102 S. W. 124, reversed upon another point in (1907) 101 Tex. 200, 105 S. W. 987. See report of second judgment of the appellate court in (1910) — Tex. Civ. App. —, 125 S. W. 316.

In *Texas & P. R. Co. v. Hayden* (1894) 6 Tex. Civ. App. 745, 26 S. W. 331, evidence had been given in favor of both parties, and the court in its main charge placed the burden of proof upon the plaintiff, generally. Held, that a special charge to the effect that the brakeman had no implied authority to eject persons from the train had been properly refused.

In *Krueger v. Chicago & A. R. Co.* (1900) 84 Mo. App. 358, a new trial was ordered on the ground that the brakeman who had ejected the plaintiff from a moving freight train had been allowed to testify that the ejection was in the line of his duties. It would have been proper to ask him whether he had ejected trespassers with the approval of his superiors.

⁴In *Kansas City, Ft. S. & G. R. Co. v. Kelly* (1887) 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, the brakeman, when asked how it happened that he stood by and let L., another brakeman, do all the talking with the plaintiff, testified: "I was to keep them off of my end of the train, and he was to keep them off of his."

In *Marion v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 568, 21 N. W. 86, where the court seems to have adopted the theory that a brakeman is presumptively authorized to eject trespassers

(see § 2353, note 7, *ante*), it was held that a man who had had fourteen years' experience as fireman, engineer, brakeman, and conductor, and who was then a conductor on defendant's road, was properly allowed to testify to the effect that brakemen were subject to the orders of conductors, that the conductors' general orders to brakemen were to eject all trespassers, and that the brakeman in question had received such orders. The evidence of other witnesses that they had seen brakemen ejecting trespassers was also held to be competent.

⁵In *Brevig v. Chicago, St. P. M. & O. R. Co.* (1896) 64 Minn. 168, 66 N. W. 401. This statement was approved in *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1908) 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047. There the defendant gave in evidence a rule which provided in the first place that its brakemen were expected to be vigilant and to perform their duties without special instructions from conductors, and contained specific and detailed instructions as to their duties on trains which carry passengers. Then followed a clause prohibiting brakemen from ejecting any person from a train except by special direction of the conductor and in his presence. The court was of opinion that the introduction of this rule did not overthrow the *prima facie* case, so as to entitle the defendant to a directed verdict in its favor.

In *West Jersey & S. R. Co. v. Welsh* (1898) 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736, the defendant's printed instructions to its freight con-

to its brakemen not to expel trespassers from trains, but to report the facts to the conductor, did not relieve the company from liability for any unnecessary violence used by a brakeman in ejecting a trespasser.⁶ But the preferable view is that the right of recovery is in nowise dependent upon whether the precise extent of the authority conferred upon the tort-feasor was or was not known to the trespasser. It has been laid down as undoubted law that, in cases of this description, "no question of estoppel arises, as might be the case upon a contract made with an agent clothed with apparent authority. The question is as to express or implied authority to do an act in respect to . . . [a person] with whom the company had no contract relation, and to whom it owed no duty except to refrain from wilful injury."⁷

2355. Same subject. Ejection of trespassers from trains by other descriptions of employees.—a. Locomotive engineers.—It may be regarded as settled law that the removal of a trespasser from any part of a locomotive may properly be found to have been within the scope

ductors and brakemen respecting their duties provided that a freight conductor was charged with responsibility for the vigilance and conduct of the men employed on the train, and that, among other things, he was "not to permit unauthorized persons to enter the cars or handle freight or ride upon the train." It was also stated that brakemen were under the direction of the conductor, and they were, among other things, to assist him in all things necessary for the safe and prompt movement of the train. It was urged that the bestowal of an express authority upon conductors with respect to the exclusion of trespassers implied, as regards brakemen, a prohibition against exercising such a function; but this contention did not prevail. The court said: "It is ingeniously argued that the exercise of the power of the company to remove trespassers from its trains is of a delicate and responsive character. The servant to whom such authority is given must determine who are trespassers, and, in expelling trespassers, he must take care to use only such force as is not excessive in degree or inappropriate in kind. Mistakes by the servant in these respects will render his master liable, and for this reason the employer may well desire to commit this nice duty to a competent and proper person. . . .

But, notwithstanding these considerations, I find myself unable to concede that the authority to remove trespassers from freight trains, which, as we have seen, is implied to have been conferred on those put in charge of such trains, has been either abrogated or annulled by the instructions which gave express authority to that effect to the freight conductor. If he had acted under that authority, the liability of the company would not have been in any respect diminished by its conditioning its grant of authority upon its being properly exercised. So, when the company committed to the conductor and his crew of brakemen the custody and care of its freight train, and thereby gave implied power to exclude and expel therefrom any unauthorized persons intruding thereon in contravention of the design and purpose of the company in running such a train, I think that the implication is not rebutted by proof that it had selected one of its servants and given him express authority in respect to such trespassers. The express grant is not inconsistent with the implied authority."

⁶ *Illinois C. R. Co. v. West* (1901) 22 Ky. L. Rep. 1387, 60 S. W. 290.

⁷ *West Jersey & S. R. Co. v. Welsh* (1898) 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. 736.

of the engineer's authority, whenever the evidence shows that the locomotive was under his control at the time when the removal was effected.¹ The liability of the company has also been affirmed in a case where the engineer threw pieces of coal at a trespasser who was standing on the platform of a mail car, directly behind the tender.²

¹In *Carter v. Louisville, N. A. & C. R. Co.* (1884) 98 Ind. 552, 49 Am. Rep. 780, where the plaintiff was thrown off an engine which was rapidly moving along a siding near a station, the court reasoned thus: "We think it too clear to be seriously questioned that those in charge of and operating the engine of the appellee, in transacting its business, had not only the right to remove from it any person wrongfully upon it, but authority to do so from the appellee. Authority to take charge of and operate the engine would include authority to remove from it anything or person whose presence upon it might in any way interfere with its use. Such authority is indispensably necessary to enable the servant to transact the business of the master. The question is not as to the manner of the removal, but whether those in charge of an engine may, by authority of the master, because they have control of it, remove from it persons who have wrongfully gotten upon it. . . . It can hardly be questioned, we think, that the removal of a person wrongfully upon an engine is within the scope of the employment of those to whom its care, management, and control have been intrusted."

In *Chicago, M. & St. P. R. Co. v. West* (1888) 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, affirming (1887) 24 Ill. App. 44, the engineer had, in a yard contrary to rules, invited a seven-year-old boy to ride upon the engine, and, upon seeing the yard master coming, directed him to get off while the engine was in motion. Held, that inasmuch as it was his duty under the rules to put any stranger off the engine, although he acted beyond the scope of his employment in inviting him upon the engine, and by that act alone could not render the company liable, a verdict finding the company to be liable for injuries received by the boy in getting off was proper.

The statement in the text is also supported by *Chicago, M. & St. P. R. Co. v. Doherty* (1893) 53 Ill. App. 282; *Gal-*

veston, H. & S. A. R. Co. v. Zantlinger (1899) 93 Tex. 64, 47 L.R.A. 282, 77 Am. St. Rep. 829, 53 S. W. 379 (on the previous appeal the only question discussed was the contributory negligence of the plaintiff [1898] 92 Tex. 365, 44 L.R.A. 553, 71 Am. St. Rep. 859, 48 S. W. 563, 5 Am. Neg. Rep. 477).

In *McKeon v. New York, N. H. & H. R. Co.* (1902) 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. 329, the court remarked, *arguendo*, that an engineer "probably" has authority to eject a trespasser from his engine.

²*Polatty v. Charleston & W. C. R. Co.* (1903) 67 S. C. 391, 100 Am. St. Rep. 750, 45 S. E. 932. The court, after referring to the decision in *Carter v. Louisville, N. A. & C. R. Co.* note 1, *supra*, proceeded thus: "Must an engineer stop and think what his powers of interference may be with trespassers riding on the cowcatcher of his engine, his tender, or the platform near his engine, who were engaged or may be engaged in doing an injury to the machinery of the master, which machinery is placed by the master under his charge?" The case last cited held that the engineer could throw out and off of his engine a trespasser while on the engine. The cowcatcher is a part of the engine, the tender thereto attached is a part thereto, and no great care will be taken to differentiate the case of a trespasser upon the platform next to the tender of the engine, and a trespasser upon the engine itself. We must not be understood as holding that an engineer is invested by the railway company with powers coextensive with those intrusted to a conductor, or that the powers of an engineer collide with those of a conductor. What we do hold is that *ex necessitate*, an engineer must be intended to have been clothed by his principal—the railway company—with power to preserve order and expel intruders and trespassers from his engine, cowcatcher, tender, and the platform adjoining the same, with a view actually to protect the property confided to him by his principal."

b. Porters.—The doctrine that a porter is, by virtue of his employment in that capacity, impliedly authorized to eject trespassers seems to be recognized in some cases, though not with perfect distinctness.³ The *ratio decidendi* in another case was simply that certain specific evidence—the effect of which is not stated in the report—showed that the act of the porter in question was beyond the scope of his authority.⁴

c. Baggage-men.—It has been held that a baggageman might properly be found to have acted within the scope of his employment in ejecting a trespasser from a baggage car, where the defendant's conductors and baggage-men were directed by general instructions to enforce rigidly a rule providing that no persons except certain employees should be allowed to ride in the car;⁵ and where the rules of the defendant conferred on the conductor the authority to eject trespassers, and required the baggageman to inform the conductor of trespassers on the train, and to aid in ejecting trespassers when called on by the conductor.⁶

³ In *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 7 C. P. 415, a case in which the injured person was a passenger, Willes, J., during the argument of counsel, remarked with regard to a porter: "If a man were in a carriage without a ticket and refused to come out, would there not be authority to treat him as a trespasser and pull him out, using no more force than necessary?"

That a railroad company is liable for the act of a porter in using unnecessary force to eject a trespasser from a moving train, either from misjudgment, negligence, or violence of temper, was laid down in *Harlinger v. New York, C. & H. R. R. Co.* (1882) 15 N. Y. Week. Dig. 392, affirmed in (1883) 92 N. Y. 661 (mem.)

In *Alabama, G. S. R. Co. v. Harris*, (1893) 71 Miss. 74, 14 So. 263, a verdict in favor of a plaintiff who had been assaulted and knocked off a car by a porter was set aside, but merely on the ground that the trial court had given an instruction which, as it imported that the defendant was answerable even if the assault was outside the scope of the assailant's employment, was applicable only upon the hypothesis that the ejected person was entitled to the rights of a passenger,—a point regarding which there was a conflict of evidence.

These two American cases, it should be observed, were decided by courts

which have adopted the second and third of the doctrines regarding the presumptive powers of brakemen. See § 2353 (c), (d), *ante*.

⁴ *Missouri, K. & T. R. Co. v. Brown* (1911) — Tex. Civ. App. —, 135 S. W. 1076.

⁵ *Rounds v. Delaware L. & W. R. Co.* (1876) 64 N. Y. 129, 21 Am. Rep. 597, affirming (1874) 3 Hun, 329, 5 Thomp. & C. 475.

⁶ *Daley v. Chicago & N. W. R. Co.* (1911) 145 Wis. 249, 32 L.R.A. (N.S.) 1164, 129 N. W. 1062, the court, after referring to some earlier cases, proceeded thus: "From the foregoing precedents it is easy to derive a rule that, where one is in charge of his master's vehicle with the right to use it for certain purposes, the jury may infer that it is within the scope of his employment to expel intruders or trespassers who attempt to use the vehicle for other unlawful, or unauthorized purposes. But where there are several servants the master may select which of these he will put in charge or upon which of these servants he will confer the authority to protect the property against trespassers. This will rebut such authority on the part of other servants if nothing else appear. This appears to have been done in the instant case, but still leaving with the baggageman a duty relating to trespassers who attempt to steal a ride

No liability, of course, can be imputed to the company where the tortious act complained of was done as a mere joke.⁷

d. Switchmen.—The ground upon which the plaintiff was in one case held to be entitled to recover was that, although under a rule of the defendant only conductors and brakemen were authorized to eject trespassers, this rule had, by customary violation, been abrogated in so far as it applied to switching crews.⁸

e. Flagmen.—In one case the defendant was held liable for an injury received by a boy who, while stealing a ride on a passenger train, was ejected from it by a flagman whose duty in regard to trespassers, as his own evidence showed, was to take them to the conductor, and, if directed to put them off, to request the engineer to stop the train.⁹ By this decision the powers of a flagman are assimilated to those of a brakeman under the second of the theories discussed in § 2353, *ante*. But in another case a special finding that such an employee was not authorized to eject trespassers was upheld by the court.¹⁰

on the baggage car. This duty did not include the ejection of the trespasser, but it did call on the baggageman, when he observed the act of trespass, to give information to the conductor, and thus call into action the forces provided by the master for the humane and careful ejection of the trespasser, as in case of the passenger without a ticket or pass who refused to pay fare. By the written rule the baggageman had the further duty to aid the conductor in ejecting a trespasser, when called upon by the former. In the instant case, instead of discharging this duty in the manner prescribed, the baggageman undertook, in his master's interest, to discharge it by the short cut of himself expelling the trespasser without calling the conductor or waiting for his orders. Had the baggageman not used excessive force his act would have been legal. But from these regulations of his employment the jury might infer that his act, while outside the express authority conferred upon him, was yet within the scope of his employment. They might say of the baggageman as was said by Justice Dodge in *Bergman v. Hendrickson* (1900) 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304: "It was his method of performing the duty delegated to him." Having observed the trespasser, he should have called the conductor and left the latter to deal with him, except that, if required by the conductor he

must assist in expulsion. He did not call the conductor nor wait for his orders, but undertook to expel the trespasser without this detail of procedure, and in so doing, as found by the jury, used excessive and unnecessary violence. There was therefore evidence to support the verdict." But it seems not unlikely that some courts would disapprove this decision on the ground that it unduly extends the category of acts improperly done within the scope of the servant's employment. If such a rule as the one in question does not serve to protect a company, it is difficult to see how protection can be secured by any form of general instructions short of an explicit prohibition against rendering any assistance to the conductor.

⁷ *Louisville, N. O. & T. R. Co. v. Douglass* (1892) 69 Miss. 723, 30 Am. St. Rep. 582, 11 So. 933 (baggage master went at the invitation of the express messenger into the compartment of the latter, and so frightened a negro boy who had by mistake got into the car that he jumped off).

⁸ *Texas & N. O. R. Co. v. Buch* (1910) —Tex. Civ. App. —, 125 S. W. 316 (boy frightened so that he jumped from moving car).

⁹ *Southern R. Co. v. Hunter* (1896) 74 Miss. 444, 21 So. 304.

¹⁰ *Jones v. Seaboard Air Line R. Co.*

f. Servants employed to clean out cars.—In a case where it was shown that an employee of this description was required by a rule of the railway company to keep trespassers out of cars, damages were held to be recoverable in respect of injuries received by a boy whose hand he kicked from the railing of a car while it was in motion.¹¹

g. Special police officers.—See §§ 2475 *et seq.*, *post*.

2356. Same subject. Ejection of trespassers by employees of street railway companies.—*a. Conductors.*—A street railway company is liable for injuries caused by the improper manner in which a conductor exercises his right of ejecting a trespasser from the car which he controls.¹

(1909) 150 N. C. 473, 64 S. E. 205. See § 2369, note 6, *post*.

¹¹ *Northwestern R. Co. v. Hack* (1872) 66 Ill. 238.

¹ *City Electric R. Co. v. Shropshire* (1897) 101 Ga. 33, 28 S. E. 508; *North Chicago City R. Co. v. Gastka* (1889) 128 Ill. 613, 4 L.R.A. 481, 21 N. E. 522; *Indianapolis Street R. Co. v. Hockett* (1903) 161 Ind. 196, 67 N. E. 106 (boy injured in trying to comply with conductor's order to leave the car while it was running at a dangerous speed); *Citizens' Street R. Co. v. Clark* (1903) 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53; *Sanford v. Eighth Ave. R. Co.* (1861) 23 N. Y. 346, 80 Am. Dec. 286; *Burns v. Glens Falls, S. H. & Ft. F. Street R. Co.* (1896) 4 App. Div. 426, 38 N. Y. Supp. 856.

In *McCann v. Sixth Ave. R. Co.* (1889) 117 N. Y. 505, 15 Am. St. Rep. 539, 23 N. E. 164, the plaintiff's evidence was to the effect that, to get out of the way of a truck at a crossing of a street on which were two tracks of defendant's road, he jumped onto the rear platform of a car which had stopped at the crossing; that, as he was passing across the platform, the conductor kicked at him; that, to avoid the kick, he jumped from the car, landing in the other track, without looking to see if a car was approaching thereon; and that he was struck by a car moving on that track at an unlawful rate of speed. Held, that a nonsuit was error; that, although technically a trespasser, plaintiff's conduct was to be weighed with that of the conductor, for whose act the defendant was responsible; that defendant could not escape the consequences of its own negligence by conduct of plaintiff induced by its em-

ployee; and that it could not have the benefit of the misjudgment or want of judgment of the former, if the act of the conductor threw him off his balance.

In *Hestonville, M. & F. Pass. R. Co. v. Biddle* (1894) 1 Monaghan (Pa.) 553, 16 Atl. 488, former appeal [1886] 112 Pa. 551, 4 Atl. 485, the defendant was held to be liable for the misconduct of an employee who acted both as driver and conductor of a bobtailed car, in pushing off the car, while it was in motion, a boy who had been invited to get on by a boy who was driving while the conductor was collecting fares.

In *Schultz v. La Crosse City R. Co.* (1907) 133 Wis. 420, 113 N. W. 658, an action brought by a minor to recover damages for an injury caused by his having been kicked from a street car upon which he had jumped while the tort-feasor and his fellow servants were pushing it, the evidence was held to sustain a finding that the kick was given by a servant acting within the scope of his employment; but the report does not show whether the tort-feasor was a conductor or a motorman.

In *Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 277, 7 Am. Rep. 448, a conductor, while engaged in ejecting a passenger who had refused to pay his fare, struck him in the face. Held, that it was a question for the jury, whether the blow was given wilfully and in malice, or because the conductor mistakenly deemed the blow necessary to effect the purpose which the performance of his duty called on him to accomplish.

In *McMillan v. Federal Street & P. Valley Pass. R. Co.* (1898) 172 Pa. 523, 33 Atl. 560, it was laid down that the liability of a company for the ejection of a passenger who refused to comply

b. Drivers of horse cars.—The doctrine that the power of removing trespassers from the front platform of a horse car is an implied incident of the functions of the driver has been recognized in several cases.²

with a reasonable rule upon the request of the conductor cannot be based upon the circumstance that, in the struggle which ensued upon his resistance to the ejection, there was not an exact and delicate adjustment of the force employed to the end in view.

² In *Lovett v. Salem & S. D. R. Co.* (1865) 9 Allen, 557, a boy ten years old who had wrongfully got upon a street railway car while it was in motion, without the intention or means of but was wrongfully allowed by the servant of the railway company to remain there for a time. The driver afterward, paying fare, was not at once removed, while driving at such a rate of speed as to make it dangerous for the boy to leave the car, ordered him to jump off. Held, that the company was answerable for the resulting injuries. The *ratio decidendi* was that "it was the right, as well as the duty, of the driver to protect the property of the defendants which had been intrusted to his care and management," but that, "for the protection of property, no man has a right to resort to violence greater than the occasion requires." The court approved of the refusal of the trial judge to give a requested instruction to the effect that, although a corporation may be responsible for the wrongful acts of its servants in the discharge of a duty assigned them, it is not responsible for such acts done beyond the scope of their duty; and that, if the servants of a corporation, publicly known as a corporation authorized to carry passengers for hire, without authority and against orders, allow boys to ride without paying fare, and upon a part of the car obviously not proper for passengers, a state of things exists so manifestly beyond any contemplated by the duty assigned to the servants, that the corporation cannot be held responsible for any excess or wilful misconduct of the servants.

In *New York, L. E. & W. R. Co. v. Haring* (1885) 47 N. J. L. 137, 54 Am. Rep. 123, one of the instructions given by the trial judge was substantially to the effect that if the driver of the horse

car in question, being the agent of the railroad company, and having the right to expel the plaintiff on account of his intention to ride without paying his fare, effected the expulsion so rudely and violently as to cause the injury complained of, then I think you may say that it is a part of the act of removal, and the driver, or the company whose agent he was, would be liable. Held, that this instruction was not objectionable, as it plainly limited the responsibility of the railroad company to the results of the acts of its agent in its business.

In *Amato v. Sixth Ave. R. Co.* (1894; N. Y. C. P.) 9 Misc. 4, 59 N. Y. S. R. 674, 29 N. Y. Supp. 51, it was held to be a reasonable implication from the terms of the employment of a driver, that he had authority to eject trespassers from the front platform of a car. The doctrine thus laid down was applied in *Barber v. Broadway & S. Ave. R. Co.* (1894; N. Y. C. P.) 10 Misc. 109, 30 N. Y. Supp. 931.

In *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480, the defendant was held to be liable for the act of its driver in forcibly throwing from the platform of the car a person who, while the car was obstructing a crossing, was attempting to pass over the platform for the purpose of avoiding the obstruction.

In *Hogan v. Central Park, N. & E. R. Co.* (1890) 26 Jones & S. 322, 33 N. Y. S. R. 702, 11 N. Y. Supp. 588, reversed in [1891] 124 N. Y. 647, 27 N. E. 412 (but merely on the ground of an error in the instructions), where a boy, being frightened by the acts of a driver, jumped off a moving car and was killed, the agency of the driver in respect of the acts was taken for granted.

In *M'Graw v. Edinburgh Street Tramways Co.* (1891) 28 Scot. L. R. (Ct. of Sess.) 256, no definite opinion was expressed regarding one of the questions involved, *viz.*, whether the driver of a tram car was justified in ejecting a boy by coiling a whip several times round his neck and jerking him off while the car was running rapidly.

c. Gripmen on cable cars.—In a case where a boy who had jumped onto a cable car to sell papers had fallen while trying to dodge an attempt made by the gripman to push him from the car, it was held that, as the boy was not a passenger, he could not recover for the injuries caused by his fall, unless he alleged and proved by affirmative testimony that the gripman was acting within the scope of his duties.³

d. Motormen on electric cars.—It has been held that the power of a motorman on an electric car to eject trespassers or other persons from the car cannot be inferred from evidence which shows merely that he was hired to operate the motor.⁴ But the actual authoritative

³ *Raming v. Metropolitan Street R. Co.* (1900) 157 Mo. 477, 50 S. W. 791, 57 S. W. 268. This case, it should be observed, was decided by one of those courts which hold that the power of ejecting trespassers is not an implied incident of the service undertaken by a brakeman. See § 2353, (b), *ante*. A different view might possibly find favor in those jurisdictions in which a more liberal theory as to the inferential scope of the protective functions of such an employee has been adopted. It is by no means easy to see what satisfactory reason can be furnished for placing in different categories servants whose positions are, in the present point of view, so closely analogous as those of brakemen and gripmen.

⁴ *Drolshagen v. Union Depot R. Co.* (1904) 186 Mo. 258, 85 S. W. 344. The court said: "The duties of a man in the cab of the locomotive engine, and the man on the front platform of the street car with the electric controller in his hand, although varying to suit the respective conditions, are in many respects of quite similar nature, and therefore the illustration suggested in the brief of counsel for appellant, of an engine driver undertaking with violence to eject a passenger, or a trespasser for that matter, from the train, is worthy of consideration. In the case of a passenger whom the engine driver might assault or forcibly eject from the train, the carrier would be liable, but on a different principle from that we are now considering; he would be liable because the passenger is in his care as carrier, and is entitled to his protection, even from strangers; but the liability of the carrier in that case is that of a carrier, not that of a master responding for the act of his servant committed in the line

of his duty. In the case at bar it is not alleged, and it is not claimed, that the plaintiff's son was a passenger; the ground on which the defendant is sought to be held is that this alleged wrong was done by the defendant's servant in the line of his duty to his master. . . . We cannot see any connection between the apparent duty of the motorman to operate the machine and the alleged authority to eject passengers or trespassers from the car; if there is such authority in the motorman, its source is independent of his mere duty to operate the machine; it does not flow from that duty. If the motorman should be called on by the conductor, to assist in preserving order or in ejecting a person from a car, then a different case would be presented, in which the duties of the conductor and his right to call for assistance would be involved. And even if the motorman acted on his own motion to eject a person whose conduct seemed to render it necessary for the protection of the passengers or the preservation of the peace, a question of authority implied from such an emergency might arise; but that is not the case at bar. Here the boy, according to plaintiff's story, was injuring no one and threatening injury to no one, unless it was to himself in attempting to ride on the upturned edge of the running board. The cause of, or excuse or pretext for, the alleged assault by the motorman, is unexplained by any circumstance in the case." It was observed that the case fell within the rules of law laid down in *Farber v. Missouri P. R. Co.* (1893) 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631 (see § 2353, note 2, *ante*.)

In *Coll v. Toronto R. Co.* (1898, 25 Ont. App. Rep. 55, where the defend-

weight to be ascribed to the rulings to this effect must be gauged with relations to the circumstance that, like the decisions mentioned in the preceding subsection, they proceed from courts which have taken the narrower view of the implied powers of brakemen.

e. Car greasers.—In a case where a car greaser undertook to eject a person who had insisted upon traveling beyond the point to which his ticket entitled him to go, it was held that, as he had nothing to do with the operation of the car, his act would not be within the scope of his employment, unless it had been done at the request, express or implied, of the conductor.⁵

2357. Simple assaults by servants of sleeping and palace car companies.—In one case a palace car company was held not to be liable for an assault made by a porter upon a passenger who, being unable to find any water in the ordinary first-class car upon which he was traveling, entered the palace car and requested permission to use the basin in it.¹

ant was held not to be liable for an injury received by a newsboy who had been pushed off a car, the decision was put upon the grounds (1) that the removal of persons from the car did not belong to the "class of acts intrusted to his discretion to perform," and (2) that he had "no control over, or authority to interfere with, passengers or others lawfully on the car." The court cited with approval *Marion v. Chicago, R. I. & P. R. Co.* (1882) 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415 where the servant in question was a brakeman. See § 2353, note 5, *ante*.

⁵ *Mills v. Seattle, R. & S. R. Co.* (1908) 50 Wash. 20, 19 L.R.A.(N.S.) 704, 96 Pac. 520.

¹ *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631. The court said: "The evidence in this case establishes that the porters employed in defendant's service are mere menials employed to clean up the car and keep it in order, and to wait upon the passengers, having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor. Anything more completely outside of 'the functions in which he was employed,' than the assault committed on the plaintiff, could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or

to put him out at all, and in performing this duty, he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privilege, and that, in addressing the porter, he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has a right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment; but if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one, on lawful business, should knock at the door of any private house, and on asking the servant who answered the call for permission to see the master, the servant should assault and beat him, would the master be responsible?" The railway company was subsequently held to be

2358. —by servants in mercantile establishments.—Employers have been held responsible, where a garment which a customer was trying on at a store was forcibly taken off of him by the salesman, acting under the direction of the floorwalker, who had come up and accused him of being a spy from a rival establishment;¹ and where a salesman, believing that a customer had stolen a certain article, touched her, and requested her to enter another room for the purpose of being searched.²

On the other hand, an employee deputed to superintend the delivery of certain goods to a drayman sent by the purchaser to take them away was held to be acting outside the scope of his employment in assaulting the drayman when he objected to receiving certain damaged packages.³

In a New York case, where a salesman in a store had pushed out a customer after she had refused to go upon his request, the decision proceeded upon the ground that the trial judge had erroneously instructed the jury that the act of the clerk in pushing the plaintiff out of the store was an unlawful interference by him with her person, and in law an assault; that in doing this he acted within the scope

liable for the assault. See *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, § 2422, *post*.

¹ *Geraty v. Stern* (1883) 30 Hun, 426. The court said: "Their action was in their line of duty as they understood it. The duty to act was cast on them then and there. Their instructions were not to show styles or give prices to persons who came from other stores to look at styles or obtain prices. Here an emergency arose, where such a case was presented, as the employees believed, and the duty of deciding was imposed on them. They may have decided unwisely, but their decision and action was clearly within the line of their duty, and the defendants are responsible for the resulting consequences."

² *McDonald v. Franchere Bros.* (1897) 102 Iowa, 496, 71 N. W. 427. Compare cases cited in § 2472 (d), *post*.

³ *Heehan v. Morewood* (1889) 52 Hun, 566, 5 N. Y. Supp. 710. The court said: "If the plaintiff had attempted to carry off other goods, the foreman, doubtless would have been expected to interfere and protect the property of the firm. But his employment did not contemplate the exercise of any compulsion upon the plaintiff to force him to ac-

cept any particular teas or any teas whatsoever, against his wish or protest. Indeed, a direction to deliver property to a person who has come for it generally involves the assumption that the person who has come is desirous of receiving the property. If the foreman, in making the assault, was actuated by any other feeling than one of mere anger because the plaintiff had expressed an unwillingness to accept some of the tea, his purpose must have been to force the tea upon the plaintiff in spite of his objection; but there is no reason to suppose that the defendants themselves would have insisted, or wanted anyone to insist in their behalf, that he should take the tea in question, notwithstanding his refusal to do so. The object sought to be accomplished by the foreman in making the assault thus appears to have been wholly disconnected from his employment." Since the evidence in this case seems to have been clearly susceptible of the construction that the tort-feasor was acting in what he supposed to be the interest of his employer, some courts might possibly prefer the view that the question whether the assault was within the scope of his employment was essentially one for the jury.

of his employment; that the only question for the jury was one of damages. The court of appeals was of opinion that the defendant was entitled to have all three of these questions submitted to the jury.⁴ The effect of this decision is to discredit, so far as New York is concerned, the theory upon which the appellate division had relied,⁵ and which had been previously countenanced by other courts of inferior jurisdiction,⁶ viz., that the proprietor of a mercantile establishment owes to his customer an absolute duty of protection similar to that which carrier owes to his passengers. (See §§ 2406 *et seq. post.*) On the authority of one of these earlier precedents, that theory has been adopted in North Carolina.⁷ But it has been explicitly rejected in Wisconsin,⁸ and impliedly in Minnesota.⁹

All the decisions which bear upon the general subject of the obligations owed by the owners and occupants of real property to persons entering thereon by invitation are discussed in chapter CVII. *post.*

⁴ *Collins v. Butler* (1904) 179 N. Y. 160, 71 N. E. 746, reversing (1903) 83 App. Div. 12, 81 N. Y. Supp. 1074. The court said: "When a party is sued for an assault and battery committed by his servant upon another, the liability must depend either upon proof of some express direction or authority of the master, or upon facts and circumstances from which a direction or authority of the master may be inferred, and that inference must be drawn by the jury as one of fact. This is the case of a clerk in a store alleged to have committed an assault upon a customer, and the question is, Was he acting within the scope of his employment? We are not dealing with the case of a railroad conductor or other agent of a corporation vested with discretion in emergencies. 'There is no parallel,' says this court, in *Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 266, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, between the case of a clerk in a store who has a person arrested and searched upon suspicion of a theft and whose general employment could not warrant such an act, and the present case of an agent who is considered to be invested by the carrier with a discretion."

⁵ It was considered by the lower court that, having regard to modern conditions in such mercantile establishments, "the law should hold the master liable for the wrongful acts of servants towards those lawfully upon the scene of his place of business."

⁶ *Mallach v. Ridley* (1888; Sup. Ct.) 24 Abb. N. C. 172, 9 N. Y. Supp. 922; *Swinarton v. Le Boutillier* (1894) 7 Misc. 639, 28 N. Y. Supp. 53.

⁷ *Brittingham v. Stadiem* (1909) 151 N. C. 299, 66 S. E. 128, citing *Swinarton v. Le Boutillier*, note 6, *supra*.

⁸ *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276 (disapproval expressed in commenting upon an instruction to the effect that a master is liable for acts done by a servant in performing a duty owed to the plaintiff).

⁹ In *Johanson v. Pioneer Fuel Co.* (1898) 72 Minn. 405, 75 N. W. 719, an employee of a coal company sold one ton of coal to the plaintiff, who at first took away only a part of it. When he returned for the remainder, M. charged plaintiff with having procured larger sacks than he formerly used, and with wrongfully attempting to procure more coal than he was entitled to. This was denied by plaintiff; whereupon M. became enraged, and assaulted him. Held, that this assault was an independent tort, and not done in the course of his employment. The court argued thus: "The refusal to furnish more coal in the sacks which plaintiff brought on his last trip might possibly be considered an act in furtherance of the master's interest, because he probably thought plaintiff was attempting a dishonest act, to the master's disadvantage. That refusal evidently ended the business rela-

2359. —by servants of warehousemen.—In one case it was unsuccessfully contended that a depositor in a warehouse, upon whom an assault prompted by personal resentment had been committed by a servant of the warehouseman, was entitled to recover on the ground that the warehouseman owed him a special duty in respect of protection, similar to that which carriers owe to their passengers.¹

2360. —by servants of public service companies.—In one case the liability of an express company was considered with reference to the ordinary criterion of the scope of the tort-feasor's employment.¹ Two other decisions, the one relating to an express company, and the other

tions between them. Then arose the question of honesty and veracity,—not as between plaintiff and the fuel company, but as between plaintiff and McKee; and the assault was not intended by the latter to aid his master's business, nor could it in any manner have that effect. It was purely a personal matter between plaintiff and McKee, and it was this quarrel which led to the assault,—an act done outside of the scope of McKee's employment. Suppose that, on a day subsequent, these parties had met at some other place, and the same charges had been made by McKee, and denied by plaintiff, and this altercation had resulted in a similar assault upon plaintiff by McKee; could it be reasonably said that the latter was then acting in the line of his master's business, or in the scope of his employment? And if not, then the master would not be liable. The time and place of the transaction in this case do not constitute the test of the master's liability. In order to hold the master liable, the act causing injury must pertain to the duties which the servant was employed to perform."

¹ *Fairbanks v. Boston Storage Warehouse Co.* (1905) 189 Mass. 419, 13 L.R.A.(N.S.) 423, 109 Am. St. Rep. 646, 75 N. E. 737. There the uncontradicted evidence showed that the defendant's superintendent directed a servant, H., to take the plaintiff up in the elevator, and that he did so, and unlocked the room where the plaintiff's goods were stored, and then went back to the elevator; that the plaintiff went in and selected some goods which he wished to take away, and in a short time went to the elevator well and called to H. to come up and get him; that he called two or three times, with considerable waits between, M. & S. Vol. VI.—447.

and finally called to H. and asked him to go out into the yard and get a man who had come with the plaintiff and take him in where it was warm; and that in about ten minutes H. came up with the man, and, as the elevator stopped at the landing, stepped forward, and grabbed and struck the plaintiff without any provocation. There was nothing to show that down to the time of the assault the conduct of H. while in the defendant's employ had been otherwise than good. After stating that the assault was not committed as a means or for the purpose of performing the work which H. was employed to do, the court thus dealt with the theory that the claim might be enforced on the ground of an absolute duty: "The contract, so far as material, was a contract for the storage of goods belonging to the plaintiff, with an agreement on the part of the defendant to use due care in keeping the property, and to deliver it upon reasonable demand, and that the plaintiff might visit the room where it was stored, during business hours, in the presence of one of its employees. The contract was not like that in *Bryant v. Rich* (1870) 106 Mass. 180, 18 Am. Rep. 311, for transportation by a common carrier, but, as already observed, was a contract for the storage of goods; and the case comes within the class of cases relating to warehousemen, or those where one enters upon the premises of another by his express or implied invitation for the transaction of business with him. What is required in such cases is ordinary care and diligence."

¹ *Wells, F. Express Co. -v. Sobel* (1900) — Tex. Civ. App. —, 125 S. W. 925. The defendant company was held to be liable to a customer for an assault

to a telegraph company, have proceeded upon the theory that a public service company is absolutely bound to see that those members of the public who come to the usual and appointed place to deal with it shall be respectfully treated.² The effect of such a theory obviously is that, in respect of persons who enter the premises of a public service company for the transaction of business, it is deemed to be an insurer of the good conduct of its employees to the same extent as, by most of the American courts, a carrier is deemed to be in respect of his passengers. See §§ 2407 *et seq.*, *post*. But the weight of authority, as indicated by the bulk of the cases which involve the obligations of the occupant of premises to persons whom he invites to enter then, is distinctly opposed to this view. See § 2244, *ante*.

2361. —by servants in manufacturing establishments.—The liability of the employer has been affirmed under the following circumstances: Where a foreman of a factory, having exercised his authority to discharge a workman, assaulted him for the purpose of compelling him to leave the premises more quickly than he was disposed to do;¹

committed by one of its clerks just after he had, by menacing gestures, compelled the customer to sign a withdrawal of a claim for shortage in goods consigned to him, and a retraction of a charge that some of the goods had been stolen by the company's servants. The court said: "It being within the line of employment of the witness Coleman, as an agent of defendant, to discuss the claim with plaintiff, and to obtain statements and other evidence tending to settle the question of defendant's liability for the shortage, it is my conclusion that the defendant is liable for the injury caused by Coleman to plaintiff in the performance of the service. Had the assault been committed merely in resentment of the offensive words contained in the letter, as would have been the necessary conclusion if Coleman had committed the assault at the time when he went to request the attendance of the plaintiff at the office, then the defendant would clearly not have been liable. But the witness, to whom certain business of defendant was customarily intrusted as agent, chose to make the assault, and forcibly exacted retraction as part of the performance of this customary service of the defendant."

² In *Richberger v. American Exp. Co.* (1895) 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922, the

grounds upon which the defendant was held to be liable for a malicious assault committed upon the plaintiff were thus stated: "Doubtless there is a difference in the extent of the application of the principle, as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties respectively. But the principle applies to both. An express company does not transport passengers, and cannot be made liable as a carrier of passengers might for wilful torts committed by its agents on passengers in their transportation; but it keeps offices for the transaction of its proper business, . . . and in its dealings with its customers, in its offices, in its business, it is bound, in Judge Story's language, 'for respectful treatment and decency of demeanor.'" As to this case, see further in § 2348, *ante*.

In *Dunn v. Western U. Teleg. Co.* (1907) 2 Ga. App. 845, 59 S. E. 189, an action was held to be maintainable, where the plaintiff had entered a telegraph office with the intention of delivering a message for transmission, and the agent in charge of the office had, without any provocation, ordered him out, and insulted and humiliated him by abusive language.

¹ *Rogahn v. Moore Mfg. & Foundry Co.* (1891) 79 Wis. 573, 48 N. W. 669.

where a servant in charge of an engine by which a crusher was operated injured a person on a boat by maliciously discharging steam from the blow-pipe when the boat was passing it; ² where the superintendent of a mill, intrusted with the general control of its management, and, as an incident of such control, with the authority to use such methods as he might deem proper for the purpose of preventing interference with the men employed in the mill, assisted the overseers to throw into the reservoir a person who had come upon the premises with a view to enticing away operatives; ³ and where an employee appointed to inspect creosoted blocks which a company had contracted to supply to a city was, while engaged in performing his duties, assaulted by the company's engineer, in pursuance of a conspiracy between the master and the servant to render it impossible for the inspector to fulfil his obligations to the city. ⁴

The court said: "If the foreman was authorized by the company to discharge workmen, he might lawfully use such reasonable force as was necessary to remove the discharged man from the shop. This would be necessarily implied from the nature of the authority given to him. . . . Now, suppose the corporation had been a natural person who had selected a foreman, and given him authority to engage and discharge workmen, would not the principal have authority to forcibly eject a workman from the shop who refused to leave when ordered to do so; and if the principal might use necessary force to eject the discharged man, could not the foreman in charge of the shop do the same thing, and would it not be in the scope of his employment so to act? It seems to us the question must be answered in the affirmative. . . . It seems to us that, under the circumstances, the company should be held responsible for the injury which the foreman did while in the charge of the shop and in the exercise of the authority implied in his employment. . . . Where the servant is authorized to use force against another when necessary in executing his master's orders, or in conducting the business intrusted to him, the master commits it to him to decide what degree of force he shall use, and if, through misjudgment or violence of temper, the servant goes beyond the necessity of the occasion, and gives a right of action to another, he cannot be said, as to third persons, to have

been acting beyond the line of his duty, or to have departed from his master's business."

² *Regan v. Reed* (1901) 96 Ill. App. 460. The court said: "The rule is well established in this state that where the servant of a defendant, while in the discharge of his duties to the defendant, perverts the appliances of his employer to wanton and malicious purposes, to the injury of another, the employer is liable to the person so injured. (*Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 298, 95 Am. Dec. 489; *Chicago, B. & Q. R. Co. v. Dickson* (1872) 63 Ill. 151, 14 Am. Rep. 114). To blow mud and sediment out of the boiler was the engineer's duty. He testifies the boilers needed this cleaning that day, and no one contradicts him. If, therefore, he performed his duty in wanton disregard of the safety of the people on the boat, his employers are liable."

³ *Fields v. Lancaster Cotton Mills* (1907) 77 S. C. 546, 11 L.R.A.(N.S.) 822, 122 Am. St. Rep. 593, 58 S. E. 608. The court remarked: "Without evidence of the participation of Skipper, the superintendent of the mill, there might be some question whether the mill would be liable for the wrong committed by the overseers, who had no authority to act for the mill beyond warning such persons as Fields to keep off the mill property, and to appeal to the law if the warning should be unheeded."

⁴ *Cressy v. Republic Creosoting Co.*

2362. —by servants of publishers.—The right of recovery was denied in a case where an employee of a newspaper publishing company, while he was delivering papers to the sellers, engaged in an altercation with one of them, and aimed a blow at him, but missed him and struck the plaintiff.¹

2363. —by servants engaged in construction work.—Actions have been held to be maintainable where a laborer in a gang sent by a railroad company to erect a snow fence on land outside the right of way assaulted, in compliance with the directions of his foreman, an employee of the landowner, who had, in behalf of his master, come with the avowed intention of putting a stop to the work;¹ where section-men threw a tie at a police officer who was attempting to prevent them

(1909) 108 Minn. 349, 122 N. W. 484. The evidence showed that, prior to the assault complained of there had been several quarrels between the engineer and the inspector with regard to the latter's methods of computation, and that the defendant had been advised of an assault upon the plaintiff.

¹*Froomkin v. Brooklyn Daily Eagle Co.* (1906) 113 App. Div. 443, 99 N. Y. Supp. 300. The court said: "It seems to me, then, that there was not sufficient evidence to present any question to the jury as to whether the servant in striking this blow was in the prosecution of his master's business. Of course, if Lewen had not been present there would have been no quarrel. And Lewen was present to transact business with the master through his servant. The difference arose over a dispute with the servant in the general charge of that business. But the blow was not given in the attempt of the servant to regulate the business that he was doing, or to enforce any rule or system of the master. The anger of the servant was aroused and provoked at Lewen's outrageous conduct or attempted violence upon him, and action followed accordingly. Even the plaintiff's witness testifies in effect that Lewen was the aggressor. The servant was attempting to punish Lewen, either for his outrageous conduct to him personally or his attempted violence against him. The matter was the personal affair of Lewen and the servant. I think, then, that the purpose of the servant in striking the blow was 'wholly disconnected from his employment.'"

The effect of a case involving an as-

sault by a publisher's collecting agent is stated in § 2367, note 1, *post*.

¹*Waalder v. Great Northern R. Co.* (1908) 22 S. D. 256, 18 L.R.A.(N.S.) 297, 117 N. W. 140. The court said: "The evidence fully sustains the allegations of the complaint, that the plaintiff was directed by Berit Pramhus to go and forbid the workmen from erecting the fence; that he did go, and the workmen refused to desist, and continued to work; that he went back to the house, and procured an ax, and returned to the place where the workmen were engaged in erecting the fence, and not only forbade them from continuing the construction of the fence, but laid his ax upon the fence, and threatened, if they continued the work, to destroy the fence as fast as it should be completed. In order, therefore, for the workmen to continue their work and construct the fence, it was necessary to forcibly resist the acts of the plaintiff, and in so doing it may be that more force was used than was necessary, and that the plaintiff was unnecessarily injured, but this fact, as we have seen from the authorities, does not relieve the defendant from liability for the injury inflicted upon the plaintiff. . . . The contention of the appellant, that no express authority was shown in the foreman to construct this fence by the defendant company, and that, therefore, it is not liable, is untenable. It is sufficient for the plaintiff to show that the foreman or the section boss on the road was directing the work and giving orders to the men under his charge to erect the fence. The reasonable and fair inference from these facts, which the

from laying a track across a street;² where an employee engaged in repairing a street assaulted the lessee of a railway while he was attempting to remove from the track stone and gravel deposited upon it in such a manner as to obstruct the operation of the cars;³ and where the owner of premises in front of which a trolley pole was being set up for a street railway company met with forcible resistance when she attempted to break through a ring of laborers in order to prevent the tearing up of her pavement.⁴

jury was authorized to draw, was that the section boss was performing his duties under the direction of the defendant." On a former appeal it had been held that a complaint which merely alleged that the person assaulted had been sent by his master to remonstrate against the erection of the fence was demurrable. (1904) 18 S. D. 420, 70 L.R.A. 731, 112 Am. St. Rep. 794, 100 N. W. 1097. The author ventures to express the opinion that this decision was erroneous. The consideration upon which it was based was that, at the time when the injury was sustained, the plaintiff was neither interfering, nor threatening to interfere, with the work. It is submitted that, as the essential purpose of what the servant said was to bring about the stoppage of the work, he was, in any reasonable sense of the expression, "interfering" with it. The theory of the court, as indicated by the language of the opinion, apparently was that, in order to bring the assault within the scope of the authority of the tortfeasors, it was necessary that forcible interference with the work should have been attempted by the plaintiff. Such a doctrine, however, is not likely to meet with general acceptance as a test of liability in similar circumstances. To most persons, it is apprehended, a protest based upon the assertion of a legal right to stop a certain work will probably appear to be a very definite form of interference. The amended complaint which on the second appeal was held not to be demurrable contained additional allegations to the effect that plaintiff, after having been advised by defendant's section foreman and his crew at the time of the assault that they were instructed to construct a fence by defendant company, and proposed and intended to so do, notwithstanding plaintiff's protest for the own-

er of the land, said to the crew that he would remove such part of the fence as was then constructed if it was not removed, and would remove other fences on the land of P., and that he had with him an ax to tear down and remove the same,—all for the purpose of preventing a trespass on P.'s land so being committed and threatened by defendant company by and through the section crew.

² *Cincinnati, H. & D. R. Co. v. Klute* (1905) 29 Ohio C. C. 702. Evidence that soon after the injury a locomotive drawing one of defendant's cars ran out of its yards, and pushed the car over the track laid on the street, and as far beyond the end of the track as possible, was held to be admissible as tending to show that the acts of the servants were authorized or approved by defendant. This decision was affirmed without any opinion, by the supreme court. (1905) 73 Ohio St. 380, 78 N. E. 1120.

³ *Barree v. Cape Girardeau* (1906) 197 Mo. 382, 6 L.R.A. (N.S.) 1090, 114 Am. St. Rep. 763, 95 S. W. 330. The *ratio decidendi* (apart from the effect of the doctrine as to the liability of a municipal corporation for the exercise of powers granted for its private advantage), was that the injury was inflicted by the tort-feasor in attempting to prevent the plaintiff from interfering with the work of repairing.

⁴ *Moore v. Camden & T. R. Co.* (1907) 74 N. J. L. 498, 132 Am. St. Rep. 399, 65 Atl. 1021. The court said that the evidence showed "that the hurts and bruises complained of occurred to plaintiff at the hands of the defendant's employees while engaged in this unlawful trespass upon the plaintiff's close, and the forcible exclusion of the plaintiff from that part of her pavement where she had a right to be."

On the other hand, the action was held not to be maintainable in a case where an artisan whom his master, being just then engaged in an altercation with a third party, called outside the building where he was at work, assaulted a person who had come with the third party, but was not taking any part in the altercation.⁵

2364. —by servants placed in charge of real property.—An employer is liable for an assault committed in the course of his employment by a servant whose duty it was to prevent unauthorized persons from entering upon or otherwise interfering with real property;¹ or by a

⁵ *Grattan v. Suedmeyer* (1910) 144 Mo. App. 719, 129 S. W. 1038. The *ratio decidendi* was that the artisan "was not instructed to remove or punish persons who might come upon the premises, and his act in assaulting plaintiff had no connection whatever with his duties as a laborer in the concrete work." The persons who came to the building were union men whose object was to prevent nonunion men from working.

¹ This rule was taken for granted in *New Ellerslie Fishing Club v. Stewart* (1906) 123 Ky. 8, 9 L.R.A.(N.S.) 475, 93 S. W. 598. See § 2348, note 3, *ante*.

In *Schmidt v. Vanderveer* (1906) 110 App. Div. 758, 97 N. Y. Supp. 441, where the plaintiff was beaten while he was being ejected from the defendant's premises by a man hired to keep out trespassers, it was held that the battery, even though it might have been committed out of revenge, was nevertheless imputable to the defendant, if it was in point of fact adopted as the means for effecting the plaintiff's expulsion.

In *Collins v. Wise* (1906) 190 Mass. 206, 76 N. E. 657, plaintiff was assaulted by a servant who was on the master's premises after working hours. The servant testified that the plaintiff attempted to take a closet key away from him by force, and that he resisted such attempt; and there was evidence that more force was used than was necessary for the purpose. Held, that the question whether the servant was acting at the time within the scope of his employment and to protect the master's property in his charge was for the jury.

In *Montgomery v. Sartirano* (1897) 16 App. Div. 95, 44 N. Y. Supp. 1066, it was laid down that a lodging house keeper is liable for an injury resulting from the acts of the porter while in the

scope of his authority in using unnecessary force in ejecting an intruder, although he abuses his authority and violates the instruction of the master, but is not liable if the act committed by the porter was a wilful, wanton wrong not done in the performance of his duty but because of the intruder's calling him vile names.

In *Plouf v. Putnam* (1908) 81 Vt. 471, 20 L.R.A.(N.S.) 152, 130 Am. St. Rep. 1072, 71 Atl. 188, 15 Ann. Cas. 1151, the declaration alleged that while plaintiff was sailing his sloop upon a lake, a sudden and violent tempest arose; that, in order to save the vessel and those on board, he was compelled to moor the sloop to a dock on an island owned by the defendant and then in charge of his caretaker; and that the defendant by his said servant "wilfully and designedly" unmoored the sloop, so that it was wrecked, and the plaintiff and his family were cast into the lake and on the shore. Held, that these averments sufficiently showed that the caretaker was acting within the scope of his employment. The case having been tried upon the merits, a verdict was rendered for the plaintiff and upheld by the supreme court ([1909] 83 Vt. 252, 26 L.R.A.(N.S.) 251, 138 Am. St. Rep. 1085, 75 Atl. 277), which made the following remarks: "This man Williams, who was the defendant's caretaker and had sole charge of his island in Lake Champlain, was clothed with implied authority to keep off trespassers and intruders,—and this, without regard to his written instructions that the defendant did not care to have people tie up to his wharf. Authority to use such force as might be necessary to accomplish this is implied from the character of the work. When Williams cast off the plaintiff's rope, he was doing one of a class of acts well within

doorkeeper directed not to admit into a building any persons except those provided with tickets.²

In one case where several boys who were creating a disturbance in front of the defendant's building ran away when the janitor ran out with a stick in his hand, whereupon he hurled it at the plaintiff's son, a mere onlooker, who was standing on the opposite side of the street, the nonliability of the defendant was affirmed as a matter of law.³ This decision it is apprehended would scarcely be followed in all ju-

the scope of his employment,—one which under ordinary circumstances would be proper and lawful. But in the peculiar circumstances then existing, the act was improper and unlawful; it was done under circumstances in which it ought not to have been done; and the defendant is responsible, whether it was done carelessly or wilfully, unless it was done from the caprice of Williams; that is, to serve some purpose of his own. In other words, if Williams cast off the rope, intending thereby to carry out his instructions and perform his duty as caretaker of the property, the defendant is liable; if he cast it off, not for this purpose, but only to serve some purpose of his own, the defendant is not liable. . . . As we have already seen, the act of casting off the rope of one attempting to tie up to that wharf would, ordinarily, be within the scope of William's employment. He testified that he threw the plaintiff's line off in furtherance of his employer's orders, and that he so informed the plaintiff at the time. The only evidence disclosed by the record, which could in any view be claimed to have a tendency to contradict this, comes from Williams himself when he testifies that, after he told the plaintiff that the defendant did not allow boats to tie up there, the plaintiff swore at him, called him an opprobrious name, and threatened him. There is nothing in this fact alone which tends to show that Williams thereupon cast off the rope for any purpose of his own. It does not appear that he was angered or even irritated by it."

Some cases involving the use of deadly weapons by watchmen are cited in § 2370, note 1, *post*.

² *Barabasz v. Kabat* (1897) 86 Md. 23, 37 Atl. 720. The court said: "If we assume, as we may well do, that the defendant did not intend Molis to use more force than was necessary, and

even went so far as to forbid him from using any force, he cannot, for these reasons alone, be relieved from liability for the acts of Molis. As his employment was to keep those out who had no tickets, his master or principal was liable if he used more force than was reasonably necessary for that purpose, to the injury of a third person, because the act was done in the course of the master's service and for his benefit, within the scope of his employment; "but as the evidence showed that the alleged injuries might have been sustained after the complainant had been taken into custody by the police, it was held to be error to grant an instruction which authorized recovery against the defendant upon the mere finding that unnecessary force had been used by the doorkeeper.

³ *Kennedy v. White* (1904) 91 App. Div. 475, 86 N. Y. Supp. 852. Woodward, J., delivered a strong dissenting opinion, which, as the present writer ventures to think, embodies the more correct view. A portion of his remarks may be quoted: "Assuming the most favorable inference from the facts, the defendant's janitor, for the purpose of driving away some noisy and troublesome boys, ran out upon the sidewalk in front of the defendant's premises, and seeing plaintiff's son on the opposite side of the street, and, no doubt, assuming him to have been one of those who had been producing the disturbance, threw a club at him, causing the injuries complained of here. If he was the defendant's janitor or watchman and had charge of the premises, he was given the authority to drive away such persons as should trespass upon or annoy those who were lawfully in possession of the premises, and in the act of driving these boys away he was doing the work of the master. He had the right to use such force as was

risdictions. But the point of view which it indicates is very similar to that which emerges in a case where it was held that a man whose duties were to keep lighted the lamps which guarded a structure in a street, and to keep boys away from there, was not acting within the scope of his employment, when he threw stones at the boys playing round the structure.⁵

necessary to accomplish the result, and if he used more force, or improper means, he was still doing what the master might have done, and the latter is responsible within well-defined limits. In the case now before us the janitor did not leave the defendant's premises; he was still upon the sidewalk, with reference to which he had, or might have had, duties to discharge for the master, the injury being done by throwing a stick across the street. If, while upon the sidewalk, and in the act of driving the plaintiff's son away from the premises, the janitor had struck the boy with the club, it seems quite clear that, within the authorities, the defendant would have been liable for the tort, and it is difficult to understand how the rule can be different where the same result follows from the throwing of the club across the street. The janitor was none the less engaged in the work of the master, and the mere fact that he made a mistake, and threw the club at a boy who had not been engaged in the mischief, does not alter the case. . . . Assuming that the janitor in this case supposed that he was doing the will of the master in driving these boys away, that he was engaged in a work which had for its object the welfare of the master's property, can it be said that the master was not liable because the servant exceeded his authority to drive away those who were actually engaged in disturbing the premises, and committed an assault upon an entirely innocent person? It seems to me that the only test in cases of this character is whether the servant, at the time, is engaged in the general work of the master; whether his acts are in the discharge of his duty as an employee, or are such as in their very nature take them out of this classification. Generally where a man is at work for another he is presumed to use his energies in behalf of his employer, and it is only where he abandons this employment and assumes to act for his own purpose that

the master is relieved from responsibility for his acts. The general rule is that of liability, and this continues unless the fact is proved to the satisfaction of the jury that the servant willfully and maliciously, and to effect some purpose of his own, outside of his employment, committed the injury; in other words, that at the time of the injury, and in the act of its commission, the relation of master and servant did not exist. *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 549. Clearly, the jury might have drawn the inference that the janitor was in the discharge of his duty in driving away the boys who had been disturbing the tenants of the building, and if this was in fact his duty, the methods which he made use of, or the fact that he threw a club from the defendant's premises, did not alter the case; the master was answerable for the conduct of his servant."

⁵ *Kaiser v. McLean* (1897) 20 App. Div. 326, 46 N. Y. Supp. 1038. The court said: "It is difficult to see upon what theory the defendant can be held liable for the act of Hanafin, even if it was wrongful. There was no evidence that he was employed or authorized by his employer to commit any assault upon anybody in keeping his lamps lighted and the boys away from them. . . . There does not seem to be any proof whatever that Hanafin was authorized to do anything more than to prevent these boys from interfering with the lamps and to keep them burning, and any violence which he used towards the boys was a wrongful act upon his part, for which the defendant is not responsible." This argument is scarcely convincing. It is submitted that, if the stones were thrown for the purpose of keeping the boys away from the structure, the defendant would properly be held liable, and that the question whether the act of the employee was prompted by this motive was one for the jury to determine.

In a case where the janitor of a building was engaged in cleaning a room in which a ladder had been placed upon a table, for the purpose of enabling a mechanic to reach an electric light, became impatient at the delay in the completion of the work, and pushed the table, so that the ladder fell, the question whether his act was prompted by a desire to gratify his personal resentment was held to be for the jury.⁶

2365. —by servants deputed to assert rights in respect of real property in possession of a third person.—One who enters upon a land owned or occupied by another person and employs a servant to assist him in maintaining his wrongful possession, must answer for an assault made upon the owner or his servants by the servant so employed, if it is committed while he is engaged in performing the duties delegated to him.¹

A master who claims a right of passage over another person's land, and instructs his servants to proceed in accordance with that right, is liable for injuries sustained by the owner of the land in consequence of an assault made upon him by the servants for the purpose

⁶ *Nelson Business College Co. v. Lloyd* (1899) 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 54 N. E. 471. The court said: "It would seem that there cannot be much doubt that the janitor was at the time engaged in the performance of his duties, or, at least, that that question should have been submitted to the jury. He had, for the time being, the custody of the room, and was engaged in cleaning it up and putting it in order for use that evening, which, as before stated, required the moving of tables from one part of the room to another. There was some evidence that the janitor had an ill will against the plaintiff, and availed himself of this opportunity to injure him. If this were so, and the act was done with no other purpose, it was a clear departure from his employment, and the master is not liable."

¹ In *Barden v. Felch* (1872) 109 Mass. 154, the evidence as to the assault and battery was contradictory. According to the plaintiff's evidence, it was the joint act of the defendant and his servant. But according to the defendant's evidence it was an act of the servant in self-defense, and contrary to the defendant's express command.

The defendant requested the court to rule "that he was not responsible for the act of the servant, if done contrary to his express command." Held, that this ruling was rightly refused, and that the court had correctly instructed the jury to the effect that "if the defendant was wrongfully maintaining his entry by force, and employing his servant so to do, he was liable for the act of his servant in maintaining such entry, although the servant used more force than he was authorized by the master to do." The court said: "These instructions were all that the case required. Much depended on the question of title; and if the defendant was using force wrongfully, and employing his servant to assist him in doing a tortious act, his general purpose, the fact of his presence, his silence while the acts of violence were done, and his whole deportment during the assault and battery by his servant, would be as significant as his previous direction to the servant not to touch the plaintiff."

See also *Denver & R. G. R. Co. v. Harris* (1886) 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286, affirming (1884) 3 N. M. 114, 2 Pac. 369, cited in § 2368, note 10, *post*.

of overcoming his resistance to the entrance of the master's wagons upon his premises.²

2366. —by servants deputed to assert rights in respect of personal property in the possession of a third person.—There is ample authority for the doctrine that where a servant commits an assault while attempting to obtain possession of personal property in respect of which his master claims a right of seizure, the resulting injury is imputable or not imputable to the master according as the tortious act was or was not done for the purpose of enforcing that right. This criterion has been applied in a case where a servant, being deputed to take chattels by which a debt owed to his master was secured, went to the debtor's house in company with a constable holding a writ, and took part in an assault made by the constable upon a member of the household;¹ in several cases where the assaults complained of were

² *Miller-Brent Lumber Co. v. Stewart* (1910) 166 Ala. 657, 51 So. 943, 21 Ann. Cas. 1149.

¹ In *Hardeman v. Williams* (1907) 150 Ala. 415, 10 L.R.A.(N.S.) 653, 43 So. 726, the material evidence as presented by the record was to the effect that, while the parties were conversing about the state of the indebtedness, the constable was provoked by some contemptuous words spoken by the plaintiff, and struck her with a pistol; that she retaliated with a poker; that the defendant's agent knocked her down. Discussing these facts, the court said: "We are unable to draw any reasonable inference other than that he was impelled by motives wholly personal to himself, and struck simply to gratify his feeling of resentment, and not for the purpose of overcoming resistance, or of clearing the way to getting possession of the furniture. Nor does the evidence warrant the inference that Meyers went to Herman's assistance for any other than the single purpose of helping him to punish plaintiff, or of preventing her from overcoming him. We cannot see that the evidence affords an inference that Meyers aided Herman for the purpose of promoting any interest of the defendant, or that his conduct was in line with his duties as agent." The verdict for the plaintiff having been set aside, a new trial was had, in which the plaintiff was again successful. The facts submitted to the supreme court on the appeal from the judgment were so far different from

those discussed on the previous appeal that the liability of the master was held to be a question for the jury, but the verdict against him, which was for one cent, was set aside for inadequacy of damages. See (1908) 157 Ala. 422, 48 So. 108. The nature of the evidence given at the third trial, and the conclusions of the supreme court on the third appeal, are indicated by the following extract from its opinion in (1910) 169 Ala. 50, 53 So. 794: "The principal is responsible for the acts of his agent done within the scope of his employment, and in the accomplishment of objects within the line of his duties, though the agent seek to accomplish the master's business by improper or unlawful means, or in a way not authorized by the master, unknown to him, or even contrary to his express direction. The legal aspect of such a case is not changed because the agent superadds malice or other personal motive to his wrongful act. There is no question about the authority of Myers to recover the property for the plaintiff, or that he went to the plaintiff's house for that purpose. He went there to make the writ of seizure, the means adopted to recover the goods, effective by pointing out the property to the constable. The jury were at liberty to infer also that trouble was anticipated, and that Meyers and Falligant, both agents for the defendant, went with the constable to guarantee his safety and the execution of the writ, no matter what the consequences might be to plaintiff. Accord-

committed by servants who undertook, without the aid of legal process, to seize chattels delivered under contracts of lease or conditional sale;² and in a case where a woman was assaulted by an employee sent from a department store to reclaim certain goods which

ing to plaintiff's version of what occurred, she did interpose verbal objection, and according to the testimony of the constable, who was a witness for the defendant, she attempted to prevent the execution of the writ by physical force. The jury was free to find that defendant's agents went to the assistance of the constable, and joined in the use of force and violence upon her person in order to overcome her opposition to the seizure and removal of the "goods." The history of this case is surely a noteworthy illustration of the remarkable efficacy of second trials in generating testimony calculated to produce a change in the views of an appellate court.

² In *Dyer v. Munday* [1895] 1 Q. B. (C. A.) 742, 64 L. J. Q. B. N. S. 448, 72 L. T. N. S. 448, 14 Reports, 306, 43 Week. Rep. 440, 59 J. P. 276, the manager of a branch of the defendant's business, which was the sale of furniture on the hire-purchase system, sold a piece of furniture to a person who was lodging in the plaintiff's house, and, on one of the instalments being in arrear, went to the house and removed the furniture. While so doing he assaulted the plaintiff. Held that the jury might reasonably come to the conclusion that the tort-feasor, as general manager for the defendant, had, as part of his duty, to obtain possession of the furniture directly the instalments became in arrear, and might also fairly consider that he had committed the assault in order to carry out the employment with which he was intrusted.

In *O'Connell v. Samuel* (1894) 81 Hun, 357, 30 N. Y. Supp. 889, an employee hired to make collections of money due for property leased was instructed to retake the property from those who were in arrears, and were supposed to have the intention of not paying their debts. He went to a house, and, being unable to make a collection, assaulted the occupant in an attempt to take away the property leased to him. Held, that the employer was liable for the resulting injury. The court said: The employee "was of course not in-

structed to use forcible means to enter houses, or to do acts of personal violence to get possession of the goods. But when he proceeded to take the property he was acting in the business of his employers, and in that sense in the scope of his employment, and although his action to accomplish such purpose may have been or become wilful on his part, his employers were not for that reason necessarily relieved from the consequences of his conduct while so engaged, prejudicial to others, for which he would be personally responsible. In the present case the conclusion was warranted by the evidence that, although the defendant Beecher may have deviated from the instructions of his employers in proceeding to get possession of the property, he did not depart from his purpose of reclaiming the property for them, and consequently may throughout have acted within the scope of his employment."

In *Canton v. Grinnell* (1904) 138 Mich. 590, 101 N. W. 811, where plaintiff was assaulted by the truckmen whom defendant had directed to remove from his house a piano delivered to him under a contract of conditional sale, it was held that the assault was imputable to the defendant, if it was committed for the purpose of getting possession of the piano.

In *Singer Sewing Mach. Co. v. Phipps* (1911) — Ind. App. —, 94 N. E. 793, where the plaintiff was the lessee of a sewing machine, the liability of the lessor company was predicated on grounds thus stated: "The agent was authorized to enter the home of appellee and take possession of the machine in question; the appellant thereby permitted him to determine the manner and method of obtaining such possession, and it is therefore responsible for his misjudgment or misconduct, and if he used such force as to injure appellee in carrying out the object, or regaining the machine in question, that being the purpose of going to her house, the result of such conduct will fall upon appellant." The questions, whether one B., who had sent the servant, had made

had been delivered to her on the preceding day in place of other goods which she had found unsatisfactory and returned.³ The pref-

the leasing arrangement as managing agent of the company, and whether the machine in question belonged to him or to his employers, were held to be for the jury.

In *Ferguson v. Roblin* (1889) 17 Ont. Rep. 167, under a hire receipt of an organ sold by defendant R. to plaintiff's son, signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be, with authority to remove the same without resorting to any legal process. Default having been made in payment of certain instalments due under the receipt, defendant R. sent his bookkeeper, the other defendant, and two assistants, with instructions to get the organ. The bookkeeper, taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door, and entered the hall, but, on his attempting to open the door of the room in which the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued, and the plaintiff's wife was injured. Held, that R. was responsible for the acts of his servant, the bookkeeper, since they were done by him in the discharge of what he believed to be his duty, and were within the general scope of his authority. "In the case we are considering, Ruse was aware that the organ was in the plaintiff's house, and that the assent of the plaintiff was necessary before entering to obtain possession of the instrument. Roblin, instead of asking permission to remove the organ, opened the outer door of the house, and when the plaintiff's wife endeavored to bar his further progress, he assaulted her. Roblin no doubt entertained an erroneous idea as to the extent of his authority when he entered the house to remove his master's property therefrom; and he doubtless assumed that, being clothed with authority to so enter and remove the property, he was entitled to overpower anyone who attempted to resist his entrance."

See also *Levi v. Brooks* (1877) 121 Mass. 501 (liability of the master

affirmed where the assault was committed by a servant sent with express instructions to remove certain furniture leased under a stipulation providing for such removal in the event of the rent not being paid); *Peddie v. Gally* (1905) 109 App. Div. 178, 95 N. Y. Supp. 652 (liability affirmed in respect of assault committed by a collector whom the defendant had authorized to go to the plaintiff's rooms and take away furniture sold on the instalment plan); *Kessler v. Deutsch* (1904) 44 Misc. 209, 88 N. Y. Supp. 846 (assault committed by a servant in attempting to remove property purchased on the instalment plan); *Zart v. Singer Sewing Mach. Co.* (1910) 162 Mich. 387, 127 N. W. 272 (contract of lease and conditional sale of sewing machine, with reserved right to resume possession upon default in payments; lessor liable for assault committed by employee sent to take machine); *Griffith v. Friendly* (1899) 30 Misc. 393, 62 N. Y. Supp. 391, affirmed in (1900) 47 App. Div. 635, 62 N. Y. Supp. 1138 (no opinion) (liability imputable to vendor though he merely directed the servant to take the property); *Ziegenheim v. Smith* (1904) 116 Ill. App. 80 (collector of an instalment due on furniture committed an assault, when he was ordered off the plaintiff's premises after having declared he must have either the money or the furniture).

³ *Marcus v. Gimbel Bros.* (1911) 231 Pa. 200, 80 Atl. 75. Error was assigned in respect of the refusal of the trial judge to admit the testimony of the plaintiff tending to prove that the defendant's superintendent said over the telephone that the employee was sent for the goods, and would, if necessary, use force to regain possession of them, and that he actually did demand them when he called, and in endeavoring to obtain them committed the alleged assault. This testimony was excluded mainly on the ground that it failed to show that the acts complained of were committed within the scope of the authority either of the superintendent or of the employee acting for and representing the appellee corporation. Held, that the testimony should have been admitted. The court said: "Whether

erable view is that the master's liability for an assault committed under such circumstances as these is not negated by evidence which shows that the servant was instructed not to resort to force or violence;⁴ or that he was forbidden to take the chattel when the party in possession made objections.⁵ The rulings to this effect are clearly

Hoffman was acting within the scope of his authority under the facts proved, or offered to be proved, was a question for the jury. . . . It is contended that the burden of showing that Barrett was the agent or servant of the appellee, and the extent of his authority, was upon the appellants. If it be conceded that this is the correct rule, the evidence was sufficient to submit to the jury on the question of his authority. Mrs. Marcus testified that the president of the corporation referred her to Barrett as superintendent, saying: 'Whatever he says goes.' After her interview with Barrett the silk was given her, she took it home, and then followed all the acts about which complaint is made. If this testimony is believed it is sufficient to warrant a finding by the jury that Barrett was authorized to act for and represent the appellee, and that in pursuance of his authority he directed Hoffman, another employee, to take possession of the silk by force if necessary. If Hoffman, acting by direction of Barrett, who represented the company, committed wrongful acts in the performance of the duty thus required of him, it was for the jury to say whether these wrongful acts were done in the course of his employment and within the scope of his authority. We see no escape from this conclusion. . . . It is argued that what Barrett said to Mrs. Marcus over the telephone should not be admitted as evidence in any way binding upon appellee. This position is asserted upon two grounds: First, that Barrett was not the agent of appellee; and, second, even if an agent, the principal is not bound by his declarations. As to the first position, we have already said there was sufficient evidence, if believed by the jury, to warrant a finding that Barrett in this particular transaction was authorized to act for and represent the appellee. The second position is also free from difficulty. The declarations of an agent while transacting the business of his principal are evi-

dence against the principal, not as mere declarations, but as explaining the character and quality of the act. *Dick v. Cooper* (1855) 24 Pa. 217, 64 Am. Dec. 652. In the case at bar, if the jury should determine that Barrett had authority to represent appellee in adjusting the complaint of Mrs. Marcus about the silk purchased, what he said and did while so acting may be shown at the trial for the purpose of explaining the transaction, and as bearing upon the question of his authority."

⁴ *McClung v. Dearborne* (1890) 134 Pa. 396, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698.

In *Regg v. Buckley-Newhall Co.* (1911; App. Term) 72 Misc. 387, 130 N. Y. Supp. 172, the evidence showed that the defendant company, having sold plaintiff an article on the installment plan, directed its servant to demand payment, or take the article if he could do so "by lawful means and without any interference with plaintiff's rights," and without committing any acts of assault, engaging in any disorderly conduct, or indulging in any force or incivility, and that the agent obtained possession of the wringer after committing an assault on plaintiff. Held, that the complaint had been improperly dismissed, since the act was done in the prosecution of the defendant's business, and the defendant had clothed the agent with the discretion of determining whether the means by which he possessed himself of the chattel were "lawful or without interference with the rights of the plaintiff." The decision in *McGrath v. Michaels* (note 6, *infra*) was declared not to be in point, because the evidence introduced did not show the authority of the tort-feasor to seize property. No reference was made to the earlier and apparently inconsistent ruling of the same court, in *Feneran v. Singer Mfg. Co.* (note 4 to following section).

⁵ *Shear v. Singer Sewing Mach. Co.* (1909) 171 Fed. 678

more consistent with general principles (see § 2285, *ante*) than a decision to the effect that an assault committed by a servant in attempting to remove a chattel against the will of the purchaser is not imputable to his master, if he was merely authorized to collect the instalments of the purchase money of a chattel, or to remove it with the consent of the purchaser.⁶

A servant who commits an unnecessary assault in levying a distress is not acting within the scope of his employment.⁷

2367. —by servants deputed to collect debts.—(See also preceding section.) A servant who is merely authorized to collect money due to his employer is not acting within the scope of his employment when he assaults a debtor for the purpose of compelling him to pay what he owes.¹ Such violence “is not a recognized or usual means resorted to for the collection of a debt, nor is it one likely to bring about a settlement of a disputed account.”² Where it is agreed between the master and the servant that a certain article is to be de-

⁶ *McGrath v. Michaels* (1903) 80 App. Div. 458, 81 N. Y. Supp. 109. The actual point determined in the case was that the trial court had improperly instructed the jury that the defendant was responsible for the tortious acts committed by his agent while acting within the “apparent” scope of his authority. The court observed that “it is actual, not apparent, authority which governs,” and declared the instruction to be erroneous because the jury might have inferred from it that the acts of the servant in question “were evidence that apparently he had authority to remove the goods without the consent of the plaintiff, and that the assault was committed in the exercise of such authority.” But it is submitted that if removal was one of the classes of acts which the servant was authorized to do, the master should, according to the theory usually accepted, have been treated as responsible for injuries resulting from the improper manner in which the authority was exercised.

⁷ *Richards v. West Middlesex Water-Works Co.* (1885) L. R. 15 Q. B. Div. 660, 54 L. J. Q. B. N. S. 551, 33 Week. Rep. 902, 49 J. P. 631.

¹ In *Cullahan v. Hyland* (1895) 59 Ill. App. 347, a publisher’s collector, having called for an instalment of the purchase price of a book, was told by the purchaser that she had already paid the full price to another agent of the

publisher. The collector refused to accept this statement, whereupon the purchaser appealed to the lessor of her house, who lived close by, to support her assertion. An angry discussion then ensued, and the collector assaulted the lessor. Held, that the publisher was not liable for the injuries inflicted. The court said: “It was the lawful right of Hyland to employ an agent to make collections of money for books sold, and to demand a return of the books in case the money was not paid; and although in this case there was a mistake made by somebody with reference to Mrs. Hathaway having paid in full, the lawfulness of the agency was not thereby affected. But such agency did not extend to the committing of an assault and battery in order to get either, and an agency to do so will not be presumed from the fact that it was committed.”

² *Collette v. Rebori* (1904) 107 Mo. App. 711, 82 S. W. 552. There the evidence showed that, when the plaintiff returned to the defendant’s store, for the purpose (as he said) of amicably settling the disputed account, and made known to the servant his purpose, the servant did not take up the settlement of the account with him, but, without the least provocation, assaulted and beat him, not for the purpose of settling or collecting the account, but to gratify his private malice against the plaintiff.

livered to a third person only upon payment of what is due in respect of it, and that the servant is to be responsible for any money not collected at the time of delivery, if he fails to make a collection at the proper time, and subsequently uses force in order to compel the third person to satisfy the debt, the assault is deemed to be outside the scope of his employment for an additional reason, *viz.*, that his object in committing it is to relieve himself of a liability arising from his own breach of the contract entered into with his master.³

It has been held that a servant who is employed to collect the purchase money of a chattel sold on the instalment plan has no implied authority to seize and carry away the machine upon the failure of the purchaser to pay an instalment, and consequently that his master is not liable for an assault and battery committed by him while attempting to remove such machine after the purchaser's default.⁴

B. ASSAULT WITH DEADLY WEAPONS. HOMICIDE.

2368. Master's liability predicated on the ground of the scope of the tort-feasor's employment.—The *ratio decidendi* in several cases where

³ In *McDermott v. American Brewing Co.* (1901) 105 La. Ann. 124, 52 L.R.A. 684, 83 Am. St. Rep. 225, 29 So. 498, it was agreed between the driver of a beer wagon and defendant that the former was to collect cash on delivery of the beer, and if he failed to collect the cash or return the beer, the amount was to be deducted from his salary. The driver had delivered beer to plaintiff without requiring a cash payment, and on the following day called for the money. It was then that the assault was committed. The court said: "The act of this driver was not in the furtherance of the company's business, nor in the protection of its interests. The defendant had not sent him to collect, nor was it interested in recovering losses by pursuing the violent methods which it pleased the driver to pursue. The instructions of the company were to collect the cash at the time of the sale, and to hand it over to the proper party the next morning. In order, as he wrongfully imagined, to make return in the morning as instructed, he resorted to violence. He thereby sought to protect his own interests, for his employer, whether rightfully or wrongfully,—a question with which we are not at this time concerned,—had made provision to

protect itself in case of the driver's failure to settle for the beer sold."

The above case was followed in *Steinman v. Baltimore Antiseptic Steam Laundry Co.* (1910) 109 Md. 62, 21 L.R.A.(N.S.) 884, 71 Atl. 517. There it appeared that a rule of the defendant laundry company provided that, if drivers delivered work without collecting the charge, they did so at their own risk, and must account therefor as though received. A driver, having delivered certain articles to plaintiff without having received the amount due on them, returned and demanded the articles, and in attempting to obtain them committed an assault. His act was held not to be within the scope of his authority.

⁴ *Feneran v. Singer Mfg. Co.* (1897) 20 App. Div. 574, 47 N. Y. Supp. 284. The right of recovery was also denied on the special ground that the servant had been expressly instructed that, if he should be unable to collect an instalment from a purchaser, he was not in any event to take or touch the chattel. But under the theory commonly accepted as to the inefficacy of restrictive directions (see § 2285, *ante*), it would seem that such a prohibition would not have protected the master, if

the action was held to be maintainable may be said to have been simply this, that the nature of the employment was such as to invest the tort-feasor with an implied authority to use force, if it should be necessary for the purpose of discharging the duties imposed upon him. Thus, the liability of the master has been affirmed under the following circumstances: Where various employees hired as watchmen wounded or killed persons whom they believed to be committing, or about to commit, unlawful acts in respect of the property placed under their guardianship;¹ where a person in the street was killed by a bullet fired by the conductor of a street car at a passenger with

the question of implied power of the servant had been decided in the plaintiff's favor.

¹In *Magar v. Hammond* (1902) 171 N. Y. 377, 59 L.R.A. 315, 64 N. E. 150, reversing (1900) 54 App. Div. 532, 67 N. Y. Supp. 63, the action was brought to recover damages for injuries inflicted on the plaintiff by a bullet from a rifle discharged by the defendant Tompkins, employed as a watchman or gamekeeper by the other defendant, Hammond, to guard a fish pond. The plaintiff was a trespasser who, with two companions, at night, had been taking trout from the pond, and was in the woods on its bank when Tompkins passed by in a boat and fired the shot which struck him. The plaintiff alleged that the shot was intentionally fired. On the other hand, Tompkins denied he was aware that the plaintiff, or any other person, was in the adjacent woods, and asserted that he fired the shots in the air simply to frighten off any poachers that might be in the vicinity. The judgment of the appellate division was not disapproved in so far as affirmed that the defendant's motion for a nonsuit, asked for on the ground that the shooting was not within the scope of the watchman's employment, had been properly denied. The reason for the reversal of that judgment was thus explained in the opinion delivered by the court of appeals, when the case came before it after the second trial. See (1906) 183 N. Y. 387, 3 L.R.A.(N.S.) 1036, 76 N. E. 474, reversing (1904) 95 App. Div. 249, 88 N. Y. Supp. 796: "On the previous appeal we reversed the judgment recovered, because of the refusal of the trial court to submit to the jury the question of the plaintiff's contributory negligence. It will be seen,

however, on an examination of the record then before us, that the case went to the jury on the theory of negligence, and that the question of whether such a theory could be upheld was not before us. If the defendants were to be held liable for negligence, we held that to that liability the plaintiff's contributory negligence was a bar. Under the views that we have now expressed, however, that no liability of the defendants can be predicated on negligence, the contributory negligence or positive wrong of the plaintiff in trespassing on the premises becomes immaterial, for it was not the proximate cause of the injury for which he seeks to recover, and contributory negligence is not a defense to a wilful or wanton wrong." In another part of that opinion is the following statement: "We think the rules of law applicable to the case are well settled and comparatively simple. The plaintiff and his companions were trespassing on the premises of the defendant Hammond, and engaged in the commission of a crime. The defendants, therefore, owed them no duty of affirmative care, and the only obligation resting upon the defendants was to abstain from wilfully, wantonly, or recklessly injuring them. *Sutton v. New York, C. & H. R. R. Co.* (1876) 66 N. Y. 243; *Johnson v. New York, C. & H. R. R. Co.* (1903) 173 N. Y. 82, 65 N. E. 946. But, though the plaintiff and his associates were engaged in the commission of a crime, that crime was only a misdemeanor, and it did not authorize the use against them of a deadly weapon, or the infliction upon them of serious bodily harm. . . . Under these principles of law, neither Tompkins nor his master and codefendant was liable for the accidental or merely

negligent discharge of his rifle. If on the other hand, being aware, or believing, that the plaintiff or other human beings were on the bank of the pond, Tompkins shot the plaintiff wilfully, intending to hit him or some human being; or if, without intending to hit the plaintiff or any human being, he recklessly or wantonly shot where he had good reason to believe there were human beings, then he is liable for the injury caused to the plaintiff. To render the defendant Hammond liable for the wilful, reckless, or wanton act of Tompkins, the act must have been done by Tompkins in the scope of his employment, and whether it was so done should be submitted, as a question of fact, to the jury. *Craven v. Bloomingdale* (1902) 171 N. Y. 439, 64 N. E. 169. If Tompkins, not having the interests or services of his master in mind, and acting maliciously or in order to effect some purpose of his own, shot the plaintiff, then his master, the defendant Hammond, is not liable for his act; but if his act was within the general scope of his employment, and done with a view to the furtherance of his master's business, then Hammond is liable, whether the act was wilful, wanton, or reckless. . . . The learned trial judge presented to the jury the question of the defendants' liability substantially on the theory that has been already outlined, except that he did not instruct the jury that the defendants were not responsible if the shooting was accidental or merely negligent, and, when requested to so charge, refused the request. Personally, I should incline to the view that this omission and refusal did not constitute error, because the case was not given to the jury on the theory of negligence. My associates, however, are of a contrary opinion, and think that the defendants were entitled to an express instruction that they were not liable for negligence. Moreover, I must concede that the use by the learned trial judge, in several portions of his charge, of the term 'negligence' as applied to the conduct of the watchman, affords ground for their opinion. Hence, I yield to their conclusion, and the judgment appealed from must be reversed for the error indicated."

In *Robards v. P. Bannon Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, a complaint was held not to

be demurrable which alleged, after amendment, that G. V. was the night watchman of the defendant company, and authorized as such watchman to carry firearms for the purpose of protecting its property from injury, and also to use them whenever in his judgment it seemed necessary or advisable; that, while the plaintiff was "on or near said premises," G. V., with gross negligence, wrongly adjudged that the plaintiff was doing, or attempting to do, wrong to the property of the defendant, and with gross negligence adjudged it was necessary to fire at the plaintiff in order to protect said property; and that he did actually fire at and wound the plaintiff. The court said: "Where the master employs a watchman and authorizes him to use firearms in his discretion, we cannot hold, as a matter of law, that the act of the watchman in shooting a third party who, at the time, was only near the premises, is conclusive evidence of the fact that the watchman was not acting within the scope of his employment. The master cannot escape liability for the acts of his servant when he has given the servant authority to act and the discretion when to act, and the servant negligently acts at a time when such action was not necessary. The statements of this pleading may be overcome when all the surrounding facts and circumstances are made known; but, taken by themselves, as we must do for the purpose of the question before us, they show that the act of Vanetta was within the scope of his employment."

In *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881, it was laid down that a railroad company was liable for the act of a night watchman in shooting a person whom he suspected of having attempted to break into a car, although in so doing he might have exceeded his authority.

In *Conchin v. El Paso & S. W. R. Co.* (1910) 13 Ariz. 259, 28 L.R.A. (N.S.) 88, 108 Pac. 260, the court reversed a judgment rendered for the defendant on a demurrer to a complaint which in substance alleged that the defendant employed one S. as watchman at one of its yards to guard its property from depredations; to apprehend and turn over to a peace officer for arrest all persons who he had believed had committed

or attempted to commit any depredation upon its property; to keep off from said premises and property all persons acting in a suspicious manner, and armed him with a revolver to carry out his employment; and that plaintiff, while passing the yard in a peaceable manner, and without having committed or intending to commit any depredation upon the defendant's property, was fired at by S. and wounded.

In *Southern Ry. Co. v. James* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303, the liability of a railway company was affirmed in a case where a man was shot and wounded by a night watchman while he was attempting to break way after having been arrested for stealing a ride on a train. The authority of F., the watchman, to make arrest, was held to be established by evidence which tended to prove that S., the superior employee who had hired him, had told him he was to arrest all tramps or other persons stealing rides upon any of the company's trains coming into or going out of East Rome, and to take charge of them; that F., after he was hired by S., was paid his salary by the company; that F.'s predecessors had arrested persons stealing rides, and confined them in the prison until morning, when they were turned over to the state officers. In reply to the contention of counsel that, even if F. had authority to arrest the plaintiff, he had no right to imprison him, or to shoot him on the way to the prison, the court said: "While there was no evidence to show that Ford was expressly instructed to confine his prisoners in the calaboose, there was evidence that his predecessors had done so. Even in the absence of proof of such a custom, we think the authority to confine the prisoner necessarily followed the authority to arrest. This was one of the incidents of the arrest. If Ford could not imprison one arrested, what was the use of the arrest? The town marshal was shown not to be on duty at night, and some disposition had to be made of the prisoner. It could not have been expected that Ford would personally hold his prisoners all night and neglect his other duties. To tie them or lock them up at the yards could scarcely have been expected of him, nor would either of these methods have required less authority than to confine the prisoners in the town calaboose. The calaboose was the proper

place to put them in until they could be turned over to the state's officers to be held for trial. We hold, therefore, that the authority to arrest carried with it the authority to take the prisoner to the calaboose, and there confine him until he could be turned over to the proper officers. When an agent is authorized to do a thing, he has implied power to do all the acts necessarily incidental to doing the thing authorized. Having shown that Ford was authorized to arrest and imprison, the next question to arise is whether the company is liable for the injury which James sustained as a consequence of the shot from Ford's pistol. . . . Where a master instructs a servant to do a lawful act, and the servant, while engaged in the master's business, and intending to do the act authorized, is reckless in the performance of the act, and inflicts injury on another, the master is liable. Webb's Pollock, Torts, 103. . . . In the case now under consideration, the servant had full authority from the master to arrest the plaintiff. If made in a proper way, this arrest would have been entirely lawful. Indeed, the arrest was properly made, and was a lawful arrest. Acting still within his authority, and being still within the law, the servant undertook to imprison the person he had arrested. To do this it was necessary to take him to the calaboose, where he was to be confined. So far the servant was clearly within his authority, and did nothing which was illegal. In endeavoring, however, to take the prisoner to the place of confinement, when the prisoner broke away and ran, the servant negligently, recklessly, and wantonly fired in the prisoner's direction in order to frighten him into halting. The authority to make the arrest and to confine the prisoner implied the authority to use such force or violence as was necessary. The servant, through a want of judgment and discretion, used an unjustifiable amount and character of force and violence. He did so in an attempt to execute the authority to arrest and imprison, and the master is liable for the injury thus wrongfully inflicted upon the plaintiff."

In *Texas & N. O. R. Co. v. Parsons* (1908) 102 Tex. 157, 132 Am. St. Rep. 857, 113 S. W. 914, it was not disputed that if the tort-feasor, an employee who was discharging the functions both of

whom he had had an altercation about the payment of the fare;⁴ where a conductor of a train shot a trespasser while he was complying with an order to get off;⁵ where a brakeman who had been direct-

a deputy sheriff and of a railway watchman, was acting as a watchman when he fired the shot which wounded a supposed trespasser, the company would be liable. The evidence as to the capacity in which he acted was held to be sufficient to sustain a verdict in favor of the injured person.

In *Letts v. Hoboken R. Warehouse & S. S. Connecting Co.* (1904) 70 N. J. L. 358, 57 Atl. 392, the first count of the declaration alleged that the defendant employed one B. as a watchman of its property, and to prevent persons from trespassing upon its lands, and that B., "within the scope of his employment, and acting for and in the interest of the defendant, in attempting to remove the plaintiff's intestate from the defendant's property, made an assault upon him with a pistol, and so wounded him that he died." The second was similar to the first, except that it stated that B., "acting within the scope of his employment, and for the purpose of removing the plaintiff's intestate from the defendant's lands, assaulted and shot him, and so wounded him that he died. Held, that each of these counts showed a cause of action, since they alleged that the assault was made by the agent of the defendant while in the performance of his duty of ejecting the deceased from the defendant's premises. The court said: The "authority given by the master to his servant to eject trespassers from the former's premises charges the master with the liability for the act of the servant in using excessive or inappropriate force in removing one who was a trespasser. And this is so even if the use of any but reasonable and necessary force is expressly prohibited. *West Jersey & S. R. Co. v. Welsh* (1898) 62 N. J. L. 658, 72 Am. St. Rep. 659, 42 Atl. 736."

In *Haehl v. Wabash R. Co.* (1893) 119 Mo. 325, 24 S. W. 737, a demurrer to the evidence was held to have been properly overruled, where a watchman employed by a railway company to keep trespassers off its bridge shot and killed a trespasser on the bridge while he was engaged in removing him.

In *Ward v. Young* (1884) 42 Ark. 553, the defendant was held liable for a

wound resulting from a shot fired by an employee guarding his orchard.

⁴ *Savannah Electric Co. v. Wheeler* (1907) 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38 (petition alleging these facts, held not to be demurrable). The court said: "What we think we have demonstrated is that, under the allegations of the petition, the conductor, in dealing with the passenger and shooting at him, was acting in the prosecution and scope of the business intrusted to him, within the meaning of the law. If he had hit the passenger, there could be no doubt that the shooting would have been within the rule. If he had missed the passenger, did the shooting cease to be within the scope of his business? Shooting at another does not fall within or without the scope of the agent's employment according as his aim is good or bad. Bad marksmanship does not alter the status of the agent doing the shooting. If, then, the conduct of the conductor within the car was in law the conduct of the company, why was not the result of that same conduct, taking effect outside the car, also the result of the conduct of the company? It is not easy to see. But it is contended that, although there was an unlawful or negligent act relatively to the passenger, there was no violation of duty toward a passer on the street, and therefore no liability, although she was struck. It is a mistake to say that there was no duty to passers on a public highway not to do wrongful or negligent acts which would naturally tend to injure them. . . . Again, it has been held that if, in the performance of its business, the company, through its agents, negligently sets in motion a force which naturally and proximately causes injury, it is liable."

⁵ *Southern P. Co. v. Kennedy* (1894) 9 Tex. Civ. App. 232, 29 S. W. 394. The court rejected the contention of the defendant's counsel that the company was not liable, because the shooting was done while the trespasser was in the act of getting off, but said that the action would not have been maintainable if the plaintiff had been shot after he got off.

ed to remove a trespasser from a train fired a pistol at him, and thus caused him to fall under the wheels; ⁶ where a station agent who had been furnished by his employers with a revolver for the purpose of protecting the railway premises against intruders shot a person whom he erroneously supposed to be a trespasser; ⁷ where a slave who was trespassing upon a plantation was killed by a shot from a gun with which a servant of the planter had been directed to scare him; ⁸ where an employee in charge of a farm worked by convicts beat one of them so severely that he died; ⁹ where a servant employed by a railway company to assist it in seizing and holding land occupied by another company wounded a servant of the latter company.¹⁰

2368a. Master's liability predicated on the ground of an absolute duty to protect the injured person.—In one case recovery was allowed where a station agent shot a man who had come to the station to inquire about his baggage, and used insulting language concerning the charge made for storage.¹ But this decision is opposed to the gen-

⁶ *Mobile & O. R. Co. v. Seals* (1893) 100 Ala. 368, 13 So. 917.

⁷ *Blakely v. Greer* (1905) 28 Ohio C. C. 33 (decided on demurrer).

⁸ *Priester v. Augley* (1851) 5 Rich. L. 44.

⁹ *Tillar v. Reynolds* (1910) 96 Ark. 358, 30 L.R.A.(N.S.) 1043, 131 S. W. 969. The undisputed evidence, to the effect that the employee had been instructed to observe the rules laid down by the penitentiary board governing the convicts confined in the penitentiary, and had been charged by defendant not to depart from those rules in the management and punishment of the convicts placed on the farm, was held to prove that he had the authority to punish, and was acting within the scope of it when he inflicted the injury.

¹⁰ In *Denver & R. G. R. Co. v. Harris* (1886) 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286, affirming 3 N. M. 114, 2 Pac. 369, the Denver & R. G. R. Company had collected a large body of men for the purpose of forcibly expelling the employees of the Atchison & T. R. Company from a railway of which that corporation was then in peaceable possession. The plaintiff, one of those employees, was wounded while engaged in defending the railway from this aggression. Held, that the Denver & R. G. R. Co. was liable for the injury so received, irrespective of the question of

the legal title or the right of possession.

¹ *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327, the plaintiff's decedent had, upon application to a station agent, received one of two trunks which he was expecting. When he was informed of the charge for storage (the other trunk not being yet delivered), he became angry, and, whilst the agent was writing and delivering the receipt, and receiving the money, violently abused him. The decedent, having obtained his receipt and change, started to leave the office and was at the door, when the agent picked up his gun and inflicted on him the fatal wound. In the opinion delivered for the majority of the court, the following remarks were made: "A patron of the defendant, whilst in his warehouse on business connected with the road, is entitled, from defendant's agent, to protection against assaults or insults from anyone. The language of the deceased to the agent was rude and wrong, for which the agent had a right to expel him from the premises by using such force as was necessary, and no more. The offensive language of the deceased, however, did not justify or excuse the violence of the agent, and, if his violent act was done within the scope of his employment or line of duty, then his employer, the defendant, is liable in damages for the in-

eral current of authority, and has been emphatically condemned by one of the Federal courts of appeals.²

jury complained of, by reason of the original contract and the act of the agent whilst so engaged." In the opinion delivered for the majority of the court, the decedent was viewed as a person who, when the homicide was committed, had ceased to occupy the position of a passenger, having come to the place in question on an earlier train than the one by which his baggage was to have been transported.

The phrase "original contract," near the conclusion of the passage quoted, was, it seems, used in a loose sense, as importing merely the situation of a person who enters premises to transact business with the occupier. But in the opinion of the present writer, the decision in favor of the plaintiff cannot be justified except upon the hypothesis that the defendant owed to the decedent, during his visit to the station, the contractual obligations of a carrier. (See chapter CIII., *post*.) If he were not entitled to the benefit of those obligations, the case clearly came within the scope of the general rule which precludes recovery against a master in respect of acts prompted by personal resentment. It is submitted that Avery, J., although his view that the decedent was in point of fact a passenger would be disputed by many courts, propounded the correct theory in the following passage of his concurring opinion: "The correctness of the ruling in the court below depends, not upon the general principles governing the liability of the master for the torts of his servant, but upon the nature, extent, and duration of the duty of protection which is implied in contracts for the carriage of passengers. . . . The fact that the plaintiff's intestate had come upon the premises by invitation of the company gave him a right to the protection of the company through its officers and servants. The contract of carriage, and the fact that he was receiving the baggage that had been transported under it, being admitted, the company was, nothing further appearing, liable for an injury to him by its servant. I think there was no error in instructing the jury that, under the admitted facts, the burden of proof was shifted upon the defendant to show that he was jus-

tified in making the deadly assault upon the plaintiff's intestate. While I concur with the majority of the court in the conclusion reached, I do not agree to the opinion of the chief justice in so far as it seems to make the liability of the defendant dependent at all upon the question whether the servant was acting within the scope of his authority. The liability for acts of servants is absolute as to the injuries inflicted by them on persons under their protection. I wish to emphasize the view that the principle governing this case affects the relation of master and servant only when the former is a common carrier, and, while the opinion of the court has been modified, it is still open to objection upon this point."

²In *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306 (for facts, see § 2369, note 8, *post*), the decision was thus commented upon: "The majority of the court, while placing stress on the proposition that the business of the deceased with the baggage men had its origin in the contract for carriage with the railroad company, placed the liability of the railroad company upon the ultimate proposition that, at the time and under the circumstances, the law laid upon the railroad company the duty of absolute protection against such wanton violence of the servant while the deceased was in the office for the purpose of transacting such matter of business. The minority opinion filed held that the placing of the responsibility of the master on the ground that the place of the assault was such as to invoke the rule of protection against a wilful and wanton assault of the servant, as in the case of hotel keepers, proprietors of theaters and steamboats, and the like, was hardly sustainable, and preferred to establish the liability of the railroad company by stretching the relation of carrier and passenger to include the incident at the baggage room. This feat was accomplished by the '*argumentum ad judicium*.' The position has no support in any well-considered case. It stands upon no fundamental postulate upon which the doctrine of *respondet superior* has been builded. 'If a case in law have no

2369. Decisions affirming the nonliability of the master.—The claims were held not to be enforceable in cases where a watchman shot a person who was near the premises of the defendant, but had not acted in such a manner as to warrant the supposition that he was about to intrude upon them;¹ where a watchman shot a trespasser

cousin or brother, it is a sure sign it is illegitimate.' Bacon. When the intestate reached his destination, left the train and the premises of the company, going about his other affairs, the contract of carriage had been performed, and the relation of carrier and passenger was at an end. . . . So that the liability of the railroad company for the unanticipated and improbable occurrence, provoked by the misconduct of the deceased and unlawfully resented by the servant, as the majority opinion rightly conceived, could be sustained only on the ground that it was the neglect of a duty on the part of the railroad company in not safeguarding every person who entered its place of business against violence and injury from its employees, no matter whether or not the injury had any legal connection with the manner of performing the duty assigned by the master to the servant. . . . To uphold the plaintiff's contention, there would have to be written into the law of master and servant a new rule, making every employer an absolute insurer of the safety of every person who comes upon his premises to deal with him on any matter of his special business, against any injury inflicted by any employee."

¹In *Grimes v. Young* (1900) 51 App. Div. 239, 64 N. Y. Supp. 859, it was held that no action could be maintained by a person who, while standing on a public wharf to which he had gone after having bathed near the defendants' works, was shot by the defendants' night watchman without any provocation. The court said: "Taking all the evidence on this subject together, we have the case of a watchman armed with a revolver by his employers, and authorized by them to fire with it into the air in order to frighten away intruders for purposes of self-defense, or to protect the property which he was employed to watch. If, under these circumstances, it appeared that the watchman, either to defend himself or to protect the property of his employers, had fired at a person and killed him,

instead of firing into the air according to the direction of the employer, it might very well be that the master would be responsible for the wrongful act of the servant. Such a question of liability would be presented if Buck had shot Grimes while Buck was on duty acting as a watchman for the defendants, and was engaged in an endeavor to shield their property or his own person from some attack on the part of the lad. If he had aimed at Grimes and fired and killed him under such circumstances, although in disregard of the defendants' directions to fire in the air, his employers might be chargeable with his act under the well-established doctrine that the master may be held responsible for the acts of the servant within the general scope of his employment while engaged in the master's business, even though the servant's act be negligent, wanton, or wilful."

The above decision was followed in *Sandles v. Levenson* (1903) 78 App. Div. 306, 79 N. Y. Supp. 959, affirmed in (1903) 176 N. Y. 610, 68 N. E. 1124 (mem.). The circumstances under which recovery was disallowed were as follows: Plaintiff, with other boys, was playing ball near a yard where defendant's watchman was stationed. The ball was driven into the yard, which was surrounded by a high fence, and one of the boys went upon an adjoining shed and stepped on a ladder to descend into the yard. As he did so, the watchman pulled the ladder from under him, seized him, drew a pistol, pointing it into the air, when it was discharged, either by accident or design, the bullet striking plaintiff, who was standing on a shed near by. This shed did not belong to defendant, and, in the view of the majority of the appellate division, there was no evidence that the watchman knew or had reason to believe that plaintiff was there; but the evidence was uncontradicted that the pistol was pointed in the air as soon as the other boy was seized, and before the plaintiff went on the shed. Ingraham and Hatch, JJ., dissented on the ground that the

while he was withdrawing from his master's premises;² where a man guarding his master's personal property upon his master's prem-

question whether the act of the servant was within the scope of his employment was for the jury. The latter reasoned thus: "There can be no doubt in this case but that the jury would have been authorized to find that the watchman was engaged in the course of his employment in caring for the property of the defendant; that the defendant had furnished him the pistol, to be used if the watchman deemed it necessary in the performance of his duty. Were the jury authorized to find that, in what the watchman did, he acted for the defendant in furtherance of his interests? The first boy had gone over this shed to the ladder. Of that fact the watchman was aware, because he had discovered and pulled the ladder from under him. The second boy passed over the same shed in the same manner towards the same point, in close proximity to the watchman. When he arrived within 4 or 5 feet of the point where the watchman stood, the latter fired the shot which inflicted the injuries, and immediately thereafter communicated to the police that he was being robbed. There is nothing in this record to show that, at the time the shot was fired, the plaintiff was not plainly visible to the watchman. He stood within 4 or 5 feet of him. The watchman had the pistol pointed directly at him; the trespass by the first boy had been by the same ladder, and it seems clear, therefore, that the jury would be justified in drawing the inference that the watchman was aware of the presence and position of the plaintiff; that he fired the shot under the impression that the plaintiff intended to commit a trespass, and deemed such act necessary in the discharge of his duties as watchman of the defendant's property. Under such circumstances, within the rule of the authorities which we have cited, a case was presented which required its submission to the jury." With this view of the evidence the present writer ventures to express his agreement.

In *Letts v. Hoboken R. Warehouse & S. S. Connecting Co.* (1904) 70 N. J. L. 358, 57 Atl. 392, a count which merely alleged that the defendant's watchman, acting within the scope of his employment, made an attack upon the plain-

tiff while the latter was passing along the public highway, was held to be demurrable. The court said: "Such an act is ordinarily entirely outside the scope of a servant's employment, and responsibility is not made to appear merely by an allegation that the servant, in making such an attack, was acting within the scope of his employment."

² *Golden v. Newbrand* (1879) 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537. The court said: "The theory of appellant is that Roenspeiss was employed to guard and protect the brewery, for which purpose he was furnished with a pistol, and that he shot the deceased while in the line of his duty. Without determining whether, if this was all, the defendants would be liable, we think that the fact that the deceased was retreating from the brewery at the time the fatal shot was fired shows conclusively it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss's duty. If Roenspeiss had shot with the pistol from the brewery a person peaceably passing along the highway, the defendants clearly would not have been liable, and we think there is no essential difference between the case supposed and the one at bar. To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom."

The rule applied in the above case was relied upon in *Robards v. Bannon Sewer Pipe Co.* (1908) 130 Ky. 380, 18 L.R.A. (N.S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429, as a ground for sustaining a demurrer to the original complaint, because it alleged that the plaintiff was running away when the shot which wounded him was fired.

In *Belt R. Co. v. Banicki* (1902) 102 Ill. App. 646, it was held that an instruction should have been given to the effect that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and that, if the jury believe from the evidence that the plaintiff was peace-

ises killed a person who had entered thereon for a lawful purpose;³ where a man employed to watch personal property stored by his master upon the premises of a third party shot a person trespassing upon those premises, because he refused to leave the premises, or to halt, or to throw up his hands, at his command.⁴ But it seems to be at

ably leaving the railroad property of the defendant, and was not threatening the defendant's property, nor refusing to go promptly outside its right of way, nor interfering in any way with the performance by the watchman of his duties in the defendant's railroad yard, and that, under these circumstances, the watchman fired the shot that struck the plaintiff for some purpose of his own, the plaintiff could not recover. The court also laid it down that "the mere employment of a watchman to guard property and keep away trespassers does not involve an authority to shoot trespassers; and authority for such shooting cannot be presumed."

³ *Davis v. Houghtellin* (1891) 33 Neb. 582, 14 L.R.A. 737, 50 N. W. 765, decided upon demurrer. The court said: "There is no allegation that Davis was molesting the feed or attempting so to do, or that it was any part of Ireland's duty to seize and arrest persons who happened to be upon the premises, except those who were there for a specified purpose. It is obvious that the averment in the fourth paragraph of the petition, that Ireland 'was acting for the said defendants in the due course of his employment as aforesaid, and, pursuant to his instructions and orders, attempted to seize and detain,' is a mere conclusion, and not a statement of any fact showing that the attempted seizure and detention of Davis was within the range and authority of Ireland's duties. Likewise the allegation in the fifth paragraph, that Davis's death 'was caused by the wrongful and unlawful act, neglect, and default of said defendants,' is the statement of a conclusion of law which the demurrer does not admit. It is only facts that are well pleaded which are confessed by general demurrer. So far as the allegations in the petition are concerned, or the legitimate inferences to be drawn therefrom, Ireland's employment was exclusively in guarding and protecting the feed, and the wrong charged was something which his agency did not contemplate, and which he could not

lawfully do in the name of the defendants. His business no more contemplated the seizure of a person who was upon the defendant's premises for a lawful purpose, than it did the arrest and detention of a person lawfully passing along the public highway near the property, and in neither case would the defendants be liable for the act." If the complaint had been based on the theory of a mistake made by the tort-feasor with regard to the object for which the person in question entered his master's premises, a good cause of action would presumably have been shown.

⁴ *Holler v. Ross* (1902) 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472, reversing (1901) 67 N. J. L. 60, 50 Atl. 342. The court argued thus: "If the person shot had the personal property, or some of it, in his possession, and refused to surrender it, or if he was in the act of taking it, and refused to desist when commanded so to do, and he was shot by the servant, even though the shooting were wanton and wilful, the master might nevertheless be liable. But that is not this case. There is no proof in this case that the plaintiff, or those with him, were interfering in any way with the property of the defendant. They were simply upon the wharf to boil some coffee, and the servant of the defendant, without excuse or explanation, while they were engaged in gathering wood for this purpose, or while they were in the act of running away, shot and injured the plaintiff. It is difficult to see how such shooting can in any way be distinguished from the shooting by any stranger who might have happened to be on the wharf and tried to drive the men therefrom. There is no proof in the record that it was any part of the duty of the defendant's servant to keep persons off the wharf. In fact the implication is entirely the other way. . . . When the plaintiff rested, the proof, as I think, left no room for doubt that the act of the servant was neither within the express or implied duty imposed upon him by the fact or

least open to question whether these decisions were correct. It might well be contended that the courts by which they were rendered failed to ascribe sufficient weight to the consideration that a servant hired to guard property must, in view of the nature of his functions, be assumed to have a certain discretion in respect of determining the proper course to be pursued at a given conjuncture. It would certainly not be inconsistent with any general principles to take the position that the master of such a servant should not have been allowed to escape liability merely on the ground of his having transcended the bounds of his authority, either with respect to the person against whom he undertook to protect the property placed in his charge, or with respect to the means which he employed for the purpose of protecting it.

Recovery has also been denied in cases where a watchman in the service of one railway company shot a man who was attempting to get on a train operated by another company;⁵ where a flagman on a freight train shot a trespasser whom he undertook to eject;⁶ where a conductor discovered that a car had been broken open, and, believing that it had been done by a certain person, coolly walked up to him as he was standing quietly at a station, saying and doing nothing, and shot him down without a word;⁷ where a consignee of

nature of his employment. The plaintiff was bound by the evidence of Anderson, Aspen, and Ross, offered by him, which established the fact that the servant of the defendant was not, at the time of the shooting, doing an act which was necessary, or which he could possibly have believed to be necessary, to protect his master's property, but was engaged in a wilful and wanton trespass outside the line of his duty. Anderson testified that he fired the shot 'to know for himself' why the men were on the wharf at that hour of the night. He was not employed for that. It was not in the line of his duty to shoot at men to learn that fact."

⁵ *Illinois C. R. Co. v. Andrews* (1898) 78 Ill. App. 80. The court said that if the defendant company had no duty to perform concerning the other company's train, the watchman could not have been acting in the course of his employment by the defendant company. So far as the record showed, he was voluntarily assisting the trainmen of the other company.

⁶ *Jones v. Seaboard Air Line R. Co.* (1909) 150 N. C. 473, 64 S. E. 205.

The defendant was held to be entitled to have his motion for judgment on the verdict allowed, where the jury found, upon issues submitted without objection, that defendant's servant shot and injured the plaintiff in a reckless and wanton manner, and that he was not acting within the scope of his employment at the time.

⁷ *Candiff v. Louisville, N. O. & T. R. Co.* (1890) 42 La. Ann. 477, 7 So. 601. The court said: "No stretch of the doctrine that masters are responsible even for the torts of their servants when done within the scope of their employment, and in the exercise of the functions in which they are employed, can make it cover such an act as this. Admitting that the conductor is charged with the duty of protecting the cars and contents confided to his care, and that acts done in execution of such charge are within the scope of his employment, and admitting that he supposed Candiff had broken into the car, and shot him for that reason, in what manner was such shooting under such circumstances necessary or conducive to the protection of the property? If, on the

freight, after his inquiry concerning the charges thereon had been answered by the station agent, was called back to receive an express parcel, and was shot by the agent while he was signing the receipt book;⁸ where a man who had entered a railway yard to apply for a job was shot by a servant employed to clean and care for the lamps, while he

other hand, we accept the conductor's version, we have the case of a man detected in the crime of breaking open a car in the nighttime, who attempts to escape by running away, who, when ordered to stop by parties in charge of the property, refuses to do so, and who is then shot by one of said parties. It is not necessary to justify the act of the brakeman, or to decide whether or not it was within the scope of his employment in such manner as to make the company responsible. It is very clear that, in such a transaction, the party detected in the commission of a crime, and shot while attempting to escape arrest, would be in a case of such contributory fault that the law would afford him no relief in a civil action for damages. Counsel for defendant suggests the very apt analogy of a night watchman employed to guard a house. He detects burglars in the house, who attempt to escape, and on their failing to halt when called to do so, he shoots one of them. Could the burglar shot be listened to in an action of damages? On the other hand, if the watchman had discovered that a burglary had been committed, and sometime afterward seeing two persons standing quietly in the street, whom he supposed to be the burglars, he walks up to them and shoots one of them without a word, who proves to be innocent, would his employer be liable?"

⁸ *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306. The court said: "At the utmost, the only inference possible is that Steagald was in the employ of the railroad company as its station agent at Ben Clare; that within the compass of this agency was the selling of tickets to passengers and receiving and delivering railroad freight. Bowen was not at the station as a passenger to buy a ticket. He was not there to deliver or receive freight. He went there solely for the purpose of making inquiry as to whether any demurrage would be exacted for

the failure to unload a car of coal that day. When he was answered that, in the opinion of the agent, there would not be such demurrage, and he turned away, that matter was concluded. The assault committed had no legal relation thereto. When he was recalled by the statement that there was a package for him, and he was shot by Steagald while in the act of signing the receipt book therefor, in order to make out a case against the railroad company, it devolved upon the plaintiff to prove that such package pertained to the business of the railroad company. The plaintiff's evidence showed that Steagald not only had charge of freight matters at that station, but also of matters pertaining to the express company. The evidence did not show that the package pertained to the business of the railroad company. If the package referred to was express matter, it did not pertain to the railroad as such, and therefore Steagald did not appear to be acting for the railroad company at the time. Whether the package came as railroad freight or as express matter was left entirely to the conjecture of the jury, to guess at. If this important fact was to be submitted to the chances of guessing right, there was not only as much, but better, reason for guessing that it was express matter. Signing a book at or near the window of the office would rather indicate that it was a receipt book for an express than a freight package. No package was displayed, and we do not know, save by the imputed statement of Steagald, that any package in fact was there to be delivered. As Steagald stood at the window of the ticket office, the indication was, when the book was signed, the package would be handed out through the window,—not a place for the delivery of such bulky packages as would usually come by freight. Facts affirmatively established by tangible proofs, not conjectures, are essential to a right of recovery."

was running away to escape being seized as a trespasser;⁹ where a shot discharged by one of a body of men who had been hired to take the places of striking servants, and who, at the time of the discharge, were defending themselves against an attack, wounded a person who was not participating in the affray;¹⁰ and where a person in a dwelling house at a mine operated by employees of that description was wounded by a chance shot while they were indiscriminately firing at some supposed assailants with guns which had been obtained by the company for protective purposes, but which, on this occasion, had been taken without its consent or direction from the storehouse where they had been deposited.¹¹

The *ratio decidendi* in two cases involving a homicide was simply that, under the facts in evidence, recovery was precluded by a doctrine then accepted in most jurisdictions, but now very generally discarded (see §§ 2239 and 2239a, *ante*), *viz.*, that a master could not be held liable for the malicious and wilful act of his servant, done without his direction or assent.¹² In another case the nonliability of the

⁹ *Turley v. Boston & M. R. Co.* (1900) 70 N. H. 348, 47 Atl. 261.

¹⁰ In *Shay v. American Iron & Steel Co.* (1907) 218 Pa. 172, 67 Atl. 54, the shot was fired at a mob from the premises of the defendant, and struck the plaintiff while in his own house. The *ratio decidendi* was that the tort-feasors were hired to operate the defendant's works, not to protect his property. But is it not one of the duties of every class of servants to protect the property of their masters? And even if it should be conceded that there is no universal rule in this regard, is not a jury warranted in finding that men employed as "strike breakers" are expected, as a part of their functions, to guard the premises of their employer against the acts of violence which are so frequently committed during a strike?

¹¹ *Thorburn v. Smith* (1895) 10 Wash. 479, 39 Pac. 124, on the occasion in question a carload of colored men had been taken from the F. mine, where they ordinarily worked, and where the guns and ammunition were stored, to another mine of the defendant company at N., where a strike was in progress. During their absence a colored guard was killed at the F. mine, his slayer being, as was supposed, one of the former employees whose places had been taken by the colored men. Owing to this oc-

currence, the colored men who had remained at the F. mine had become greatly excited and alarmed. As the car on which the gang of miners were being brought back to the F. mine was approaching the station, several shots were fired at and from the car. Thereupon the excitement of the miners who had stayed behind was greatly augmented, and, rushing in a body to the storehouse, they seized a large number of the guns and joined in the firing, which had by this time become somewhat indiscriminate. The ground upon which it was held that the mining company was not responsible for the wound received by the plaintiff was that, in discharging the weapons, the men were not engaged in any duty assigned to them in their capacity of servants. But it is submitted that, as the weapons had been obtained for protective purposes, the right of action might well have been affirmed on the theory that the men used them in the belief that their lives were really endangered. Under such circumstances, it would seem that the mere fact of their having taken possession of the arms without having been specially authorized to do so was not a material element, so far as a third person was concerned.

¹² *Fraser v. Freeman* (1871) 43 N. Y. 566, 3 Am. Rep. 740, reversing (1870)

defendant for the death of the party in question was affirmed with reference to another principle which has also been abandoned as regards most classes of cases (see §§ 2241 *et seq.*, *ante*), viz., that "authority from the master can only be implied where the act is one which, in a certain state of circumstances, might have been legally done by the master himself."¹⁸ The liability of the master was

56 Barb. 234 (holding that, as there was no adequate evidence to express direction or assent on the master's part, it was error to refuse to instruct the jury that if the servant fired the shot with the premeditated design to cause death, the master was not liable); *McCoy v. McKowen* (1853) 26 Miss. 487, 59 Am. Dec. 264 (hired slave mortally wounded by defendant's overseer).

¹⁸ In *Kinsella v. Hamilton* (1888) Ir. L. R. 26 C. L. 671, the plaintiff's decedent had been killed by one of the shots of a volley fired by the members of a party of men engaged in distraining his cattle. The action was brought under the damage act against Hamilton, the agent of the decedent's landlord, and Freeman and McBride, two bailiffs. Several other persons were co-operating with the bailiffs in carrying out the seizure of the cattle. In answer to questions left to them the jury found (1) that M. did not fire the shot which killed K., (2) that the parties making the distress (other than F. and M.) were acting on that occasion under the direction of both F. and M.; (3) that the parties making the distress were acting in concert, to overcome by force any resistance that might be offered to them in seizing the cattle; (4) that H. authorized F. and M. to bring the others with them, and to use all force that might be necessary to take the cattle, and overcome any resistance to the taking of them; (5) that the resistance offered by those in the yard did not justify the shooting by the party making the distress; (6) that the shot which killed Kinsella was fired by one of the party engaged in making the distress. On cause shown against entering the verdict for the defendants, it was held, (1) that the verdict should be set aside, and that a verdict and judgment be entered for H., and a new trial be directed as to F. and M.; (2) that there was no evidence that H. authorized M. to make the distress in an illegal manner, and that the illegal manner in

which M. effected the distress would not render H. liable in the present action; (3) that causing the death of Kinsella was an act collateral to the distress, and not within H.'s express authority to M. in making the distress, nor necessarily or reasonably incident thereto; (4) that there was no evidence of implied authority, or subsequent ratification by H., to render him responsible for Kinsella's death. In the course of the judgment delivered for the whole court, Palles, C. B., said: "In my opinion there is no evidence that Mr. Hamilton employed M'Cabe to make the distress, or contemplated his making it, in an illegal manner. However, the act itself of making the distress was one the legality of which, under the 9 & 10 Vict. chap. 111, § 10, depended upon the particular of rent being delivered or affixed at the time of the distress by the person who made it. Mr. Hamilton thus necessarily trusted M'Cabe as the person to serve this notice, and M'Cabe's omission to perform his duty cannot render the very act authorized, *i. e.*, the making of the distress, less the act of Hamilton than it would otherwise have been. If, then, this had been an action for the illegal distress, I should have held Mr. Hamilton liable in it. This I understand to be admitted by his counsel, and my only reason for referring to it is to make clear the question we decide. The present action, however, is not for the illegal distress, but for causing the death of Kinsella, an act which, although done whilst the distress was being made, was, to some extent at least, an act collateral to the distress; and the question is, Is there evidence that this collateral act was authorized by Hamilton, so as to render him civilly liable? for, of course, criminal liability is out of the case. From the mode in which the case was argued, it is necessary to distinguish between express and implied authority. I use the word 'express' as including, not only the act authorized, *i. e.*, here the distress, but

denied in one instance on the ground that the homicide complained of was committed by the servant while engaged in an unlawful employment.¹⁴ But it is difficult to see why such a consideration should operate prejudicially to an innocent third party. The decision would probably not be accepted as good law in all jurisdictions.

Other cases have proceeded upon the general ground that a master is not responsible for injuries resulting from the acts of a servant which were prompted by his personal resentment against the injured person.¹⁵

also everything necessarily or reasonably incident to the performance of that act. For everything so expressly authorized, the person giving the authority is civilly liable; and where the relation of master and servant exists, the master may be liable, although he directed the act to be done in a legal manner, and the cause of action is not the act itself, but the illegal and unauthorized mode of its performance. . . . It is clear, in the present case, that the act of killing Kinsella was not within Hamilton's express authority, using that word in the wide sense I have mentioned. It is neither necessarily nor reasonably incident to the making of the distress. The question then is, Was there any evidence of implied authority?" After quoting the principle in the text from the judgment of Holmes, J., in *Barry v. Dublin United Tramways Co.* (1888) Ir. L. R. 26 C. L. 150, the learned judge continued thus: "It is admitted by the plaintiff's counsel that there is no state of facts known to the law which would justify the taking of human life in order to levy a distress. No doubt, were the bailiffs assaulted, they would have the ordinary right of assaulting their assailants in self-defense; but this is a right which springs from the assault, not from the right to levy the distress. It is a right to protect themselves, and not to enable them to make, or to assist them in making, the distress. It follows that the mere direction to levy that distress cannot support an implication of authority by Hamilton to McCabe or any of the parties, to kill Kinsella." The conclusion arrived at furnishes a noteworthy instance of the difficulty which is so often found in determining whether the servant, when he committed the given tort, passed entirely outside the scope of his employment, or merely did an author-

ized act in an improper manner. It seems quite probable that some of the American courts whose rulings are referred to in the preceding section would, under the given circumstances, have held the action to be maintainable.

¹⁴ In *Sagers v. Nuckolls* (1893) 3 Colo. App. 95, 32 Pac. 187, while an employee engaged by cattle raisers to farm and handle stock was guarding and protecting an illegal possession of government land by such raisers and others as individuals, he killed a third person. Held, that the act was not imputable to his employers, even though he was armed by them, and expressly ordered to eject or kill any person invading the possession. The court said: "To render the employer liable, the employment must be lawful and the business lawful. The wrong and fraud upon the government and the public by taking illegal possession of a large tract of the public domain, preventing its occupation, settlement, and sale by and to those who had legal right to occupy under the laws of Congress, and maintaining such possession by force and violence, resulting in the taking of life, cannot be regarded as the prosecution of a lawful business, and one in which the relation of master and servant could have an existence. Under such circumstances all are principals, confederates in the prosecution of a criminal enterprise, and all jointly, or each individually, may be held criminally responsible for any wrong perpetrated. It follows that guarding and protecting the illegal possession of the land claimed by the individuals as alleged was not an incident of the alleged employment, but a criminal and wrongful act as a confederate or a volunteer, in which the question of master and servant could have no place."

¹⁵ *Johnson v. Alabama Fuel & I. Co.*

2370. Master's liability as affected by statutory provisions.—In Georgia the death of a person who, while engaged in discussing at a railway freight office certain transactions between him and the company, was shot by its agent, has been held to be imputable to it, although the killing resulted from a private feud growing out of matters entirely disconnected with the business then on hand.¹ The decision reflects the peculiar construction which has been placed in that state

(1910) 166 Ala. 534, 52 So. 312; *Holler v. Ross* (1902) 68 N. J. L. 324, 59 L. R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472 (one of the grounds of the decision; for the other, see note 4, *supra*); *Lytle v. Crescent News & Hotel Co.* (1901) 27 Tex. Civ. App. 530, 66 S. W. 240; *Hidalgo v. Gulf, C. & S. F. R. Co.* (1910) — Tex. Civ. App. —, 128 S. W. 683.

¹ *Columbus & R. R. Co. v. Christian* (1895) 97 Pa. 56, 25 S. E. 411. It was held to be error for the trial judge to charge the jury without qualification, that if they believed from the testimony that the agent was not justified in taking the life of the decedent, the plaintiff would be entitled to recover. The court said: "Twice before this case has been before this court for review. The decision made upon its first appearance is reported in (1887) 79 Ga. 460, and that made when it was last here appears in (1892) 90 Ga. 124, 15 S. E. 701. The law of the case seems to have been practically settled by the decision first above indicated. In that case, upon authority of our Code provision, it was ruled that liability of railroad companies for injuries committed upon others by persons in their employment was not confined to injuries inflicted by their servants while engaged in running and operating their cars, but extended to injuries inflicted by their employees in the conduct of their business other than those resulting from negligence in running their trains, etc. The effect of this construction placed upon this section of the Code is to eliminate entirely from the region of doubt the proposition as to whether railroad companies are answerable generally for torts committed by their employees while engaged in the transaction of the business of their employer. . . . But, while the section of the Code in question lays down the proposition broadly, that for damage done by any person in the employment and service of such company the latter shall be liable, such

language must be understood to mean such torts only as are committed by an employee while engaged about the business of his employer; for it cannot be presumed that the legislature intended that the mere circumstance of a person being in the employment of a railroad company should render it liable for all torts committed by such employee, whether in any manner connected with the performance of his duties to his employer or otherwise. . . . The husband of the plaintiff, as we have seen, was a patron of the defendant. He was at the place where he was killed rightfully and upon the implied invitation of the company, to transact his business with its agent, and in the transaction of such business, he was at least entitled to protection against the violence and insults of such agent. If, in the course of the transaction of such business, upon provocation growing out of the negotiations between the parties, he was wrongfully slain by the agent of the company, the latter would be liable. But even though the homicide might have occurred during the time the negotiations were pending between the agent of the company and the deceased, if the deceased was slain by the agent upon some private feud growing out of other matters wholly disconnected with the transaction of the business then in hand, and upon some provocation given by the deceased, the company would not be liable. If, however, the agent of the company took advantage of the opportunity afforded by the presence of the deceased at his place of business, to bring about a difficulty with the deceased upon the occasion of some previous private quarrel, the company would be liable, because of the obligation imposed upon it by law to at least afford to its patrons protection against the violence of its agents, when the patron is himself without fault and is engaged about his business with the company. If, however, the patron himself provoke a

upon the words of the section of the Code under which the action was brought. It is clearly inconsistent with the doctrine which prevails in jurisdictions in which the right of recovery is not affected by any statutory provision. See generally § 2288, *ante*.

C. LIBEL AND SLANDER.

2371. Responsibility of a master for a libel published by his servant.

Generally.—It would seem that at one time the view prevailed that a master could not be held responsible for a libel published by his servant, except upon the ground of his having authorized or ratified the writing or printing of the particular words complained of.¹ But at the present day the only condition precedent to the maintenance of

difficulty which terminates in his homicide, thus withdrawing the agent from the business of the company to engage in a settlement of an outside controversy with himself, the company would not be answerable for the consequences resulting to such patron from the violence of the agent thus provoked; or, if the patron were himself guilty of such disorderly conduct as would authorize his expulsion from the premises, the agent of the company might be authorized to expel him, using only such force as would be necessary to accomplish that purpose; but such conduct or provocation would not justify the homicide of the patron upon the part of the agent, and the company could not exonerate itself from liability for the consequences of the act of the agent done on its behalf, without showing that the agent was justified in the premises. Of course, if the homicide committed by the agent was justifiable, the justifiable act of the agent could not be made by relation the wrongful act of the company. We think, therefore, that when the court made by its charge the question as to whether or not the act of the agent was justifiable the sole test of the liability of the company for the damages resulting from the homicide of the plaintiff's husband, it left entirely out of consideration the question as to whether or not the homicide was committed under such circumstances as would excuse the company from liability upon the theory that it was a mere personal conflict, wholly disconnected from the business of the company. Whether or not the

wrongful act alleged to have been committed was committed by the servant, and if so, whether it was done in the course of the transaction of the business of his employer, or upon independent provocation, for the consequences of which the company would not be liable, are questions for the jury, and should have been submitted for their consideration."

¹This was apparently the *ratio decidendi* in *Harding v. Greening* (1817) 8 Taunt. 42. There the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters. A customer to whom a bill written by the daughter had been sent by the daughter, being advised by the plaintiff that the charge was too high, sent it back; it was returned to her inclosed in a letter also written by the defendant's daughter, which constituted the libel. Held, that in an action for the libel this evidence was not sufficient to fix the defendant. Dallas, Ch. J., said: "The plaintiff must therefore go the length of showing that, at the trial of this cause, evidence was adduced which would have been sufficient, in case the defendant had been indicted, to prove that he was the author of the libel. Now, can the writing of this libel be considered as coming within the scope of the authority delegated by the defendant to his daughter? It is, indeed, shown that he had given her authority to write for him in common cases, because he could not write himself; but there is not a grain of evidence to show that he had given his daughter authority to write libels in general, or that the

an action against a master for injuries caused by a tort of this description is that the words in question should have been written, printed, or spoken by the servant in the course of his employment.² The sufficiency of the declaration, and the incidence of the burden of proof, are determined with reference to the criterion thus indicated.³

defendant had even seen the letter containing this particular libel." Park, J., said: "The case put by the counsel, of the sale of a book by a bookseller's servant in his shop, is quite beside the question; there, the act is done in the regular course of trade." The report does not state what were the defamatory statements in question. From this omission it may reasonably be inferred that, in the view of the judge, a libel was a species of tort which was to be regarded as being outside the scope of a servant's employment in all cases except those in which it was published in compliance with the master's command, and that their attention was not directed to the element which would now be treated as all-important, *viz.*, the distinction between libels which are, and libels which are not, incidental to the servant's duties.

Another illustration of the same point of view seems to be furnished by *Goodrich v. Stone* (1846) 11 Met. 486, an action against the proprietor of a newspaper, for a libel published therein by his agent, in his absence and without his knowledge or consent. One of the points decided was that the plaintiff might give in evidence an article published in a subsequent issue, with the defendant's knowledge and consent, justifying the publication of the article complained of, although the second article was not published until after the commencement of the action. It is apprehended such evidence would, by a modern court, be treated as wholly immaterial except with reference to the question of the assessment of damages. See § 2372, note 2, *post*.

² See the cases cited *passim* in the following sections.

The rule stated in the text was presumably the *rationale* of a decision to the effect that an employer is not liable for the unauthorized act of an employee in showing a libelous circular to other persons, nor for his negligence in losing it. *Chambers v. Appleton* (1883), an

unreported case decided by the supreme court of New York. See Townshend, *Slander & Libel*, 4th ed. p. 104, note.

³ In *Beaton v. Glasgow* (1908) Sc. Sess. Cas. 1010, one Thompson, the general manager of the public baths of Glasgow, sent to the school board of the city a report in which the superintendent of one of the baths had commented adversely on the conduct of the plaintiff, a swimming instructor, employed by the board. The pursuer averred that Thompson, "in the execution of his duty as general manager," had forwarded the report, and that in writing and despatching the report the superintendent and Thompson "acted within the scope of their authority from the defenders." Held, that *prima facie* it was not part of the duty of the general manager of baths to make communications on behalf of the corporation of the school board; that it was not enough to aver generally that the report was forwarded by the general manager "in the execution of his duty," and that, in the absence of any averment that he had special authority to act as he did, the action was irrelevant. Lord Kinnear said: "To make a corporation liable for the slander by a person in their employment, it is not enough to say generally that what that person did was done in the execution of his duty. You must go on and make some averment to show what his duty was, so as to make it apparent that the particular thing complained of at least belonged to the class of services he was employed to perform. All that is said about the kind of employment that is committed to Mr. Thompson, whose conduct is here complained of, is that he was employed as general manager of the public baths. Now, if he had done any wrong in the course of his management of the baths, then it may very well be that the corporation would be responsible for it. But what he did was not an act of management of the baths in any sense. It was a communication to the Glasgow

2372. Same subject. Libels published by servants engaged in newspaper work.—In one case it was remarked that “there is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper.”¹ In other cases the doctrine has been propounded with more or less distinctness, that the proprietor or publisher of a newspaper is answerable for any libelous matter printed therein, irrespective of whether it was or was not inserted with his knowledge and approbation.² Such statements as these, if taken literally, would seem to import an acceptance of the doctrine that the responsibility of em-

school board of a report made to him by another person in the same employment, which is said to be slanderous of the pursuer. But then the only averment which could have made that a relevant ground of complaint would have been an averment that it was part of his employment under the corporation of Glasgow to make reports to the Glasgow school board as to the business of the baths. If it was part of his employment to make reports or communications of any kind on behalf of the corporation to the school board, it would have been perfectly easy to say so. But that is not said. There is nothing to suggest that he was in any sense, or for any purpose, the mouth-piece of the corporation.” Lord Dunedin was of opinion that the irrelevancy of the action might also be predicated upon a ground thus stated: “This so-called slanderous document is a report and nothing else, and the province of a report is that it is confidential and is meant to be communicated to the superior officers to whom the report is made. If, accordingly, we find upon the facts averred that the report, instead of being communicated to any superior officer, was sent away to an outsider by the action of a servant, I think that shows, on the face of it, that the servant was not acting within the scope of his authority, but was going outside of it,—in the absence, of course, of any averments which would show that this particular act was within the instructions that had been given.”

¹*Detroit Daily Post v. McArthur* (1868) 16 Mich. 447.

²*Andres v. Wells* (1810) 7 Johns. 260, 5 Am. Dec. 267; *Huff v. Bennett* (1850) 4 Sandf. 120; *Hunt v. Bennett* (1859) 19 N. Y. 175; *Crane v. Bennett* (1904) 177 N. Y. 106, 101 Am. St. Rep. 722, 69 N. E. 274, affirming (1902) 77 M. & S. Vol. VI.—449.

App. Div. 102, 79 N. Y. Supp. 66; *Robertson v. Bennett* (1878) 12 Jones & S. 66; *Perret v. New Orleans Times Newspaper* (1873) 25 La. Ann. 170; *Buckley v. Knapp* (1871) 48 Mo. 152.

In *Dunn v. Hall* (1849) 1 Ind. 344, the court observed: “If Mr. Dunn himself had been at home and suffered one of his journeymen to insert the libelous article in his paper, under his own eyes, he certainly could not have excused himself by proving that he had given the journeyman private directions not to do so; and if he chose to leave the management of his business in the hands of a foreman, he must be held equally responsible for the neglect or incompetency of the latter, in not obeying his instructions, and in suffering such a thing to be done. If publishers could avoid responsibility by telling their foreman not to admit anything personal, and then absenting themselves while a libel was inserted, they could very easily make the newspapers vehicles for the circulation of the most atrocious slanders with perfect impunity. But, indeed, it would be presumed in all cases that a principal, in giving charge of his business to an agent, directed such agent to transact it lawfully, and proof that he instructed such agent to manage it unlawfully seems to be superfluous and irrelevant for any purpose.”

“The proprietor of a newspaper is liable for defamatory matter published without his knowledge, because of the delegation by him to others of power to do the wrong; the printer and editor, by reason of their direct connection with and control over the contents of the paper.” *Mecabe v. Jones* (1881) 10 Daly, 222 (*arguendo*).

In *Bruce v. Reed* (1883) 104 Pa. 408, 49 Am. Rep. 586, the court said: “If the defendants gave to Palmer such charge and control of an editorial col-

ployers in respect of libels inserted by their employees in newspapers owned or published by them is absolute in the same sense as that of persons who use abnormally dangerous instrumentalities for the purposes of their business. But, in the absence of explicit authority upon the point, it seems permissible to doubt whether any court would go to this extent, if the questions were actually presented. The more reasonable view would rather seem to be this,—that, as one of the normal and characteristic features of journalism is the publication of statements with respect to the sayings and doings of various persons, the law may properly treat the proprietor of a newspaper as being presumptively liable for any defamatory statement of that description that is inserted in it. It is clear that, under ordinary circumstances, the fact of its having been inserted implies *prima facie*

um, reserving no supervision, he was practically authorized by them to write and publish therein any article he thought proper. The very purpose of his employment was to collect information and write articles for publication. If they imposed such duties upon him, and gave him such powers, limited only by his discretion, they are liable for injuries resulting from an act of his clearly incident to the performance of his duties, in the scope of his employment. He stood in their place. If the libel was written under the authority of his employment, and in furtherance of their business, they are responsible, whether the wrong resulted from his mere negligence or from a wanton and reckless purpose to accomplish the business in an unlawful manner (*Howe v. Newmarch* [1866] 12 Allen, 49; *Ramsden v. Boston & A. R. Co.* [1870] 104 Mass. 117, 6 Am. Rep. 200; *Harves v. Knowles* [1874] 114 Mass. 518, 19 Am. Rep. 383), or from his wilfulness (*Wood, Mast. & S.* pp. 576, 583)."

In *Lothrop v. Adams* (1882) 133 Mass. 471, 43 Am. Rep. 528, the court relied upon cases of the above description as precedents for a decision to the effect that the express malice of one member of a partnership conducting a newspaper was imputable to his copartners. The court said: "As partners are the general agents of each other and of the firm, within the scope of the business of the partnership, we think a test of the question we are considering is the liability of the proprietor of a newspaper in damages for a libel maliciously

published without his knowledge by his agent, whom he has intrusted with the management of the newspaper; and this we regard as well settled. . . . If the liability of the principal for the fraudulent acts of the agent done within the scope of his employment be limited to those cases in which the principal derives a benefit from the act of the agent, and a corresponding limitation be put upon the liability of one partner for the fraudulent acts of another done within the scope of the partnership business, yet, when a partnership publishes a newspaper, whatever benefit, if any, is derived from the publication of a libel, is necessarily received by the partnership."

For other cases which may be regarded as embodying the doctrine stated in the text, although it was not categorically referred to, see *Shepherd v. Whitaker* (1875) L. R. 10 C. P. 502, 32 L. T. N. S. 402; *E. Hulton & Co. v. Jones* [1910] A. C. 20, 79 L. J. K. B. N. S. 198, 101 L. T. N. S. 831, 26 Times L. R. 128, 54 Sol. Jo. 116, 47 Scot. L. R. 591, 16 Ann. Cas. 166; *Storey v. Wallace* (1871) 60 Ill. 51; *Sullings v. Shakespeare* (1881) 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451 (there liability was denied on the ground that the given statement was not libelous); *Regensperger v. Kiefer* (1887; Pa. Sup.) 4 Sadler (Pa.) 541, 7 Atl. 724; *McDonald v. Woodruff* (1871) 2 Dill. 244, Fed. Cas. No. 8,770; and the decisions cited in § 2374, note 1, *post*, as to the liability of corporations.

some negligence or wilful misconduct on the part of an employee intrusted with the duty of determining whether it should or should not be printed. In this point of view, if the proprietor or publisher seeks to avoid responsibility for it, he may fairly be required to assume the burden of proving that it was inserted without any fault on the part of such an employee.³

2373. Same subject. Libels published by servants engaged in other occupations.—So far as regard occupations other than that of the production of newspapers, it is clear, both upon principle and authority, that the onus of proving that a libel published by the defendant's servant was published by him in the course of his employment can be discharged only by offering specific affirmative evidence that warrants such a conclusion.¹ This rule holds even where the servant in

³ Some indirect support for this modified theory seems to be furnished by *Samuels v. Evening Mail Asso.* (1873) 52 N. Y. 625. There the complaint charged defendant with publishing in a paper of which it was the publisher and proprietor, an article defamatory to plaintiff. The answer admitted the proprietorship of the paper, but denied that the article complained of was published with its knowledge, consent, assent, or permission, and also denied that any person employed by defendant had any right or authority from it to publish the article. Plaintiff moved for judgment on account of the frivolousness of the answer, which motion was granted. Held, error; that it was not clear that the answer did not contain a sufficient denial of the publication to make an issue for a jury.

¹ In *Nolan v. O'Brien* (1856) 3 Ir. Jur. O. S. 261, an action was brought against A for a libel contained in a letter written by B, the private secretary of A, who was at the time lord mayor of Dublin, the latter being addressed to C, and purporting to be in reply to certain inquiries put by C to A in his official capacity. It was not proved that A had ever seen the letter in question, but merely that he had directed B to look after the matters about which C desired information, and that a fortnight had elapsed before the document complained of was written. Held, that there was no evidence that A had authorized his secretary to publish the libel.

In *Southern Exp. Co. v. Fitzner* (1882) 59 Miss. 581, 42 Am. Rep. 379, where a parcel of tea sent through the

defendant to the plaintiff had been broken open, the defendant's agent at B. reported, in answer to an inquiry made by his superiors, that the parcel consigned to the plaintiff was in the condition complained of when it was received by him, and thus the matter rested. But the son of the agent, who performed his duties, saw the letter of inquiry, and, without consulting anyone, wrote as "acting agent" to the consignor, stating that "this fellow Fitzner," when he wrote the letter intimating that the tea was opened in this office, had no idea that "it would be referred here for an explanation," or he would have been far from doing so; that he was engaged in a small business at B.; that in principle he was a small man, would do anything dirty, and was endeavoring to beat the consignor out of the tea. The letter concluded; "I send you a 3-cent stamp, and want you to send this letter to him and advise me on card." The consignor used the stamp as instructed. A verdict for the plaintiff was set aside. The court said: "Conceding that E. B. Perkins was the agent of the express company at Brookhaven at the time when the libelous letter was written by him, and taking the testimony as to his duty and authority to act for the company in its most favorable phase for the appellee, no facts were shown from which the jury could infer express or implied authority on his part to act for the company in the business. So far as is shown by the testimony, he had no authority from the company to write any communications, except in those cases in which application was made by the patrons of the company to the

question was the general manager of the defendant's business.² In applying it the courts have affirmed the right of recovery with reference to the following states of fact: That the superintendent of

office at Brookhaven for information touching the business at that office, but there was no duty resting upon him to reply to letters addressed to his superior officers or to agents at other places; in so doing he was a mere volunteer, though he professed to write for and in the name of the company. The facts show that no application was made by the tea company to Perkins at Brookhaven for information touching the matter complained of by Fitzner. If inquiry had thus been made, it would have been within the scope of his authority to reply, and for a libel contained in a reply so made, it might well have been argued that the company would have been liable, because it would have been published by Perkins in the performance of a duty enjoined upon him by his principal, or which he had authority to perform. . . . It is apparent that no liability is fixed on the corporation; for the libelous letter was written not in the performance of any duty which he was required or permitted to perform. It was his own independent wrong, committed in the performance of no duty or service for the company, and he alone is liable for its consequences."

"To slander anyone is not within the sphere or region of an ordinary business, and a master is not responsible for his servant's written or spoken slander any more than he is for an assault committed at his door." Lord Young in *Cameron v. Yeats* (1899) 1 Sc. Sess. Cas. 5th Series, 456.

²In *Washington Gas Light Co. v. Lansden* (1898) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, where the general manager and the secretary of a gas company procured the insertion in a periodical of a defamatory article reflecting upon discrepancies in the testimony given by the plaintiff before two congressional committees appointed to investigate the cost of the production of gas, the grounds upon which it was held that no action could be maintained against the company were thus stated: "In this case no specific authority was pretended to have been given the general manager, Leetch, to write the letters which he sent to Brown, or to au-

thorize the publication of anything whatever in the periodical named. . . . Can any authority be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence, we find nothing upon which such an inference can be based; nothing to show that any correspondence whatever upon the subject in hand was within the scope of the manager's employment. Commencing with the time when a superintendent was employed in March, 1865, down to the employment of Leetch, no such power could be inferred from the evidence regarding the duties of a superintendent or manager. In March, 1865, the duties of such an officer were plainly stated. They were: 'To take charge of every portion of said works pertaining to the manufacture, distribution, and consumption of gas, and all persons employed in those departments.' Further details of his duties were mentioned in the writing making the appointment, but they all related to the carrying on of the business of the company. From all that appears in the record, the duties of superintendent of the gas works remained as stated in the communication as above mentioned, with possibly a change in the name from superintendent to engineer, until 1886, when, under authority of the board of directors, Mr. Lansden, the plaintiff, was employed as superintendent upon the presumption, as stated, that he was a first-class gas-works superintendent. There is nothing from which we could infer that the character or scope of the duties of superintendent was enlarged or changed at the time the plaintiff accepted the position from what those duties were stated to be in the letter appointing a superintendent in 1865. From the evidence in the case, no presumption could be indulged that the duties of the general manager of the corporation in question included in their general scope or character the right to represent the corporation in any business such as is referred to in the letters of Brown or in the letters of Leetch in answer thereto. The letters of Mr.

an insurance company had sent to several policy holders a circular in which it was declared that a former employee who had, by depreciatory statements as to the financial position of the company, been try-

Brown had nothing whatever to do with the transaction of the business of the corporation, or with anything relating thereto, which the superintendent was authorized to perform. It was an inquiry relative to a past transaction regarding the testimony supposed to have been given before a committee of Congress, having, among other things, the subject of the price of gas in the city of Washington before it for consideration. From the evidence in this case, it is plain that it was no part of the duty of the general manager even to appear before that committee, unless summoned so to do by the committee, or specially directed by the company to so appear. In no view of the evidence can we see the least basis for an inference that the manager had authority to represent the company in any matter connected with third parties and relating to the character of the evidence given by the plaintiff before the committee of Congress. . . . The fact that the manager copied his letters to Brown into the official copy book kept in the office of the secretary is not material upon this question. It was the act of Mr. Leetch, unknown to the officers of the company, so far as the record shows, and the company cannot be held liable for the original act of Leetch by such evidence. It does not tend to show that his action was within the scope of his employment as manager. . . . From the use of the term 'general manager' we should not be authorized to infer any such authority, nor would it be permissible to allow the jury to make a mere guess that it existed. A general manager of a business corporation such as this gas company is would not be presumed to have this power. The term, in our judgment, when used in connection with such a corporation, cannot, in the absence of any evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas,

its distribution, and the general ways and means of accomplishing the object of the corporation,—all these in subordination to the board of directors and such superior officers as the board should provide. We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it."

In *Henry v. Pittsburgh & L. E. R. Co.* (1890) 139 Pa. 289, 21 Atl. 157, where the libel complained of was that the defendant's superintendent had made to newspaper reporters certain statements regarding the plaintiff, who had, with other employees in his department, been suspended while certain alleged irregularities were being investigated, the court said: "The other charge, that the railroad company was responsible for a libel published by its general superintendent, is yet more novel. It would certainly be carrying the doctrine of *respondere superior* to an extreme length. The doctrine is hard enough as it is, and we are not disposed to push it further. There was not a *scintilla* of testimony to show that the company published a libel, authorized anyone else to do so, or knew that it had been done." This language seems to go to the extent of denying that the company could, under any circumstances, be held responsible for a libel published by its superintendent, except on the ground of prior specific authorization or subsequent ratification. But, having regard to the recent date of the case, it seems more probable that the court merely intended to take the position that, in the absence of evidence of such authorization or ratification, an action cannot be maintained against the master, unless it is shown that the given libel was published in furtherance of his business. The actual ground upon which the decision was rested was that there was no evidence to show that the superintendent procured the publication of the libel.

ing to induce them to leave it, was a convicted felon;³ that the secretary of one branch of a labor association wrote to the officials of another branch a letter in which he announced that he was about to have a former secretary arrested for misappropriation of money;⁴ that the secretary of a protective trade association notified the members that

In *Carroll v. Penberthy Injector Co.* (1889) 16 Ont. App. 446, the conclusion of the court, that publication by the defendant had not been proved, was put upon the ground that no authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind, to subject the corporation to actions for libel, by his admission to any person that he had published a libel on another person by their authority. Haggerty, C. J. O., said: "If Johnston had been called and had proved that he had been so authorized, or that it formed any part of his duty to do the act complained of, then the libel would be the act of his employers, the corporation. That the libel referred to the business of the company, and that it was apparently published in their interest, and to run down or depreciate a rival in business, does not in my mind bear upon the question. The shareholders or directors in the company cannot, without some sworn testimony, be held liable for a libelous publication by their manager. Such a matter would be wholly foreign to the subject of their employment of him as their officer or agent."

³ *Citizens' Life Assur. Co. v. Brown* [1904] A. C. (P. C.) 423, affirming *Brown v. Citizens' L. Asso. Co.* (1902) 2 New So. Wales St. Rep. 202. The court, discussing the question whether there was evidence on which the jury could properly find that the letter was within the scope of the superintendent's authority, said: "He was engaged by a written agreement; he was a superintendent; he was to act under instructions given to him by properly authorized officers, and in accordance with the rules and regulations of the company. He was to devote his whole time to furthering the company's business. He was to receive and pay money, keep proper accounts, and to supervise various agencies under him. He was to be paid a salary of £5 a week and a commission on policies procured by him. The written agreement did not state more precisely what his

duties were. Witnesses were called to throw further light upon the subject. Mr. Eedy, the general secretary of the company, said that if policy holders wanted to know why the company did not prosecute Brown for his statements about the company, Fitzpatrick should have communicated that matter to the head office before taking action. 'It would have been his duty.' Another witness said his duty was to appoint and look after agents, and 'to stand as an immediate between the assured and the office. His authority is to secure business and save business, and to visit policy holders whose policies have lapsed or are likely to lapse. In the district itself there is no one above him.' It is clear that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. In considering the scope of his authority and employment, their lordships agree with the acting chief justice in thinking that the jury were entitled to act on their own knowledge of colonial business and habits. They were entitled to consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision, and what would naturally be done in the colony by a person in his position. . . . Such being the evidence, their lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policy holders in order to counteract the mischief which Brown was doing to the business of the company; and although Fitzpatrick went too far, and made charges against Brown which he knew were not true, their lordships are of opinion that the company are legally responsible for what he wrote."

⁴ *Ellis v. National Free Labor Asso.* (1905) 7 Sc. Sess. Cas. 5th Series, 629. The court proceeded upon the broad ground that a master is liable for defamatory words uttered by his servant while acting within the scope of his

the plaintiff had refused to pay for a certain piece of work;⁵ that the general manager of a department of a manufacturing company wrote a letter to the mother of a former employee, charging him with theft;⁶ that a local agent of a manufacturing company wrote a letter denying the ability of a rival concern to carry out a contract for the supply of a machine which was required by the party to whom the letter was addressed;⁷ that the local agent of a manufacturing company procured the insertion in a newspaper of a defamatory statement to the effect that a former employee of the company was attempting to injure its business;⁸ that the district manager of a mercantile agency sent out a false report with regard to the plaintiff's financial position;⁹ that the general manager of a local insurance company, after having investigated certain depreciatory statements reported to have been made concerning the solvency of that company, by the representative of a foreign company sent him a written notice charging him with meddlesomeness and mendacity;¹⁰ that a telegraph operator transmitted a libelous message over his employer's line;¹¹

employment, although without special instructions.

⁵ *Trapp v. Du Bois* (1902) 76 App. Div. 314, 78 N. Y. Supp. 505.

⁶ *Rose v. Imperial Engine Co.* (1908) 110 App. Div. 437, 96 N. Y. Supp. 808, second appeal (1908) 127 App. Div. 885, 112 N. Y. Supp. 8, affirmed in (1909) 195 N. Y. 515, 88 N. E. 1130 (mem.).

⁷ *Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co.* (1906) 139 Ky. 497, 8 L.R.A. (N.S.) 1023, 96 S. W. 551. That the letter had been written in the course of the agent's business was regarded as a proper inference from the fact that its object was to procure a contract for the agent's principal. In view of the court's opinion upon this point, it is not apparent why it should have emphasized the fact that the defendant's failure to disapprove or repudiate the letter, after having obtained knowledge of its publication, operated as a ratification and approval of the libel. The defendant's liability was clearly fixed independently of this element.

⁸ *Howe Mach. Co. v. Souder* (1877) 58 Ga. 64.

⁹ *Pollasky v. Minchener* (1890) 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5. *Minter v. Bradstreet Co.* (1903) 174 Mo. 444, 73 S. W. 668.

¹⁰ *Wells v. Payne* (1911) 141 Ky. 578, 133 S. W. 575. The *ratio decidendi* was that, in sending the notice, the manager was "acting for the company, in its affairs, and for its benefit."

¹¹ *Peterson v. Western U. Tele. Co.* (1898) 72 Minn. 41, 40 L.R.A. 661, 71 Am. St. Rep. 461, 74 N. W. 1022.

In *Magouirk v. Western U. Tele. Co.* (1902) 79 Miss. 632, 89 Am. St. Rep. 663, 31 So. 206, a despatch had been sent to an unmarried man, purporting to be signed by an unmarried lady with whom he had a casual acquaintance, requesting him to meet her at a certain town. The agent afterward exhibited the telegram, and boasted of having sent it. On the ground that the act was within the scope of the agent's business, the telegraph company was held to be liable for damages arising from the mental suffering caused by injury to her reputation. This decision, it is admitted, was clearly erroneous. The only ground upon which it can be sustained is that a master impliedly guarantees that a servant shall not make an improper use of the instrumentalities of his work,—a doctrine so far accepted only with reference to a few special classes of cases. Indignation at a most dastardly act seems to have unduly influenced the court.

that a manager who had full charge of the local business of a telephone company in a certain city, and whose duty it was "to see that all accounts were promptly settled," wrote letters to third persons on the company's paper, stating that the plaintiff, a former employee, had stolen a sum of money which he had drawn in excess of the salary which the manager recognized as due, but which he agreed to make good if the excess was not finally allowed;¹² that the ticket agent of a railway company posted in his office a notice stating that a railway broker was not a reliable person to deal with;¹³ and that an employee circulated defamatory statements concerning the conduct of a subordinate servant who had been dismissed, or had wrongfully abandoned his position.¹⁴

¹² *Nava v. Northwestern Teleph. Exch. Co.* (1910) 112 Minn. 199, 127 N. W. 935 (error to direct verdict for defendant). The court said: "The letter concerned the local business, of which Rees had charge and for which he was responsible. He was attempting to guard its property. His action concerned the collection of defendant's accounts. The letter was certainly 'published by defendant's servant acting in the course of his employment.'"

¹³ *Fogg v. Boston & L. R. Co.* (1889) 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109. The court said: "We think it was a question for the jury, on the whole evidence, whether the defendant was not responsible for the original act of Dow, without actual knowledge or subsequent ratification of it. Dow was in charge of the office, subject to the supervision of the general passenger agent. One of the uses of the office was to advertise tickets, and presumptively to furnish information in relation to the purchase of tickets. It may be inferred that it was a part of his duty to post in the office notices pertaining to the business carried on there. The libel which he posted was calculated to diminish the plaintiff's, and thereby to increase the defendant's, income from the sale of tickets. In these and other facts and circumstances, there was evidence that his act was done in the course of his business as a servant of the defendant. If it was so done, the defendant is liable for it, even though it was in excess of his authority and wrongful."

¹⁴ In *Blumenthal v. Shaw* (1897) 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954, where the notice in question was

inculcated by the defendant's superintendent in the bona fide but erroneous belief that the plaintiff had wrongfully abandoned his apprenticeship, the court observed: "Had the actual fact been as was supposed, the defendants themselves might rightfully have issued the postal notice which was sent out, and done the other acts which Pierson and his subordinates did. To reclaim a run-away apprentice, and to notify the trade not to harbor him, is the right, and perhaps the duty, of the master. This case, then, is not one where an agent steps aside from his employment to gratify some personal animosity, or does an act which the principal upon the supposed state of facts would not have been justified in doing."

In *Hardoncourt v. North Penn Iron Co.* (1909) 225 Pa. 379, 74 Atl. 243, a verdict against a corporation was held to be justified by evidence which showed that a letter which was signed with the name of the corporation and of its treasurer, and contained grave charges affecting the character of the plaintiff, a former employee of the defendant, had been sent to various persons with the evident object of protecting the company's business from competition by the plaintiff, and that the person who signed the letter was not only a treasurer and director, but was in fact the general manager of the company.

In *Tench v. Great Western R. Co.* (1873) 33 U. C. Q. B. (C. A.) 8, reversing (1872) 32 U. C. Q. B. 452, a railway company was held liable for the act of its general manager in directing that placards stating the circumstances incident to the dismissal of a conductor

2374. Same subject. Doctrine applicable where the employer is a corporation.— It is now well settled that, in respect of a libel published by its servant, a corporation is responsible under the same circumstances as an individual master, that is to say, whenever the publication is shown to have been an act within the scope of the servant's employment.¹

should be posted in its offices. Draper, Ch. J., said: "It is, I think, satisfactorily shown by the evidence of Mr. Swinyard, and of three others of the directors, that, as a board, the directors did not authorize the publication of the placard, but the chairman of the board gave evidence that the general manager could, as a matter of duty, have dismissed the respondent on his own responsibility. The board of directors have, at least tacitly, acquiesced in the dismissal. There can be no doubt in my opinion that the dismissal is proved to be the act of the defendants. If that be so, then I think that the notification of that dismissal to the two thousand employees of the appellants was an act done for their interest and in their service; and for any reason I can discover to the contrary, they must be responsible if such notification was so given as to show a wrongful act, with a wrongful intent."

In *Willner v. Silverman* (1909) 109 Md. 341, 24 L.R.A.(N.S.) 895, 71 Atl. 962, where the son of the defendant, a member of an association of clothiers organized primarily to discipline employees, wrote and circulated through the association a letter stating that the plaintiff, a discharged employee of the defendant, had caused him much trouble, and asking the other members to refuse him work, there was no evidence to show that the writer of the letter was empowered to act as his father's agent in the matter. Held, that the defendant could not be held responsible for the damages occasioned to the plaintiff by the letter.

For other cases as to "blacklisting," in which the authority of the employees in question to publish the statements complained of was taken for granted, see §§ 2020, *et seq.*, *ante*.

¹In the cases cited below, the right to recover damages against a corporation was affirmed or taken for granted.

Corporations publishing newspapers. *Latimer v. Western Morning News Co.*

(1871) 25 L. T. N. S. 44; *Times Pub. Co. v. Carlisle* (1899) 36 C. C. A. 475, 94 Fed. 762; *Detroit Daily Post Co. v. McArthur* (1868) 16 Mich. 447; *Long v. Tribune Printing Co.* (1895) 107 Mich. 207, 65 N. W. 108; *Aldrich v. Press Printing Co.* (1864) 9 Minn. 133, Gil. 123, 86 Am. Dec. 84; *Hewitt v. Pioneer-Press Co.* (1876) 23 Minn. 178, 23 Am. Rep. 680; *Johnson v. St. Louis Despatch Co.* (1877) 65 Mo. 539, 27 Am. Rep. 293; *Johnson v. St. Louis Dispatch Co.* (1876) 2 Mo. App. 565; *Evening Journal Asso. v. McDermott* (1881) 43 N. J. L. 488, 39 Am. Rep. 606, affirmed in (1882) 44 N. J. L. 430, 43 Am. Rep. 392; *Hoboken Printing & Pub. Co. v. Kahn* (1896) 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053; *Samuels v. Evening Mail Asso.* (1873) 52 N. Y. 625, second appeal (1876) 9 Hun, 288, affirmed in (1878) 75 N. Y. 604 (mem.); *Pfister v. Milwaukee Free Press Co.* (1909) 139 Wis. 627, 121 N. W. 938.

Corporations engaged in other kinds of business. *Whitfield v. Southeastern R. Co.* (1858) El. Bl. & El. 115, 27 L. J. Q. B. N. S. 229, 4 Jur. N. S. 688, 6 Week. Rep. 545; *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. 262, 10 Best & S. 226, 38 L. J. Q. B. N. S. 129, 17 Week. Rep. 498; *Breay v. Royal British Nurses Asso.* [1897] 2 Ch. (C. A.) 272, 66 L. J. Ch. N. S. 587, 76 L. T. N. S. 735, 46 Week. Rep. 86; *Philadelphia & B. R. Co. v. Quigley* (1858) 21 How. 202, 16 L. ed. 73; *Washington Gaslight Co. v. Lansden* (1899) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296; *Maynard v. Fireman's Fund Ins. Co.* (1867) 34 Cal. 48, 91 Am. Dec. 672, second appeal (1873) 47 Cal. 207; *Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co.* (1906) 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 96 S. W. 551; *Behre v. National Cash Register Co.* (1896) 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986; *Fogg v. Boston & L. R. Corp.* (1889) 148 Mass. 513, 12 Am.

In one of the Canadian provinces the question whether this responsibility is predicable in a case where proof of express malice is a prerequisite to recovery was quite recently treated as being still open to discussion.² But a decision of the privy council, which is conclusive in those provinces, and which will doubtless be accepted as correct even by the English courts which are, technically speaking, not bound by it, has now settled that this question is to be answered in the affirmative.³ The weight of American authority,

St. Rep. 583, 20 N. E. 109; *Vinas v. Merchant's Mut. Ins. Co.* (1875) 27 La. Ann. 367; *Nava v. Northwestern Teleph. Exch. Co.* (1910) 112 Minn. 199, 127 N. W. 935; *Southern Exp. Co. v. Fitzner* (1882) 59 Miss. 581, 42 Am. Rep. 379; *Minter v. Bradstreet Co.* (1903) 174 Mo. 444, 73 S. W. 668; *Hardoncourt v. North Penn Iron Co.* (1909), 225 Pa. 379, 74 Atl. 243; *Owen v. J. S. Ogilvie Pub. Co.* (1898) 32 App. Div. 465, 53 N. Y. Supp. 1033; *Rose v. Imperial Engine Co.* (1908) 127 App. Div. 885, 112 N. Y. Supp. 8; *Missouri P. R. Co. v. Richmond* (1889) 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; *Sun Life Assur. Co. v. Bailey* (1903) 101 Va. 443, 44 S. E. 692; *Tench v. Great Western R. Co.* (1873) 33 U. C. Q. B. (C. A.) 8; *Carroll v. Penberthy Injector Co.* (1889) 16 Ont. App. 446; *Brown v. Montreal* (1871) 4 Rev. Leg. (Quebec Super. Ct.) 7.

In *Van Aernam v. Bleistein* (1886) 102 N. Y. 355, 7 N. E. 537, the liability of a joint stock association formed under the New York statute was affirmed.

In *Carroll v. Penberthy Injector Co.* (1889) 16 Ont. App. 446, the following statement in Odgers on Libel was quoted with approval: "A corporation will be liable to an action, for a libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication." (4th ed. p. 416; 5th ed. p. 592.)

² In *Freeborn v. Singer Sewing Mach. Co.* (1885) 2 Manitoba L. Rep. 253, the court, after an examination of the authorities, reached the conclusion that, in the absence of any evidence to show that the directors of the defendant corporation authorized, or had any knowledge of, the writing of the letters in

question, the defendant could not be held liable for express malice.

³ In *Citizens' Life Assur. Co. v. Brown* [1904] A. C. (P. C.) 423, one of the arguments relied upon was that the malice with which the servant in question wrote the libel complained of could not be imputed to the defendant company. In support of this proposition the judgment of Lord Bramwell in *Abrath v. Northeastern R. Co.* (1886) 11 App. Cas. 247, 250, was cited. Discussing this theory the court said: "There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth, in *Addie v. Western Bank* (1867) L. R. 1 H. L. Sc. App. Cas. 145, had expressed a similar opinion as to the liability of corporations for frauds. But these opinions have not prevailed, and their lordships are not prepared to give effect to them. If it is once granted that corporations are, for civil purposes, to be regarded as persons, *i. e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases in question arising out of contract, and in questions arising out of tort and frauds; and to apply them to one class of libels, and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate, appears to their lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their lordships to introduce metaphysical subtleties which are needless and fallacious. Their lordships concur with the view of the acting

so far as it goes, is in favor of the doctrine established by this decision.⁴

2375. Liability of an individual for slanderous words uttered by his servant.— The writer has not found any case in which it has been formally laid down that an individual employer is liable for slanderous words uttered by an employee in the course of his employment. But such a doctrine is implied in a few cases;¹ and it has manifestly been taken for granted in all the cases in which the actual point discussed was whether the corporate character of the defendant precluded recovery. See next section.

2376. Same subject. Doctrine applicable where the employer is a corporation.— The general doctrine which was formerly applied by some courts, that a corporation could not be held liable for the wilful torts of its servants, was in one instance stated to be applicable to slander.¹ But that doctrine has been abandoned in all jurisdictions (see § 2239, *ante*). In cases involving a slander, therefore, the only question now open to discussion is the nature and extent of the responsibility imputable to a corporation. The authorities which bear upon this subject are singularly conflicting.

One view is that a corporation cannot be held responsible, unless

chief justice in this case that, if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged, the letter must be treated as any other libel written and published by an officer of the company."

⁴In *Lothrop v. Adams* (1882) 133 Mass. 471, 43 Am. Rep. 528, although the question was not directly involved, the remarks of the court (p. 480) betoken a decided leaning toward the view that a corporation may be guilty of express malice in the publication of a libel.

In *Warner v. Missouri P. R. Co.* (1901) 112 Fed. 114, the question actually discussed was the proper mode of pleading express malice. The point that the defendant could not be held liable for such malice was not taken by counsel or noticed by the court.

The same remark is applicable to *Bacon v. Michigan C. R. Co.* (1887) 66 Mich. 166, 33 N. W. 181, where the ground upon which the right of recov-

ery was denied was that the statement complained of was privileged, and that no express malice was proved.

On the other hand, in *Detroit Daily Post Co. v. McArthur* (1868) 16 Mich. 447, it was laid down that a newspaper company could not be held liable for enhanced damages on account of the express malice of its employee, unless it was shown to have approved of the libel.

¹In *De Wolf v. Ford* (1907) 119 App. Div. 808, 104 N. Y. Supp. 876, one of the points decided was that the complaint in question could not be sustained as one for slander, because the words used by the defendant's servant were not stated. The judgment was reversed in (1908) 193 N. Y. 397, 21 L.R.A. (N.S.) 860, 127 Am. St. Rep. 969, 86 N. E. 527, but this point was not referred to by the court of appeals.

In *Ellis v. National Free Labor Asso.* (1905) 7 Sc. Sess. Cas. 5th Series 629, the liability of a voluntary association for slander spoken by its servant in the course of his employment was affirmed.

¹*Childs v. Bank of Missouri* (1852) 17 Mo. 213.

the evidence shows that it either authorized the utterance of the particular words alleged in the declaration, or ratified them after they were uttered.² So far as the present writer has been able to

² In *Behre v. National Cash Register Co.* (1896) 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986, the position of the court is thus stated in the syllabus prepared by it: A corporation is not liable for damages resulting from the speaking of false, malicious, or defamatory words by one of its agents, even where, in uttering such words, the speaker was acting for the benefit of the corporation and within the scope of the duties of his agency, unless it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question. The authorities relied on were *Odgers, Libel*, 1st Am. ed., * 368; *Newell, Slander*, 1st ed. 361; *Townshend, Slander*, § 265. See note 3, *infra*. The rule laid down in this case was approved in *Southern R. Co. v. Chambers* (1906) 126 Ga. 404, 7 L.R.A.(N.S.) 926, 55 S. E. 37, and *Jackson v. Atlantic Coast Line R. Co.* (1900) 8 Ga. App. 495, 69 S. E. 919 (petition which did not contain any averment that the defendant directed the officer in question to use the very words spoken was held to be demurrable).

In *Singer Mfg. Co. v. Taylor* (1906) 150 Ala. 574, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210, the grounds upon which it was held that a sewing machine company could not be held liable for calling the plaintiff a thief were thus stated: "The liability of the principal for the torts of the agent, when not based upon a breach of duty arising out of contract, as in the case of common carriers, is based upon principles of public policy. It is essential to such liability that the tort of the agent, if not authorized or ratified by the principal, should be committed by the agent in the course of the business of the principal and of the agent's employment. By reason of the fact that the offense of slander is the voluntary and tortious act of the speaker, and is more likely to be the expression of momentary passion or excitement of the agent, it is, we think, rightly held that the utterance of slanderous words must be ascribed to the personal malice of the agent, rather than to an act performed in the course of his employment and in aid of the interest of his employer, and exon-

erating the company unless it authorized or approved or ratified the act of the agent in uttering the particular slander." 10 Cyc. 1216." The court also quoted Mr. Odgers's statement of the law already referred to above.

The language of the Alabama court was quoted with approval in *Lindsey v. St. Louis, I. M. & S. R. Co.* (1910) 95 Ark. 534, 129 S. W. 807 (employee was charged with theft).

In *Duquesne Distributing Co. v. Greenbaum* (1909) 135 Ky. 182, 24 L.R.A.(N.S.) 955, 121 S. W. 1026, 21 Ann. Cas. 481, where the salesman of a corporation stated to persons engaged in the sale of intoxicating liquors that the plaintiff, a manufacturer of an aperient water, was contributing money to the prohibition movement, the court, after reviewing some earlier decisions, proceeded thus: "It is true that these authorities relate to actions for libel, but upon principle there can be no sound reason why the corporation or partnership may not also be sued for the slanderous utterances of its agents or servants. Libel is no more a tort than slander; the only difference between them being that in libel the words are written, while in slander they are spoken. If the principal may be liable for what his agent writes, we think he should likewise be liable for what he speaks. In each case the wrong is the same, and, although there is a dearth of authority on the subject of the liability of a partnership or corporation for the slanderous utterances of its agents or servants, we hold that, within the limitations hereinafter set out, they may be sued for slander. Without including in what we say the rules applicable when the action is for libel, and confining our opinion to actions for slander, as that is the question we are dealing with, we think that a partnership or corporation cannot be held liable for the slanderous utterances of its agents or servants unless the actionable words were spoken by its express consent, direction, or authority, or are ratified or approved by it. Generally speaking, when it is attempted to hold the master or principal liable for the wrongful acts of his servant or agent, it is sufficient to

trace the sources of this conception, it would appear to rest upon certain statements of the law made in textbooks. But it seems clear that those statements were made without any adequate judicial au-

describe in a general way the wrongful act, and charge that it was done by the servant while acting within the scope of his employment. This is particularly true in cases involving injury to persons or property, where some physical act is done or omitted to be done by the servant that involved a wrongful act or a breach of duty upon the part of the master to the person injured. But a different rule should be applied when it is attempted to hold the master or principal in slander for defamatory words spoken by his agent or servant. Slandorous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by, or put into the mouth of the speaker by, any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be. It would be entirely out of the question to hold the principal or master responsible for every reckless, thoughtless, or even deliberate speech made by his agent or servant concerning or relating to persons that the agent or servant may meet or know, or come in contact with, while in the service of his principal or master. As to other torts or wrongful acts committed by the servant or agent, and for which the master or principal may be liable, they can, as a general rule, guard against by exercising care in the employment of agents and servants, and in the selection and use of appliances or things they work with. But no sort of reasonable care that the master or principal could exercise in employment or control would enable him to prevent his servant or agent from the use in his absence of language that

might be actionable. A speech by the agent or servant when absent from the principal or master is absolutely within his power alone to regulate or control. He may be prudent and discreet, or reckless or careless, in his conversation. He may have his tongue under perfect control, or under no control whatever, may talk freely about persons and things, or talk little. And so we think that, when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his employment in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking. Tested by this rule, the petition was bad."

In *Eichner v. Bowery Bank* (1897) 24 App. Div. 63, 48 N. Y. Supp. 978, where it was held that a bank was not liable for the false declaration of its clerk that the drawer of a check had no funds, the court relied upon the statements already referred to of Mr. Odgers and Mr. Townshend.

In *Redditt v. Singer Mfg. Co.* (1899) 124 N. C. 100, 32 S. E. 392, it was held to be error to charge the jury that a corporation is responsible for slanderous words uttered by its agents in the course of their employment. This case (which is the only authority cited in 10 Cyc. 1216) has been overruled by *Saucy v. Norfolk & S. R. Co.* note 4, *infra*.

See also *Kane v. Boston Mut. L. Ins. Co.* (1908) 200 Mass. 265, 86 N. E. 302, cited in note 4, *infra*.

In *Rodger v. Nowon Co.* (1900) 19 Ont. Pr. Rep. 327, where Boyd, C., refused to strike out an averment imputing slander to a corporation, he proceeded upon the ground that a corporation may be liable for slander when spoken by its servant in obedience to its orders. In so far as this ruling is to be understood as importing that

thority.³ Nor do the learned authors of the works in question suggest any satisfactory reasons by which the exemption of a corporation from liability for slander can be justified in general principles. It seems clear that, if either the consideration that slander is the "tortious and voluntary act of the speaker" (Odgers), or the consideration that there can be "no agency to slander" (Townshend), were to be accepted as a proper cause of exemption, no employer, whether individual or corporate, could be made answerable for any wilful misfeasance whatever.

It is submitted, therefore, that there are no sufficient grounds for doubting the soundness of the doctrine which has been accepted by several courts of the highest authority, *viz.*, that the responsibility of a corporation in respect of spoken words is determined on precisely the same footing as its responsibility in respect of a libel,—that is to say, with reference to the question whether they were or were not spoken by the servant while acting within the scope of his employment.⁴

these are the only circumstances under which liability can be imputed to a corporation, it clearly conflicts with the English and Scotch authorities cited in note 4, *infra*.

³ One of the statements is the following passage in an early edition of Odgers on Libel & Slander *368: "A corporation will not, it is submitted, be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words; for a slander is the voluntary and tortious act of the speaker." The learned author, however, cited no cases in support of this statement; and as it has been omitted in the later editions of his treatise, he is no longer available as an authority for the view which it embodies.

The only cases cited by Mr. Townshend, § 265, are: *Maloney v. Bartley* (1812) 3 Camp. 210; *Hecker v. DeGroot* (1857) 15 How. Pr. 314. But a very brief examination will show that these are not in point at all.

Mr. Newell (Libel & Slander, 1st ed. p. 361) does not cite any decisions in support of his statement of the law. He mentions, as an authority opposed to his own views, some *dicta* in *Gilbert v. Crystal Fountain Lodge* (1887) 80 Ga.

284, 12 Am. St. Rep. 255, 4 S. E. 905. But it is submitted that this view of the language there used is not correct. The passage referred to is presumably the one in which the court observed that it could "think of no reason why a partnership might not slander a third person through agents or members authorized and empowered to defame orally; or by adoption and ratification, after defamation by slanderous words." An acceptance of the doctrine that a partnership may be held answerable for a slander by its agents by no means involves an acceptance of the doctrine that such a tort may be imputed to a corporation also. This consideration alone is sufficient to show that the remarks quoted are of no relevance in the present connection. But it is also clear that, even in respect of partnerships, the court did not intend to go further than to assert their liability for slanders uttered under their immediate direct authority, antecedent or subsequent. Its attention was not directed to the question of vicarious or constructive responsibility.

The statement in 10 Cyc. 1216, rests, as was mentioned in note 2, *ante*, upon the sole authority of *Redditt v. Singer Mfg. Co.* (1899) 124 N. C. 100, 32 S. E. 392, now overruled.

⁴ (a) *English and Scotch decisions.*—In *Glasgow v. Lorimer* [1911] A. C.

209, 21 Ann. Cas. 341, an action against a Scotch municipal corporation, the pursuer averred that one Gilmour, a tax collector employed by the defenders, whose duties included the collection of the police assessments payable by the pursuer's husband, and the granting of receipts therefor and for instalments thereof, called at the pursuer's house while in the exercise of his duty, and demanded payment of the police taxes; and Gilmour declined to accept as correct the sum tendered by the pursuer as the balance due, and asked to see the receipts for previous payments, after which he left the house; that when he called again on the same day, he accused the pursuer of having altered the figures on a receipt, for the purpose of defrauding the defenders; that the receipt bore no marks of being altered; that when pursuer denied the charge, Gilmour became violent and threatened to lodge information with the police authorities, which would result in her being put in jail for three months for forgery; and that he repeated the slander in the house of a neighbor. Held, reversing the decision of the second division of the court of session (Sc. Sess. Cas. [1909-10] 693), that the averments disclosed no ground of action against the defenders, for there was nothing on the face of them to show expressly or by implication that the expression of any opinion by Gilmour as to the genuineness of any receipt which might be produced to him for payment of taxes was within the scope of his employment. Lord Loreburn said: "In this case the duty of this tax collector has already been specified and is to be taken as contained in the third condescendence. In the course of it he would have to ascertain what were the credits to which the rate payer was entitled as against the assessments that had been made upon him. Had this collector, then, a right, or rather was it within the scope of his authority as I have described it, to express his own opinion as to the falsity or genuineness of any receipt; or, indeed, was it within the scope of his authority to make any statement or comment at all? I think he had no such implied authority, because I cannot see why his opinion needed to be communicated, or in what way it could be a benefit to the corporation to communicate his opinion. He might indeed act upon the belief that the credit

was a just one, or upon the belief that the credit was not a true credit; and then he might enforce or not enforce, I suppose, at the peril of his employers, the warrant of the sheriff; or he might suspend enforcement and ascertain the truth. But I do not see that he had any authority to express an opinion. I do not think it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all." The decision of the Scotch court was based upon the ground that the statement in question was "directly connected with discharge of the tax collector's duty."

In *Eprele v. Caledonian R. Co.* (1898) 6 Scot. L. T. 65 (outer house), where a railway guard told a passenger that he lied in stating that he had entered the train at a certain station, the liability of the defendant was denied on the ground that there was no presumption that the slander was authorized either expressly or by implication from the duties of the guard's position.

In *Niklas v. New Popular Cafe Co.* (1908) 15 Scot. L. T. 735, a judge of first instance refused to allow an issue upon averments which merely showed that the manager of the defendant's restaurant had verbally accused a cook of stealing property handled by him in the course of his duties.

In *M'Adam v. City & Suburban Dairies* (1911) 48 Scot. L. R. (Ct. of Sess.) 318, it was averred that a dispute concerning a balance of wages which the plaintiff alleged to be due to him from the defendant company had occurred between him and the company's manager, and that, when he did not return to work on the following day, the company's foreman addressed these words to him: "I'll give you a bit of advice. If you are wise, you'll turn out to work, because I have been instructed to place the matter in the hands of the police." Held, that the action was irrelevant, because it did not appear that the foreman, in uttering these words, was acting within the scope of his employment.

In *Finburgh v. Moss Empires Co.* (1908) Sc. Sess. Cas. 928, one of the averments was that, while the pursuer was witnessing a performance at the

theater of the defendant company, its manager and an attendant stated in the hearing of the pursuer's husband and others, that she was a notorious prostitute; that she had been thrown out of the theater two weeks previously, for being drunk and disorderly, and that she must leave the theater. The pursuer's husband also claimed damages on the ground that these statements were made concerning him, and represented that he was a person of immoral habits and character; that he was associating with a notorious prostitute, and was attempting to pass her off as his wife. These averments were held not to be relevant, because they did not show that the words complained of were uttered by the defender's servants in the course of their employment.

In *Agnew v. British L. L. Ins. Co.* (1906) 8 Sc. Sess. Cas. 5th Series 422, where the inspector of an insurance company called a local agent a liar and a fraud, and threatened to report him to the authorities if he did not settle for money collected by him, the right of the agent to recover damages from the company was denied on the ground that the words in question were not actionable. But Lord Dunedin expressed a doubt whether a casual expression uttered in anger, in the course of a call upon the plaintiff, who was ill, could be regarded as a company act, like the circular letter in *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176 (§ 2374, note 3, *ante*.) Lord McLaren also doubted whether the principle of that case could be extended to cases of slander at all. These doubts were perhaps justified by the state of the law at the time when they were expressed. But since the above cited decision of the House of Lords, it is no longer open to dispute, either in the United Kingdom or the British Colonies, that the criteria of liability are the same whether the defamatory words of the servant are written or spoken.

(b) *American decisions.*—In *International Text-Book Co. Heartt* (1905) 69 C. C. A. 127, 136 Fed. 129, an action against a corporation for slanderous words spoken by S., its agent, with reference to an alleged embezzlement by plaintiff, the authority and duties of S. as agent were expressed and limited by his contract of employment,

which was in evidence. The only duty averred in the complaint was "to check up the accounts" of the plaintiff. It was shown by the testimony that the defendant did not inform S. that the plaintiff had embezzled any of its money, and did not know that S. had made any such charge until so informed after the institution of this suit. Commenting on these facts, the court said: "It is quite clear that the words uttered by Stearns were beyond the scope of his employment, and that they were spoken under such circumstances as to render the agent alone responsible. In fact, it appears that the alleged slander was uttered after Stearns had checked up the account of the plaintiff below, after he had left the presence of the plaintiff, and had gone to another locality, where he was not engaged in the performance of any duty under the terms of his employment as such agent. To hold a principal responsible for slanderous words spoken by his agent, it must appear that the latter acted within the scope of his employment, and also that the words were spoken whilst the agent was employed in the actual performance of the duties of his principal."

In *Kane v. Boston Mut. L. Ins. Co.* (1908) 200 Mass. 265, 86 N. E. 302, one of the grounds upon which an employee of an insurance company was held not to be entitled to maintain an action against another insurance company, by one of whose soliciting agents he had been accused of dishonesty and drunkenness, was thus stated: "There was no offer to prove that what was said by either of the three solicitors was said in the course of his employment or while acting in the apparent scope thereof. Everything that they said may have been uttered wholly outside their employment, and without any reference to their employer. As in *Ober-toni v. Boston & M. R. Co.* (1904) 186 Mass. 481, 67 L.R.A. 422, 71 N. E. 980, the mere doing of the acts cannot authorize the inference that they were done in the course of the employment. *Washington Gaslight Co. v. Lansden* (1899) 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, manifestly, for such utterances the defendant cannot be held liable." But the authority of the case as precedent for the doctrine now under discussion is, it must be admitted, greatly weakened by the fol-

lowing remarks afterward made by the court: "We do not mean to throw any doubt upon the statement of Lathrop, J., in *Comerford v. West End Street R. Co.* (1895) 164 Mass. 13, 14, 41 N. E. 59, that it is at least questionable whether the defendant would have been liable if the utterances of the defamatory words by its agents had been in the course of their employment. *Behre v. National Cash Register Co.* (1896) 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986; *Singer Mfg. Co. v. Taylor* (1907) 150 Ala. 574, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210; *Redditt v. Singer Mfg. Co.* (1899) 124 N. C. 100, 32 S. E. 392; *Hussey v. Norfolk Southern R. Co.* (1887) 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; *Dodge v. Bradstreet Co.* (1880) 59 How. Pr. 104. And see Odgers, Libel & Slander, 265; 10 Cyc. 1216; 18 Am. & Eng. Enc. Law, 2d. ed. 1059. It is difficult to say that such a wrong as this could be committed in the agent's service and for the principal's benefit, within the meaning of the rule as stated by Lord Selborne in *Houldsworth v. Glasgow Bank* (1880) 5 App. Cas. 317, 326, and by Campbell, J., in *Philadelphia, W. & B. R. Co. v. Quigley* (1858) 21 How. 202, 210, 16 L. ed. 73, 75." An examination of the authorities cited in the present note will show that this expression of opinion was offered without a full knowledge of the more recent decisions upholding the right of action. A portion of these were decided before the date of the Massachusetts case. The doctrine adverted to at the close of the passage quoted, *viz.*, that a principal can be held liable only for a tort committed for his benefit, has been definitely repudiated in England. See § 2286, *ante* and § 3995, *post*.

In *Rivers v. Yazoo & M. Valley R. Co.* (1907) 90 Miss. 196, 9 L.R.A.(N.S.) 931, 43 So. 471, a decision on demurrer, the court stated its views as follows: "The doctrine has long been exploded that a corporation is not liable for slander, because, as it was ridiculously expressed, there could be 'no agency to slander.' The true doctrine is that set forth in Clark & Marshal on Private Corporations, pp. 627-629. 'It has been said that a corporation cannot be liable for a slander or oral defamation by its officers or agents, as "there can be no agency to slander;" and the opinion has also been expressed that a corporation,

because of its impersonal nature, cannot commit torts involving the elements of malice, since, to support an action for tort, "it must be shown that the defendant was actuated by motive in his mind, and a corporation has no mind." This reasoning, however, is unsound. A corporation, it is true, has no mind, and cannot itself entertain malice; but its officers and agents may, and their mental attitude, including their malice, may, like their consent to a contract, or their physical acts, be imputed to the corporation. It is well settled, therefore, for this reason, that a corporation may, to the same extent as a natural principal, be liable for the malicious wrongs of its officers or agents, if committed in the course of a transaction which is within the scope of their authority. . . . Thus, it has been held that a corporation may, to the same extent as an individual, be liable in an action for libel, or, it seems, for slander, or in an action for malicious criminal prosecution, or malicious false arrest, or imprisonment. . . . While it is true that a corporation cannot itself speak, and therefore cannot itself slander, neither can a corporation itself make false representations . . . of its agents. For the same reason, it may be liable for a slander by its agents.'"

In *Payton v. People's Credit Clothing Co.* (1909) 136 Mo. App. 577, 118 S. W. 531, during a dispute which arose between the defendant's manager and the plaintiff respecting the payment of an instalment of the price of goods purchased from the company, the manager called the plaintiff a "dirty crook and thief." Held, that the defendant was liable for the slanderous words, because their utterance was incidental to the performance of one of the manager's duties, *viz.*, the collection of bills and adjustment of accounts. The court said: "That a corporation may be held responsible for a slander uttered by an officer or agent within the scope of his employment is no longer a debatable question. It has been said that, to hold the corporation liable, the tortious act of the agent not only must have a direct relation to the performance of some duty pertaining to his employment, but also must have the express or implied sanction of the corporation, or afterwards be ratified by the corporation. But where, as in the case in hand, no

express authority is shown, the issue of whether authority to commit the wrong should be implied becomes one of fact for the jury, where the facts and circumstances in proof would induce a reasonable person to infer that the act was within the general powers conferred on the agent. . . . "McCoy's duties, being those of general manager of the business conducted in this state by a foreign corporation, embraced the widest scope. He was the corporation here, its *alter ego*, and was acting within the performance of one of the duties of his position—that of the collection and adjustment of accounts—when he spoke the slanderous words. Clearly, we think, a reasonable man might and would infer that what he did was in line with the policy and practice of the corporation he was employed to represent; in other words, that his act was within the general scope of his employment as manager, and was not merely the result of his own malice."

In *Empire Cream Separator Co. v. De Laval Dairy Supply Co.* (1907) 75 N. J. L. 207, 67 Atl. 711, the liability of a private corporation to be sued for slander was affirmed, the court remarking that it did not see any reason for making a distinction in this regard between libel and slander.

In *Sawyer v. Norfolk & S. R. Co.* (1906) 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440, where the defendant's superintendent, at the time when he was rejecting the plaintiff's application for a job, made some slanderous remarks about work which he had formerly done for the company, the liability of the defendant was denied upon grounds thus stated: In the case at bar "there is no responsibility attaching by reason of the breach of any special duty owed to the plaintiff by reason of his placing or by reason of the special circumstances of the case. The plaintiff was not a passenger, nor was he in the office by any invitation of the company, general or special. On the contrary, he had gone to the office to see King, the superintendent, of his own motion and for his own advantage,—the men were at arm's length, considering a business proposition affecting the plaintiff's interest. The case, then, is one where responsibility must attach, if at all, simply and exclusively by reason of the relationship which King bore to the

company and the power given him to select and employ the plaintiff as one of the company's agents. . . . Granting that King [the superintendent] had the power to select and employ the plaintiff as agent of the company, when he told the plaintiff that the company did not wish to employ him, he had filled the measure of his duty; and when King went further, whether from bad temper or malice or from righteous indignation, and proceeded to insult and defame the plaintiff, he was entirely beyond any authority given him, either expressly or which could be fairly implied from the nature of his employment or the duties incident to it; and for such conduct, therefore, King, as an individual, and not the company, is responsible." This case overrules *Redditt v. Singer Mfg. Co.* note 2, *supra*, which, curiously enough, was wholly ignored by the court.

In *Hypes v. Southern R. Co.* (1909) 82 S. C. 315, 21 L.R.A.(N.S.) 873, 64 S. E. 395, 17 Ann. Cas. 620, it was held that a complaint alleging that a locomotive engineer had been charged by a general division superintendent, with having fraudulently claimed wages in respect of time during which he had not been on duty was good, although it did not aver that the corporation had ratified the slander.

In *Stewart v. New So. Wales County Press Co-op. Co.* (1910) 28 W. N. 66, reversing, 10 New So. Wales St. Rep. 747, the defendant company's secretary, whose official authority did not extend to the hiring of servants regularly, deputed D., who had before been occasionally employed by the defendant as a canvasser, to make inquiries regarding the business methods of a rival company. D. informed S., the defendant's manager, that the plaintiff had contracted with B. to insert advertisements in certain newspapers under the defendant's control. S. asked D. to obtain for him a copy of this contract. In applying to B. for a copy, D. made slanderous statements regarding the contract. S., on hearing of the slanders, interviewed B. and other persons to whom D. had made similar statements concerning the plaintiff, and explained that D. had said more than he had any authority to say, and that he had "bungled the matter." Held, that the evidence did not show that the

In one case the absolute obligation of a carrier to protect passengers against ill treatment by his servants (see chapter CIII., *post*) was said to extend to protection against slander.⁵

This doctrine would doubtless be recognized even in the jurisdictions in which the former of the theories discussed above has been adopted.

D. SOME MISCELLANEOUS TORTS.

2377. Wilful torts committed by servants while managing vehicles and horses.—Several of the decisions under this head illustrate the operation of a doctrine which was originally enounced with reference to the older forms of pleading, *viz.*, that the maxim *respondeat superior* was not applicable in a case where the act complained of was wilful, and that the master could not be held liable in respect of such an act except upon the ground of his personal participation. (See § 2239, *ante*.)¹ In some cases involving injuries of the description with which we are concerned in the present section, that doctrine was treated as controlling, even after the abolition of the common-law procedure.² But except in jurisdictions in which the rules of that pro-

uttering of the slander was within the scope of D.'s employment.

The liability of a corporation for slander was also recognized in *Vinas v. Merchants' Mut. Ins. Co.* (1875) 27 La. Ann. 367; *Kuhl v. United States Health & Acci. Ins. Co.* (1910) 112 Minn. 192, 127 N. W. 628 (only a point of pleading was discussed); *United Cigar Stores Co. v. Young* (1911) 36 App. D. C. 390.

In *Etting v. Commercial Bank* (1844) 7 Rob. (La.) 459, the court referring, *arguendo*, to the provisions of the Louisiana Code with regard to corporations, observed that such a body is responsible where an act is done by an agent "in the discharge of some duty incidental to his situation, . . . *aliter*, where an act is done by him of his own free will, without reference to his functions as an agent. Thus, a bank cannot be made liable in damages for an unauthorized declaration made by one of its officers that plaintiff had frequently overdrawn his account." The court seems here to have had in mind a verbal declaration; but its language can scarcely be regarded as a clear affirmation of the doctrine embodied in the above cases.

⁵ *Singer Mfg. Co. v. Taylor* (1906) 150 Ala. 574, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210 (*arguendo*).

¹ *Savignac v. Roome* (1795) 6 T. R. 125 (action on case, not maintainable against the master of a servant who wilfully drives against a third person); *Morley v. Gaisford* (1795) 2 H. Bl. 442 (master not liable in trespass for a tort not done at his command); *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518 (master not liable in trespass for the act of a servant who wilfully drove his carriage against that of another party, without his direction or assent); *McLaughlin v. Pryor* (1842) 4 Mann. & G. 48, 4 Scott, N. R. 655, Car. & M. 354, 11 L. J. C. P. N. S. 169 (master liable in trespass, as the evidence showed that the tort was done with his assent); *Tuller v. Voght* (1851) 13 Ill. 277 (master not liable for wilful tort unless he expressly commanded it).

² *Wright v. Wilcox* (1839) 19 Wend. 343, 32 Am. Dec. 507; *Metcalf v. Baker* (1874) 57 N. Y. 662; *Cleveland v. Nevosom* (1880) 45 Mich. 62, 7 N. W. 222; *Wood v. Detroit City R. Co.* (1884) 52 Mich. 402, 50 Am. Rep. 259, 18 N. W.

cedure are still followed, the right of recovery in such cases is now always determined with reference to the general principle that the wilful acts of a servant are imputable or not imputable to his master, according as they are or are not within the scope of his employment. In this point of view the liability of the master has been affirmed where the driver of an omnibus endeavored, by drawing it across a street, to obstruct the passage of another omnibus belonging to a rival of his master;³ where the driver of a vehicle caused it to come into

124 (doctrine referred to without explicit disapproval, but with some apparent doubt). For further information regarding these cases, see § 2239a, note 2, *ante*.

³ *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. (Exch. Ch.) 526, 17 Eng. Rul. Cas. 258. Martin, B. directed the jury that if they "believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind, acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant; that if the act of the defendants' driver in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and the instructions given to the defendants' driver . . . [not to obstruct another] were immaterial; . . . but that if the true character of the act of the defendants' servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible." These directions were held to be correct, and a verdict for the plaintiff was sustained. Crompton, J., said: "It appears by the evidence of the driver that he was driving the defendants' omnibus in an improper way, for, without in-

tending to touch the horses of the plaintiff's omnibus, he drove so near to it, for the purpose of keeping it from passing him, that he caused the accident. It is not necessary to say what would have been the case if the driver had used the omnibus so as to block up the road; as it is, I cannot see that the direction of my brother Martin was necessarily wrong. If the matter had come before us on a motion for a new trial, it may be that I should have agreed with my brother Wightman, for the question might have been presented in such a way as to bring it more clearly before the jury, and it is possible that some expressions of the learned judge may have led them to a wrong conclusion. But the question now is whether any of the exceptions show that the learned judge was wrong in point of law. Throughout his summing up he left it to the jury to say whether the injury resulted from an act done by the driver in the course of the service and for his masters' purposes. That is the true criterion." Willes, J., after expressing his approval of the statement of Martin, B., with regard to the immateriality of the fact that the defendants' driver had been specially instructed not to obstruct any other driver, proceeded thus: "But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to get before the other omnibus." Byles, J., said: "The direction amounts

collision with a person walking on a highway,⁴ or with another vehicle;⁵ where the driver of a sleigh struck a boy who had jumped on

to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant." Blackburn, J., said: "It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. That the learned judge told the jury, and perfectly accurately, but that alone would not be enough to guide them in coming to a correct conclusion. . . . No doubt what Mr. Mellish said is correct; it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But in this case, I think the direction given to the jury was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned judge goes on to say that the instructions given to the defendants' servant were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion 'that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible.' That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his master's interest or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible. That removes all objection, and meets the suggestion that the jury may have been misled by the previous part of the summing up."

⁴In *Howe v. Newmarch* (1866) 12 Allen, 49, the plaintiff's evidence tended

to show that, when he was about 12 feet away from a baker's wagon which was standing on the sidewalk along which he was passing, the driver suddenly ran out of a house, threw his basket upon the wagon, and jumped to get on the seat, and that the horse immediately started and struck the plaintiff as he was trying to escape. It was held that the court had erroneously refused an instruction that, "if, at the time of the injury, the defendant's servant was engaged in the business of the defendant, and within the scope of his duty as such servant, and he drove the horse over the plaintiff and did him an injury, the defendant is responsible, whether the act was done wilfully or negligently."

In *Eckert v. St. Louis Transfer Co.* (1876) 2 Mo. App. 36, where a verdict in favor of a person who had been run over by defendant's wagon, was sustained, the court explicitly rejected the doctrine that master is not liable for the wilful acts of his servant.

See also *City Delivery Co. v. Henry* (1903) 139 Ala. 161, 34 So. 389, where the general rule as to the liability of a master for the act of his driver in intentionally driving a wagon against the plaintiff was applied.

⁵In *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543, an action brought for injuries caused by the act of a servant in driving his master's wagon against plaintiff's carriage had been dismissed by the trial judge on the ground that, as the plaintiff's witness had testified that the servant had driven purposely, it was apparent that the injury was occasioned by a wilful and malicious act. The court of appeals granted a new trial, holding that the language thus used by the witness was a mere expression of opinion, and that the quality of the driver's act was a question for the jury. The acts for which the master will not be liable are such as were not done in the course of the service, and were not such as the servant intended and believed for the interest of the master. "There are intimations in several cases of authority that for the wilful acts of the servant the master is not responsible. . . . But these intimations are subject to

the material qualification that the acts designated 'wilful' are not done in the course of the service, and were not such as the servant intended and believed to be for the interest of the master. In such case the employer would not be excused from liability by reason of the quality of the act."

In *Curley v. Electric Vehicle Co.* (1902) 68 App. Div. 18, 74 N. Y. Supp. 35, the cab drivers who frequented a certain stand in New York, the line of which extended along A street to the corner of B street, which intersected it at right angles, and then down the latter street, were accustomed, upon their arrival, to place their cabs at the end of the line in B street. Just as the driver of a hansom cab belonging to the plaintiff reached the stand on the day in question, the rear cab in the line in A street was driven away; and observing this, he waited for a few moments to see whether the line would close up. At that time one of the defendant's electric cabs occupied the head of the line on B street, a position which some of the drivers preferred. The plaintiff's driver, after waiting several minutes, saw no indication of any intention on the part of defendant's driver to take the vacant position, and drove across the street and occupied it himself. He stopped the hansom with the horse's head about 3 feet from the cab in front. Thereupon the defendant's driver mounted his cab and came around on A street, and told the plaintiff's driver that that was his place, and to move out or back up. The plaintiff's driver made no effort to comply with his request and held the place. The defendant's driver then cut in ahead of plaintiff's vehicle and backed into his horse, knocking or crowding the horse onto the sidewalk and inflicting substantial injuries. Held, that the jury would have been justified in finding that defendant's driver was acting in the course of his employment and for the purpose of furthering his master's business, and that the defendant would be liable whether the injury was wilful or negligently inflicted.

In *Dinsmoor v. Wolber* (1899) 85 Ill. App. 152, where the servant of a farmer drove his master's wagon on the wrong side of the road, and brought it into collision with another vehicle, the master was held to be liable, irrespective of

whether the tortious act was wilful or merely negligent.

In *Vernon v. Cornwell* (1895) 104 Mich. 62, 62 N. W. 175, the court refused to declare that, if the evidence had conclusively established the fact that the servants in question had been "voluntarily running" the horses which came into collision with the plaintiff's carriage, the defendant would not have been responsible. The precise relation of this case to the earlier Michigan decisions is dismissed in § 2239a, note 2, *ante*.

In *Schaefer v. Osterbrink* (1886) 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922, where a servant had driven his master's sleigh against the plaintiff's, an exception was taken to the refusal of the court to submit to the jury the question whether the servant's conduct was wilful, and to instruct them that, if it was wilful, the plaintiff could not recover as against the master. Defendant's counsel relied upon the argument that the rule under which a carrier is liable for injuries caused to a passenger by the wilful act of his servant (*Craker v. Chicago & N. W. R. Co.* [1875] 36 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.* [1877] 42 Wis. 654, 24 Am. Rep. 437) was not applicable to a case like the one under review. Discussing this contention, the court said: "Two teams upon a public highway, each with a sleigh or vehicle, coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law, and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment, then such duty rests upon the master as well as the servant. *Limpus v. London General Omnibus Co.* (1862) 32 L. J. Exch. N. S. 34, 1 Hurlst. & C. 526, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258. The employer in such case, being responsible for the performance of such duty by his delegated agency, can no more escape liability for such failure when it occurs through his agent's gross negligence or wilful misconduct, than he can when it is by reason of his agent's want of ordinary care. Such being the law in this state, the refusal to submit or instruct as thus

the runner;⁶ where a jockey intentionally fouled another horse in a race.⁷ On the other hand, the action was held not to be maintainable in a case where children who had broken an ice ax on a wagon while the driver was absent were chastised by him when he returned.⁸

In two cases the right of action was denied on the ground that the tort complained of, an assault, was induced solely by a personal motive.⁹

requested was not error, because the jury were expressly charged, in effect, that in no event could they allow Louis any punitive or exemplary damages, nor anything more than compensatory damages. This entirely eliminated from the case the question of wilful misconduct."

In *McClung v. Dearborne* (1890) 134 Pa. 396, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698, the court made the following statement, *arguendo*: "If a coachman, while driving along the street with his master's carriage, sees one against whom he bears ill-will at the side of the street, and leaves the box to seek out and assault him, the master would not be liable. Such an act would be the wilful and independent act of the coachman. It was done while in the master's service, but not in the course of that service. But if the coachman sees his enemy sitting on the box of another carriage, driving along the same highway, and he so guides his own team as to bring the carriages into collision, whereby injury is done, the master is liable. The coachman was hired to drive his master's horses. He was doing the work he was employed to do, and for the manner of doing it the master is liable."

In *Hawes v. Knowles* (1874) 114 Mass. 518, 19 Am. Rep. 383, it was held that where the injurious act of a servant who, in the course of his employment, drives against the carriage of another person, is wanton as well as heedless, his conduct will enhance the damage against the master.

⁶ *Dealy v. Coble* (1906) 112 App. Div. 296, 98 N. Y. Supp. 452. A verdict for the plaintiff was held to be proper upon evidence which tended to show that the tortious act was done by the driver in attempting to put the boy off the vehicle; that he used more force than was necessary; and that the boy, after having jumped off to avoid the first blow aimed at him, had continued

to run along holding the back of the sleigh with his hands, with the evident purpose of getting on the runner again.

⁷ *McKay v. Irvine* (1882) 11 Biss. 168, 10 Fed. 725 (jury so instructed in a nisi prius case).

⁸ In *Brown v. Boston Ice Co.* (1901) 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644. The court said: "The ground on which the plaintiffs contend that the defendant is liable for Sprague's acts in beating them with the handle of the ice ax is that, from what Sprague said at the time, the jury were warranted in finding that he punished them in whole or in part for the purpose of making it easier for him to deliver ice from the defendant's ice cart in the future, without an assistant and with slight care of the tools, and therefore the case is brought within *Howe v. Newmarch* (1866) 12 Allen, 49. But in this case Sprague's attack on the boys was an act of punishment inflicted for a past injury to his master's property, and not in doing an act which he had to do if he performed the duty owed by him to his master. It is not within the scope of the authority of a servant to whose custody his master's property has been confided, to undertake to secure it from future injury by committing the illegal act of inflicting personal chastisement on persons who have done damage to it in the past."

⁹ In *Kiernan v. New Jersey Ice Co.* (1906) 74 N. J. L. 175, 63 Atl. 998, where a servant in charge of an ice wagon gave permission to a boy to take a piece of ice, and while he was doing it, assaulted him, the master was held not to be liable. The court argued thus: "The only way by which the defendant could be held liable for the injury in the present instance is upon the theory that the invitation by Lahey is to be entirely disregarded in the transaction. In other words, the theory is this: That Lahey having no authority to extend to the plaintiff a license to

2378. Torts committed by employees on ships.—It is well-settled law that, in respect of injuries resulting from wilful misfeasances committed by the master and crew of a ship, an action may be maintained against the owner of the ship, and (in cases which fall within the jurisdiction of courts of admiralty) against the ship herself. Thus, recovery has been allowed where a ship was unlawfully captured by a privateer; ¹ where the crew of a privateer was guilty of improper conduct with reference to a captured ship; ² where one ship

take the ice, therefore, when the latter got upon the steps of the wagon, he stood as any other trespasser, and Lahey, notwithstanding his invitation, having still the authority to prevent trespassing and remove trespassers, represented the defendant when he threw the plaintiff from the wagon steps. Now, admitting that the jury had sufficient testimony from which to draw the conclusion that Lahey was possessed of authority to protect the ice carried in his wagon, and to keep trespassers from the wagon itself, the question is whether it was within the scope of his authority to create the condition which he was authorized to prevent, and then to represent the company in abolishing those conditions? "It is apparent that, according to the plaintiff's testimony, there would have been no trespass had there been no invitation. The plaintiff was doing the very act which Lahey had licensed him to do, and nothing more. No cause for ejecting the plaintiff arose, except that which Lahey had brought about. If a servant employed to keep a yard or wharf free from trespassers should challenge another to come within the limits of such property and fight, and during or at the close of the fight he should throw his adversary from the property, injuring him, it would hardly be contended that the servant was acting within the scope of his employment. Although the injured person was a trespasser, and engaged in a breach of the peace upon the property of the master, nevertheless, the transaction would obviously be the affair of the servant alone, for the result of which he alone would be responsible. So it seems in the present case, that, according to the account given by the plaintiff, Lahey enticed the plaintiff to commit the trespass for which he was ejected; that such entice-

ment was for a purpose personal to Lahey; that his subsequent conduct is a part of the same transaction, and that the whole transaction cannot be said to have occurred in the execution of any portion of the business of the company devolved upon Lahey. Therefore, for his act, the defendants are not responsible."

In *Miller v. Wanamaker* (1908; App. Term) 111 N. Y. Supp. 786, a driver in the employ of defendant, being angered at the refusal of plaintiff to allow him to unload his wagon before plaintiff's, stepped forward and kicked plaintiff's horse, thus causing it to run away. Plaintiff, in attempting to stop it, was kicked by it. Held that the defendant was not responsible for the resulting injury.

¹ *Nostra Signora de los Dolores* (1813) 1 Dodson, Adm. 290 (part owner of privateer held to be liable, although his name had not been inserted in the bill of sale or ship's register); *Gibbs v. The Two Friends* (1781) Bee, 416, Fed. Cas. No. 5,386; *Purviance v. Angus* (1786; Pa. Err. & App.) 1 Dall. 180, 1 L. ed. 90.

² In *The St. Juan Baptista* (1803) 5 C. Rob. 33, compensation was allowed for the misconduct of the captain of a commissioned cruiser in putting in irons the crew of a ship which had been seized on the grounds of resistance to search. The charge of resistance was not established, so that the seizure was wrongful.

In *Die Fire Damer* (1805) 5 C. Rob. 357, the owners of a privateer were held responsible for the wreck of a captured ship caused by the misconduct of the prize master in refusing to take a pilot or to follow the advice given him.

In *Del Col v. Arnold* (1796) 3 Dall. 333, 1 L. ed. 624 (1794) Bee, 5, Fed. Cas. No. 556, the owners of a privateer were

was wilfully run against another; ³ where the captain of a steamship, upon the refusal of the libellant to move his tug from a place where he was entitled to keep it, wilfully blew off the boiler of the steamship, so as to damage the tug; ⁴ where the master of a scow converted

held responsible, where the prize crew placed on board a captured ship ran her ashore in order to escape the pursuit of a hostile man of war, and then, after having plundered and scuttled her, abandoned her.

In *The Ann Maria* (1817) 2 Whart. 327, 4 L. ed. 252, the commander of a privateer, instead of pursuing the course usual upon a capture, first put the crew of the captured vessel in irons, and afterward removed them from her. He then stripped her of her papers and left her in possession of an officer and two men without any proper orders. Ultimately, after having run aground in a port into which she was taken, she was sold. The commander was declared to have been guilty of a "wanton marine trespass," and a culpable disregard of the rights of others, for which the owners of the privateer were answerable.

³ *Ralston v. The State Rights* (1830) Crabbe, 22, Fed. Cas. No. 11,540, the object of the collision was to injure a competitor of the owner of the ship by means of which the tort was committed. The wrongful act was viewed as being the "use of superior power to crush a rival."

In *Wallace v. Merrimack River Nav. & Exp. Co.* (1883) 134 Mass. 95, 45 Am. Rep. 301, a new trial was ordered for the reason that the trial judge had instructed the jury that the action could not be maintained if the defendant's servants had "wilfully and maliciously" run the steamer in question against the plaintiff's boat. The court said: "This instruction treats the defendant as exonerated from responsibility, if the act done by its servants was wanton and malicious, and disregards the inquiry whether they were acting under the general authority of the defendant as their master, and for the purpose of executing its orders and doing its work. . . . The evidence offered in the present case somewhat resembles that in *Howe v. Newmarch* (1866) 12 Allen, 49. The persons in charge of the steamboat which did the injury were the servants of the defendant, and the boat di-

rected by them was upon one of her regular trips to Lowell when she struck plaintiff's yacht. She varied her course before she reached the yacht, and immediately after the collision again varied it, and kept upon her course. It presented enough, certainly, to be submitted to the jury, upon the inquiry whether the defendant's servants were not within the general scope of their employment, and whether, while accomplishing the business of the defendant, they had not done so wantonly and maliciously, and with a reckless disregard of the rights of others, by which the plaintiff had been injured in his property."

⁴ *The Bulley* (1905) 138 Fed. 170. The owner of the steamship relied upon the theory that no liability attached to her in respect of an injury inflicted maliciously by one of her employees upon another vessel. The court said: "While, under the law of master and servant, there might be much to sustain the claimant's position, as it is admitted that the act was a wilful one of some person on the tug, *not within the scope of his employment*, yet, under the maritime law, it seems to be well settled that a vessel committing a tort is liable therefore, notwithstanding an unauthorized act on the part of some person on board." The decisions cited as authorities for a doctrine of the scope indicated by the words italicized were *The China* (1868) 7 Wall. 53, 19 L. ed. 67, and *The John G. Stevens* (1898) 170 U. S. 113, 42 L. ed. 969, 18 Sup. Ct. Rep. 544. But these cases relate merely to the liability of a ship for the negligence of a pilot whom the captain is required by statute to employ. The weight of authority is in favor of the theory that the liability of a ship is neither more nor less extensive than that of her owner. See chapter VIII. *post*. Under the facts in evidence, however, the libel was apparently sustainable on the ground that the captain's act was done with a view of subserving his employer's interests. Compare *Ralston v. The State Rights*, cited in the preceding note.

it and made use of it in his employer's business; ⁵ where a minor was abducted by the captain of a whaling vessel; ⁶ and where a minor who had run away from one vessel was shipped by the captain of another, with full knowledge that the shipment was unauthorized, and against the wishes of the minor's father. ⁷

Two English decisions unfavorable to the claimants proceeded upon the doctrine now abandoned in most jurisdictions (see §§ 2239 and 2339a, *ante*), that a master's vicarious liability did not extend to the wilful trespasses of a servant. ⁸ In both of those instances, the evidence was such as would at the present day probably be regarded as warranting the conclusion that the tort-feasors were acting within the scope of their employment.

2379. Acts intended to produce fear.—A case in which the injury complained of was caused by an act done by a servant for the purpose of producing the sensation of fear, either in the complainant himself, or some third person, or some animal, may present one or the other of two situations:

(1) The act may have been done with the view of protecting the

⁵ *The Florence* (1877) 2 Flipp. 56, Fed. Cas. No. 4,880.

⁶ *Walcott v. Wilcutt* (1858) Fed. Cas. No. 17,053.

⁷ *Sherwood v. Hall* (1837) 3 Sumn. 127, Fed. Cas. No. 12,777.

⁸ In *The Druid* (1842) 1 W. Rob. 392, where the captain of a tug ran it against the plaintiff's ship, demanding at the same time payment of towage money, and then forcibly detained her, Dr. Lushington used this language: "Upon this state of facts, the inquiry arises, What are the principles of law by which the decision of this case must be governed? The answer, I apprehend, is this, namely, the rules and principles which govern the cases of principal and agent, of master and servant, as they have been laid down and adopted in the courts of law in this country. The unfortunate owner of the *Sophie*, who is now seeking his redress by suing this ship and her owners, it is true, is a foreigner, a subject of Denmark, but his title to redress must be ruled by the municipal law prevailing in the courts of this kingdom and governing the court in which he sues. . . . The general principle of law that the master is liable for the acts done by his servants within the scope of their employment is not denied, but it is contended, on be-

half of the owners of the *Druid*, that the principle does not apply to this case, and that no such liability exists where the servant, though occupied in the affairs of his master generally, has occasioned an injury by his violent, wilful, and malicious conduct." The learned judge accepted, under protest, the view thus put forward, considering himself to be bound by the authority of *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518, and *Lyons v. Martin* (1838) 8 Ad. & El. 512, 3 Nev. & P. 509, 7 L. J. Q. B. N. S. 214. See §§ 2239 and 2241, *ante*.

In *The Ida* (1860) Lush. 6, 1 L. T. N. S. 417 the master of a Danish schooner lying alongside the quay at a port in the Danube went on board an English bark lying outside his own vessel, and, with a view to get the schooner out, wilfully cut the bark adrift from her moorings, whereby she swung to the stream and capsized a barge. A suit brought against the schooner by the Turkish owners of the cargo on the barge was held by the same judge not to be maintainable,—primarily on jurisdictional grounds, but also because the act complained of was a wilful one, outside the proper province of the master.

master's interests. Under these circumstances, it is clear that the sole question upon which the liability of the master depends is simply whether the act was within or beyond the scope of the servant's authority.¹

¹In *Dolan v. Hubinger* (1899) 109 Iowa, 408, 80 N. W. 514, a complaint was held demurrable, which alleged that C., a motorman, on nearing a certain curve observed some boys running away from the track, and on coming up found some obstructions on the track left there by them; that he stopped the car, and got off to remove the obstructions; that he then observed the boys hiding close by; that, believing them to be waiting there for the purpose of doing further mischievous acts towards defendant's property, as they had been in the habit of doing, he sought to frighten and drive them away, and in doing so threw at them a small stone which struck the plaintiff. Discussing these allegations, the court said: "The facts stated do not show that Case had authority to bind the company by the act of which complaint is made; that is, it does not appear that, in throwing the stone, he was acting within the scope of his employment. In this respect, we think the case at bar is ruled by *Kincade v. Chicago, M. & St. P. R. Co.* (1899) 107 Iowa, 682, 78 N. W. 698. It is not shown that Case was authorized to resist trespassers, and it is affirmatively charged in the petition that the trespass had been committed, and those engaged in it had retreated, when the stone was thrown that caused the injury to plaintiff. In such an event it cannot be said that the act was done within the scope of the servant's employment. *Golden v. Newbrand* (1879) 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Porter v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 358."

In *Guille v. Campbell* (1901) 200 Pa. 119, 55 L.R.A. 111, 86 Am. St. Rep. 705, 49 Atl. 938, a servant who was using a hook to drag bales of cotton into the defendant's warehouse made a motion as if to throw it at some boys on the bales. The hook slipped and struck a boy who was standing on the sidewalk. Held, that the defendant was not liable. The court said: (1) "Where an injury is caused by a servant in the use of means fairly adapted to accom-

plish the purpose of his employment, the master is responsible. This is true, even though the act of the servant is wrongful or unauthorized. But where the act of the servant does not fairly tend to effectuate the discharge of the duty for which he is employed, the master is not liable. . . . The act causing the injury was the waving by Fitzgerald of the iron hook, and allowing it to slip from his hand. His purpose was manifestly to frighten the boys, and drive them away from the bales. But, at the time, it does not appear that any of the boys were in any way obstructing Fitzgerald, or interfering with him in the accomplishment of his work. The boy was struck with the iron hook which had been given to Fitzgerald to use in pulling the bales around, but this use of the hook, in converting it into a missile, was entirely foreign to that for which it was intended by the master in giving it to the servant. The accident occurred while Fitzgerald was walking from the warehouse out to the bales. But, suppose, for the purpose of illustration, that Fitzgerald had been sent from the office to drag in the bales at a point a few blocks distant, and, while upon the way thither, had met a crowd of boys upon the sidewalk, and had waved the hook at them, to clear a passageway for himself. If, under such circumstances, the hook had slipped from his hands, striking a boy standing at one side, surely it would not be contended that his employer was responsible for that act; so here, we are not able to say that the act causing the injury was done in carrying out the duty to which the servant was assigned. His duty was simply to lay hold of the bales, and drag them one by one from the sidewalk into the warehouse. In performing this duty, he used the hook to grapple more securely with the bale, and this was the only use for which it was intended, or for which it was supplied by the master. The request to drag the bales of cotton from the sidewalk cannot be held to imply authority to injure a boy standing on the side-

(2) The act may have been one of a description which the servant was admittedly authorized to do in the course of the performance of his duties, but the evidence may warrant or require the conclusion that he did it merely for the purpose of amusing himself or gratifying his personal malice. The general rule is that an act of this character is not imputable to the master (see § 2288, *ante*). But different views have been expressed with regard to the extent of its applicability to cases of the class considered in the present section.

The theory apparently embodied in some of the decisions is that the general rule invariably operates so as to preclude recovery.² But

walk looking on at the work. The act of violence by which the injury was occasioned was not done in execution of the authority given, but was quite beyond it, and must be regarded as the unauthorized act of the servant, for which he himself, and not the defendant, must be answerable. Whether this action was simply careless, or whether it was malicious, it was his own, and was not incident to the authority granted. The facts of the case are undisputed; the deviation from the line of the servant's duty was in this case, we think, sufficiently marked to justify the learned trial judge in determining, as a matter of law, that the servant was not doing the business of the master in the performance of the act causing the injury."

² In *Philadelphia, W. & B. R. Co. v. Brannen* (1886) 1 Sadler (Pa.) 369, 17 N. C. 227, 2 Atl. 429, where the plaintiff was knocked down by a runaway horse which had been scared by the blasts maliciously emitted by an engineer from a locomotive whistle, the court sustained a verdict in his favor, although the act was done in contravention of explicit instructions as to the times and places for blowing whistles. This decision, it is clear, was based upon the ground that negligence on the part of the engineer was a warrantable conclusion from the evidence. But the actual standpoint of the court with relation to the subject now under discussion is indicated by the fact that the jury was held to have been properly instructed, at the defendants' request, that if the engineer "blew the whistle for the purpose only of frightening the horse, defendants would not be liable." The following comments of the judge upon this instruction were also ap-

proved: If "wantonly and maliciously done, . . . the company would not be responsible. You can assimilate it to the case of your coachman driving a wagon. . . . If he drives carelessly and negligently, and runs down a citizen passing along the street, you would be responsible, because you have intrusted him with that function. But if a man were to see some person whom he wanted to injure by running into him, and wantonly and maliciously run into him of his own accord, that would make an offense on his part, but he could not be considered your agent for doing a wanton and malicious act."

In *Simmons v. Pennsylvania R. Co.* (1901) 199 Pa. 232, 48 Atl. 1070, an instruction to which exception had been taken was thus discussed by the court: "Under the circumstances of this case, the only basis upon which the jury could conclude that the engineer was acting outside the line of his duty was by finding that he blew the whistle and let off the steam in absolute disregard of the dangerous predicament of the plaintiff; and that his action in so doing was wilful and malicious, and for the gratification of his own wanton purpose. But considered in connection with other parts of the charge, it is manifest that the court did not intend to give the jury any binding instruction as to the question of the engineer acting without the scope of his employment."

In *Stephenson v. Southern P. Co.* (1892) 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234, where a locomotive engineer wantonly backed his engine toward a street car which was crossing the railroad tracks, simply for the purpose of frightening the passengers in it, the result being that a passenger, believing himself in imminent

the evidence upon which they were rendered was not such as to demand, or even suggest, a discussion of the doctrine stated in the following paragraph.

According to another theory, the right of recovery is to be determined simply with reference to the question whether the given act was done by the servant at a time and place which authorized or required him to do it. The alternatives presented in this point of view may be stated thus: If the act was one of that character, the mere circumstance of its having been induced by a motive which had no relation to the furtherance of the master's business does not alter its

danger from an anticipated collision, jumped from the car and was injured, it was held that the railway company was not liable. Criticizing an instruction given by the trial judge, the court said: "The engineer was not acting within the scope of his employment, as assumed in this instruction, if his object in moving the engine was simply to frighten the passengers in the street car. Such an act, done for such a purpose, was entirely foreign to the object of his employment. The work which the engineer was to perform for defendant was to manage the engine while it was engaged in switching cars, and if he started the engine, not for the purpose of employing it in the service of the defendant, but to accomplish an independent purpose of his own, of the character stated in the instruction, the relation of master and servant, as to that particular act, did not exist, and the defendant would not be liable for any damage resulting therefrom, and it is immaterial that he used the engine of defendant in order to accomplish his unlawful purpose. Wharton, Neg. § 168; *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373. It would not be contended that one who employs another to sprinkle his garden, and places in his hands a hose to be used for that purpose, would be civilly responsible in damages, if, stepping aside from that employment, the servant should, either in sport or from malice, turn the same upon a person quietly passing along the street. In the commission of such an assault, the servant would not be acting within the scope of his employment, nor would the hose be used in the transaction of the business of his employer. And yet the act of the servant in the illustration just

given would not be more foreign to the purpose of his employment than was that of the engineer in this case, if committed under the circumstances stated in the instruction."

In *Hahn v. Southern P. R. Co.* (1877) 51 Cal. 605, where horses were frightened by the sudden blowing off of the steam from a locomotive, and ran away, the court intimated that, if the point that the opening of the steam cock was a malicious trespass had been properly raised, the railway company would not have been liable. But the verdict was allowed to stand on the ground that, under the evidence, the conduct of the engineer may have been simply negligent, and that the jury had so found.

In *Canton Cotton Warehouse Co. v. Pool* (1900) 78 Miss. 147, 84 Am. St. Rep. 620, 28 So. 823, plaintiff accepted the invitation of defendant's night watchman to visit defendant's ice factory at night to see the process of making ice. While he was there, the watchman and other employees, for the purpose of playing a practical joke, suddenly turned off all the electric lights in the building, allowed the steam to escape with a loud noise, dragged a coal shovel up and down the iron stairs of the engine, and uttered loud cries, thereby alarming plaintiff so that, in a rush to escape, he fell and injured himself. Held, that a verdict should have been directed for defendant. The court said: "The inquiry is not whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business, nor as to the mode or manner of doing it, whether in doing the act he uses the appliances of the master, but whether, from the nature of the act itself as actually done, it was an act

essential quality as an act within the scope of the servant's employment. On the other hand, if the act was not one of that character,

done in the master's business, or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account."

In *Weldon v. Harlem R. Co.* (1859) 5 Bosw. 576, where a man occasionally employed in the defendants' stables ran out suddenly into the street and struck one of two horses that were being led by plaintiff's servant, the defendants' liability was denied.

In *Evers v. Krouse* (1904; Err. & App.) 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, a boy, while watering his father's lawn, turned the hose upon a horse in the street, the result being that it ran away, broke up the wagon to which it was attached, and injured itself so seriously that its owner had to kill it. Held, that the father could not be held liable for the damage done. After adverting to the general acceptance of the doctrine that "for a wilful act done by a servant, not within the scope of his employment, no liability attaches to the master," the court continued thus: "Notwithstanding, there has been much contrariety of result reached in the application of the rule; and this, it would seem, is due to the assumption in some jurisdictions that the act done by a servant while engaged in the master's work is necessarily an act done within the scope of the former's employment. But this is conspicuously a *non sequitur*. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom,—done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense, and should not be deemed to be so as a matter of law. As to it the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it, the servant alone should be held responsible. . . . If the act of the defendant's son in throwing water upon the plaintiff's horse was not the result of his careless handling of the garden hose while sprinkling his father's lawn, but was deliberately done by him, purely

out of a spirit of mischief, for the purpose of frightening the animal, the fact that he used the tool supplied to him for the doing of his father's work, for the accomplishment of his own mischievous purpose, did not make it an act within the scope of his employment, and did not render the defendant liable for the injury resulting therefrom." It was stated that the view thus taken was in no wise inconsistent with the decision of the court in *Bittle v. Camden & A. R. Co.* (1893) 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305, where the defendant was held responsible for injuries received by the plaintiff as a result of the running away of his horse, which had been frightened at the blowing of a locomotive whistle. The conclusion there reached was declared in the *Evers Case* to be the necessary result of applying the general rule "that the master is responsible for injuries resulting from an act done by his servant within the scope of the latter's employment, without regard to whether the act was done negligently or even maliciously. The blowing of the whistle at the point where the company's engineer blew it was a part of the duty which he was employed to perform, and it was because of that fact that the rule of *respondet superior* was applicable. If the engineer, in the case referred to, had maliciously increased the fright of the plaintiff's horse by throwing lumps of coal at him from the tender while the train was passing by, this act would as plainly not have been within the scope of his employment (notwithstanding that the coal was furnished him by the employer to be used in the employer's business), as his act in blowing the whistle was within it. For the one act, the master would not be responsible; for the other, he would be."

These remarks show the ground upon which the court desired that the earlier case should be deemed to rest. But it is submitted that they do not accurately represent the position actually taken in that case, *viz.*, that a railway company, as contrasted with other classes of employers, is liable for injuries caused by the perversion of the agencies intrusted to its employees. See note 5, *infra*.

the master's liability is negated on this ground alone, and the motive which induced it becomes quite immaterial.³

A third theory is that the injurious consequences of fear which a servant maliciously creates by any improper use of the instrumentalities under his control are imputable to his master, whenever the act complained of was one which, under some circumstances, might justifiably have been done by him in the course of his duties. In all the cases which have so far been decided upon this footing, the injury resulted from the wrongful use of the whistles or blow-off pipes of railway locomotives. In most of these the liability of the defendants was treated as being a legitimate deduction from the mere fact of the perversion of the appliances to purposes of mischief.⁴ But in some of them the right of action has been predicated upon the special

In *Mace v. Ashland Coal & I. R. Co.* (1904) 118 Ky. 885, 82 S. W. 612, a demurrer was sustained to a petition which alleged that the plaintiff was caused to jump from an incline by a sudden warning either maliciously or mischievously uttered by defendant's servant when there was no danger or ground for alarm, but which did not allege that the warning was in any way connected with servant's duty to defendant, or that he represented defendant in any manner therein.

³In *International & G. N. R. Co. v. Yarrowborough* (1897) — Tex. Civ. App. —, 39 S. W. 1096, the court thus commented upon an instruction "based upon the theory that, if there was no occasion for the employees in charge of the engine to blow the whistle, and they blew it for the purpose of frightening plaintiff's horse, and not in discharge of duty, the railway company would be liable for damages resulting therefrom. This is not the law. If there was no occasion for blowing the whistle in furtherance of the master's business, and the act of the employee in causing the whistle to blow was solely for the purpose of frightening the horse of plaintiff, then the act cannot be said to have been done within the scope of his employment, so as to charge the master with its consequences. If the fireman had thrown a piece of coal at the horse to frighten it, it might, with equal consistency, be claimed that the railway company was liable. If, however, the act was done in the discharge of his duties and in furtherance of the master's business, and was performed in a

negligent manner, causing the injury, the master would be liable. And this would be true if the servant acted willfully and maliciously, intending to frighten the horse." But the exposition of principles seems to be inconsistent with the Texas cases cited in the following note.

⁴In *Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 298, 95 Am. Dec. 489, the evidence showed that just at the moment when a wagon was crossing a railway track in front of a stationary locomotive, the engineer negligently or maliciously caused the steam to escape, the result being that the team ran away. Held, that the company were liable for the consequent injuries. The court argued thus: "Having the control of his locomotive and the steam by which it was propelled, he [the engineer] was required to so use and control them as to avoid injury to others, acting with prudence and caution. He had no right after he saw appellee start to cross the track, to then put his engine in motion and run it against appellee's wagon and team, nor had he the right to so use the steam from his engine as to frighten appellee's horses. He saw that they were restive and afraid of his locomotive, and must have known that the escape of steam would most probably produce the result that ensued; and it was his duty to have prevented its escape, and avoid the disastrous results that followed from the noise of the escaping steam, which is highly calculated, as all observation teaches, to alarm cattle and horses. Knowing this, he should have been on his guard, and

ground that anyone who operates a railway by the dangerous agency of steam is absolutely bound to see that his servants do not misuse

used all necessary precautions to prevent injury. It can make no difference in its results to appellee, whether the escape of steam was the effect of negligence, or from wanton and wilful purpose. The engine driver does not pretend that there was any necessity, nor can we imagine any, for the escape of steam at that time. He had stopped his locomotive, and there could be no necessity to start it until appellee had crossed the track, which could have required, at most, not more than a very few seconds. . . . There can be no pretense that where an agent commits an act wilfully, or otherwise, while he is not engaged in the performance of his duty to the company, they would be liable for the wrong; or even while so engaged, if he were to personally perform an act not connected with the business of the corporation, they would be liable. But when employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskilful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he wilfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages. They should not be permitted to say, it is true he was an agent, was authorized by us to have the possession of our engines, was engaged in carrying on our business, and while so engaged, he wilfully perverted the instruments which we placed in his hands to something more than we designed or authorized, and therefore, we should not be liable for the injury thus inflicted."

In *Chicago, B. & Q. R. Co. v. Dickson* (1872) 63 Ill. 151, 14 Am. Rep. 114, the court, relying upon the above case as having established the general doctrine that a railway company is liable wherever its servants cause injury by "perverting its appliances to wanton and malicious purposes," held that damages might be recovered for the act of a locomotive engineer who maliciously and without any necessity sounded near a crossing the sharp shrill whistles ordinarily employed to frighten cattle on the track, and thus caused the plaintiff's team to run away. The court

said: "We can see that there was nothing in front of the train on the track requiring such an alarm, and when the ordinary sound of the whistle, or the ringing of the bell, would fully have complied with the requirements of the law, and there was no necessity for such an alarm as was given, and when all of the evidence is considered, although it was conflicting, we are of the opinion that the jury was warranted in finding that the conduct of the employees of the road was wanton. The servants of the road have no right, under the pretext of complying with the law, to recklessly or maliciously inflict such injuries. They must have seen, if the witnesses of appellee are to be regarded, that the sounds had frightened appellee's horses, and instead of stopping the whistle and ringing the bell, they continued the alarm until the carriage was overturned and the injury inflicted. A reasonable regard for the safety of appellee and his wife, on principles of humanity as well as legal obligation, required the servants of the company, when they saw the alarm of the horses, to have ceased whistling in this extraordinary mode; but, on the contrary, it seems to have been needlessly and recklessly continued. Persons cannot be permitted to inflict such injuries under the pretext that they were complying with the statute, when the ringing of the bell, which would almost certainly have been attended with no danger to appellee, must have been a full compliance with the requirements of the statute. Had it been necessary to alarm persons or stock on the track, then such sounding of the whistle would have been not only proper, but necessary. But appellee was not on the track, and the engine driver knew he could not get upon it, because, if for no other reason, he was prevented, as we understand it, by the fence between him and the track."

In *Alsever v. Minneapolis & St. L. R. Co.* (1902) 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841, where a railroad engineer blew off steam in order to frighten certain children, and one of them was frightened so that she fell and broke her leg, the company was held liable for the injury. The refusal of the following instruction was ap-

proved: "If you find from the evidence that the defendant's servants were not using the blow-off cock for the purpose of cleansing the boiler of defendant's engine, but solely for a purpose of their own,—for their own amusement, and for the purpose of frightening the plaintiff and the other children with her,—the plaintiff cannot recover in this action." The court said: "The engineer was in charge of the engine, and had control of the blow-off cock. How often and when to make use of it was necessarily left to his judgment. All that was exacted of him was that in doing so he exercised ordinary care. In blowing off the steam he was acting within the scope of his employment. The negligence consisted in the manner and place of doing it. There was no departure from his employment,—merely failure to exercise care in doing what he was authorized to do. . . . It was part of the engineer's duty to use this blow-off cock. For all the record discloses, he may then have been operating it to cleanse the boiler. There is no evidence to the contrary. Whether incidentally to cleansing it he engaged in the diversion of frightening the children, or blew off the steam or spray for that express purpose, however, we think, can make no difference. The company had placed in his charge an instrumentality requiring care in its operation and management. He was doing precisely what the company contemplated he should do when it employed him, *i. e.*, operating the blow-off cock. When this was to be done, and how, as said, was left to his discretion, the use of which was also contemplated in his employment; and the company was as responsible for a mistake or wilful perversion of judgment in its operation if within the compass of what he was to do, when amounting to negligence, as for his negligence in doing that which may be conceded to have been necessary." The court disapproved *Stephenson's Case*, cited in note 2, *supra*.

In *Everett v. Richmond & D. R. Co.* (1897) 121 N. C. 519, 27 S. E. 991, (1898) 122 N. C. 1010, 30 S. E. 334, where an engineer blew his whistle at an unusual place, for the purpose of frightening horses which were being watered at a stream beside the track, the court approved an instruction to the effect that, if the engineer wantonly

and maliciously made unnecessary noise for the purpose of scaring the plaintiff's horses, and thereby the injury was brought about in the loss of the horses, defendant would be liable. In *Brendle v. Spencer* (1899) 125 N. C. 474, 34 S. E. 634, another action arising out of the same tort, the liability of the company for an act of this character was again affirmed.

In *Stewart v. Cary Lumber Co.* (1907) 146 N. C. 47, 59 S. E. 545, it was laid down that a railway company is liable for actual damages which resulted from the wanton and unnecessary blowing of a locomotive whistle by its engineer for the purpose of frightening plaintiff's mule, but not for exemplary damages, if there is no evidence tending to show authorization, ratification, or negligence on the part of its managers in selecting a reckless or improper engineer.

In *Cobb v. Columbia & G. R. Co.* (1892) 37 S. C. 198, 15 S. E. 878, where an engineer, by maliciously sounding his whistle and letting off steam, frightened a horse attached to a plow in a field adjoining the track, and caused it to run away, the company was held liable for the resulting injuries. The court proceeded upon a general doctrine thus stated: "If while . . . in the exercise of the duties of the position for which he was employed, . . . [the engineer] maliciously, wilfully, wantonly, etc., performed those duties, either with an intention to injure the plaintiff, or with reckless disregard of the safety of plaintiff's property, the employer is liable." On the other hand, it was laid down that the misconduct of the trainman in shouting so as to frighten the horse was not imputable to the company.

In *Skipper v. Clifton Mfg. Co.* (1900) 58 S. C. 143, 36 S. E. 509, a demurrer was held to have been erroneously sustained to a count which alleged that, after the plaintiff's mule had almost passed the defendant's engine or "dummy," the defendant's engineer, while in the exercise of his duties in running it, maliciously, unnecessarily, wilfully, negligently, mischievously, and wantonly, with utter disregard to the rights of this plaintiff, sounded the whistle, making a great and frightful noise in close proximity to the mule.

In *Texas & N. O. R. Co. v. Syfan* (1897) — Tex. Civ. App. —, 43 S. W.

that agency to the injury of third persons.⁵ This seems to be the only footing upon which, with due regard to general principles, a master can be charged with liability for an act of this character. In no other class of cases has the circumstance that the torts involved the perversion of the master's appliances from their legitimate uses been treated as constituting of itself an adequate reason for holding

551, affirmed in (1898) 91 Tex. 562, 43 S. W. 551, 44 S. W. 1064 (but only a point of practice was discussed), a railway company was held to be liable for the act of an engineer in intentionally frightening a horse on the road near the track by throwing steam upon it.

In *Hargis v. St. Louis, A. & T. R. Co.* (1889) 75 Tex. 19, 22, 12 S. W. 953, the liability of a railway company for injuries which resulted from the frightening of teams by the wilful blowing of a whistle was affirmed in general terms.

In *Texas & P. R. Co. v. Hamilton* (1901) — Tex. Civ. App. —, 66 S. W. 797, while decedent was riding a mule on a highway about 30 yards away from defendant's tracks, a train came up from behind, and, when about 300 yards away, whistled for a flag station, and also in response to the conductor's signal to stop. There was positive evidence that the engineer, when opposite decedent and his companions, saw them, smiled, gave ten or twelve blasts on the whistle, and let off a volume of steam. Decedent's mule was frightened, and threw him. Defendant's evidence tended to show that only the customary signals were given. Held, verdict against the company was proper. The trial judge charged that, if the engineer saw decedent, and sounded the whistle and let off steam in order to frighten the animal, or with reason to believe that the animal would be frightened, defendant would be liable; that if he did not see decedent, or if only the customary signals were given, or if the unnecessary noise was made without intention to frighten the animal, and without reason to believe that it would be frightened, defendant would not be liable. Held, that this instruction was as favorable to defendant as it could ask. On a motion for rehearing it was contended that the first clause of this instruction was in conflict with the rule stated in the *Yarborough Case*, note 3,

supra. But the court refused to consider the point, because it had not been presented by any assignment of error.

In *Billman v. Indianapolis, C. & L. R. Co.* (1881) 76 Ind. 166, 40 Am. Rep. 230, it was laid down that, if the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the owner of the latter may recover therefor from the railroad company. The decision turned merely upon the question of proximate or remote cause. But the standpoint of the court seems to have been the same as that exemplified in the above cases.

⁵ In *Nashville & C. R. Co. v. Starnes* (1871) 9 Heisk. 52, 24 Am. Rep. 297, the court thus explained its reasons for holding a railway company to be liable for the act of an engineer in maliciously blowing a whistle to frighten a team which was crossing the track: "It was the established doctrine of the common law, that the master is not liable for the torts of the servants not committed in the line of the master's service, or with his assent or ratification. This doctrine has been greatly modified as applied to railroad companies, on account of the absolute necessity for more stringent rules for the protection of life and property against the perils of the steam engine and its capacity for mischief. The corporation in such case can only act through its agents and servants, and, having placed under the control of its agents an instrument of so much peril and injury, it is but reasonable that the law should demand of the corporation the utmost caution in the selection of its agents, and hold it to strict accountability for injuries which befall the citizen for the want of such caution. . . . As a general rule, the company, as carriers of freight and passengers, are liable for all the acts of their servants; but for the acts of their

him responsible. The ordinary rule exemplified in the decisions is that such torts, like those of all other descriptions, cannot be imputed to him unless they were committed in furtherance of his business. Concerning the question whether a locomotive should be placed in the category of inherently dangerous instrumentalities, there may be room for a difference of opinion. But the propriety of answering

servants in regard to strangers, as in this case, it is contended that the company is not liable for the tort of its servant committed out of the line of his duty and employment. It is said in the authority already cited [1 Redfield, Railways, 511], that, by putting its agents in their places, or suffering them to occupy them, the company consent to be bound by their acts; and an engineer or conductor of a railway, while he acts with the instruments which the company places in his hands to be used on their behalf, upon the line of their road, is acting instead of the corporation, and his acts will bind the corporation, whether done negligently or cautiously, heedlessly or purposely. . . . A railroad company would not be liable for the tort of its agent, if such agent step aside from the line of his duty and commits a battery or other tort upon a stranger, or upon his property. But if in the control of his engine, and while at his post in the line of his employment, he wantonly uses his engine for purposes of sport or malice to another's injury, then we can see no good reason why the corporation should not be liable."

In *Bittle v. Camden & A. R. Co.* (1893) 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305, the engineer, whilst apparently looking at the plaintiff, who, with his horse and wagon, was in full view, holding his horse or leading him in the usual manner along the way provided, caused his whistle to emit an unusually shrill and loud sound, described by one of witnesses as a "cattle call," a call which is ordinarily made when cattle are upon the track ahead of the train, or a call by reason of some danger. Plaintiff's horse was frightened and ran away, thus causing the injury complained of. There was no evidence that such a sounding of the whistle was called for by any danger to the train whatever from obstructions ahead of it on or near the track. The plaintiff, with his horse, was in no situ-

ation of danger. The court, after remarking that, upon the evidence as it stood at the close of the plaintiff's case, there was every appearance of negligence and heedlessness, if not wantonness, in the act of blowing this whistle in the manner in which it was blown, proceeded thus: "It must be that the defendant is bound to use reasonable care and prudence in giving statutory signals of the approach of a train or its existence at any given point where such signal may be allowed or required. Negligence in the exercise of a lawful right is actionable if it causes injury. It is no excuse or justification that an act occasioning injury was itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. *Pennsylvania R. Co. v. Barnett* (1868) 59 Pa. 259, 98 Am. Dec. 346. This is quite aside from the question whether blowing at this point could do any good or not. It was their legislative duty to blow the whistle, and it cannot be said that legal injury can arise from the proper performance of this duty, but the pregnant question always is whether, under all the circumstances of the case, reasonable care has been used in the exercise of legislative right and the performance of the legislative duty. . . . Whilst no liability attaches for damages for these acts so long as they are exercised, in accordance with the statutory authority, with ordinary care, yet liability ensues when they are done negligently or wantonly. The rule obtains, generally, that a master is not answerable in damages for the wanton and malicious acts of his servant, yet this immunity is not generally extended to railroad corporations, whose servants are entrusted with such extensive means of doing mischief. Accordingly, it has been established that if such servants, while in charge of the company's engines and machinery, and engaged about its business, negligently, wantonly, or wilfully per-

that question in the negative is, to say the least, strongly indicated by the consideration that the inclusion of a locomotive in this category would logically involve the inclusion of many other kinds of machinery also, and by consequence an almost indefinite extension of the boundaries of a master's absolute liability. In modern times there is undoubtedly a well-marked trend of theory towards the enlargement of those boundaries in certain directions. But it is desirable

vert such agencies, the company must respond in damages, and this is the principle deducible from the authorities upon this subject. Applying these principles to the facts and circumstances of this case, it leads to the conclusion that the jury should have been permitted to pass judgment upon the question whether this whistle was blown in such a negligent, wilful, or wanton manner as to be actionable."

In *Texas & P. R. Co. v. Scoville* (1894) 27 L.R.A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730, where a railway company was held liable for the act of the engineer and fireman of a locomotive in blowing the whistle wantonly and maliciously to frighten a horse which a person is driving near the track, the court argued thus: "If injury had resulted from failure to sound it [the whistle] at the required times and in the required way, the company might have been held liable. If unnecessarily and negligently sounded,—as, for instance, when the train was standing where it should be, and was not about to start, or the time had not arrived for giving the signal to start,—and an injury had resulted from such act or omission, for such negligence the company would be liable. . . . The malice pleaded in this case is only that which the law implies from an act of wanton cruelty. We are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of a locomotive engine in charge of the proper servants of the company, while engaged in pulling its regular trains, moving at schedule rate, on schedule time, under direct, constant telegraphic orders. If it is contended that in this act the servants were not in the master's service, because not employed to blow the whistle wantonly and maliciously to frighten travelers or their horses, that contention is fully answered by the supreme court of Illi-

nois,—that these servants are not employed to do any negligent or unlawful act, and such a test would exempt the company from liability from all affirmative acts of these servants violating the rights of others. . . . If public policy and safety require that carriers who undertake to convey persons by the powerful, but dangerous, agency of steam, shall be held to the greatest possible care and diligence, and, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of carrier's agents, or their wanton malice, the same public policy and safety demand that these all-pervading corporations, who commit to the custody and use of their servants, in such great numbers, these terrible expressions of the powerful and dangerous agency of steam, shall maintain discipline in their ranks, and, by the utmost care and diligence, protect the public, not only from its negligent use, but from its wanton or malicious use, by these servants, to the hurt of anyone in the lawful enjoyment of the state's peace. To say the engineer and fireman who have charge of the locomotive on a regular run may, while so running it, so blow the whistle, wantonly and maliciously, that by their manner of blowing it, and motive for blowing it, in the indulgence of their love of mischief or other evil motive, they separate themselves, in and by that act, and for that instant, from the company's service, is to refine beyond line of safety and of sound reason. Public policy and safety require that the use of the steam whistle by those servants who are in charge of the locomotive, and while the locomotive is in motion on its regular or authorized runs, should be held to be done within the scope of the employment of those servants, so far as to charge the company with liability therefor."

that the development of doctrine in this respect should proceed upon rational and intelligible lines, instead of being effected, as in this instance it seems to be, by a purely arbitrary segregation of one particular instrumentality from many others which, in our present point of view, must be regarded as being of an essentially similar quality.

The provisions in the Georgia Code (§§ 2033, 3368) by which railroad companies are declared to be liable for the "improper conduct" of their agents in or by the running of their cars or engines have been construed as extending to a case in which injury results from the malicious use of a locomotive whistle by the engineer.⁶

The cases in which the injured persons were frightened for the purpose of compelling them to alight from a moving railway train upon which they were trespassing are reviewed in §§ 2352 to 2356, *ante*.

2380. Acts involving coercion or constraint of the person.—Where men employed to unload freight at a certain port were abducted by the master, and compelled by threats of bodily harm to work as deckhands during the remainder of the voyage, the shipowner was held liable, both on the ground that the abduction constituted a breach of the contract of hiring, and on the ground that it was a tort committed by him within the scope of his authority to obtain men for service upon the vessel.¹ But in the absence of some special circumstances

⁶ *Georgia R. Co. v. Newsome* (1878) 60 Ga. 492.

¹ *The State of Missouri* (1896) 22 C. C. A. 239, 46 U. S. App. 245, 76 Fed. 376. There the evidence showed that, while the claimants (colored men) were being paid their wages for unloading the steamboat, she was loosed from her moorings, and proceeded upon her voyage with them on board; and that they were designedly abducted, and thereafter compelled to involuntary service upon the steamer, because she had become unable to prosecute her voyage, owing to the desertion of the former deckhands. The court said: "The duty was imposed upon the vessel and its master, upon completion of the contract for service in unloading the freight, to give these men unobstructed liberty and opportunity to leave the boat. That was an implied term of the contract of hiring. Failing therein, there was breach of the duty imposed by the contract of hiring. The abduction of these men was a deliberate violation of a duty imposed by the contract. The sub-

sequent compulsory labor in the navigation of the boat, to which they were subjected, goes in aggravation of the damages arising from the breach of the contract. . . . The act was a tort of the master of the steamboat. . . . He had authority to obtain men for service upon the boat. He could only legally do it by contract for the purpose of obtaining that service. Acting within the scope of his authority, he resorted to an unauthorized mode of procuring such service. For the wrong so done, the owners of the vessel must be responsible."

In the above case, the court disapproved a decision which defendant's counsel relied upon. *Sunday v. Gordon* (1837) Blatchf. & H. 569, Fed. Cas. No. 13,616. There the libellant alleged that he shipped as seaman, on board the defendant's vessel, for a voyage to Liberia, in Africa, at which place he was to be set ashore; that the master of the vessel failed to set him ashore, and, in violation of the contract, brought the libellant, against his will, to New York;

like those which were presented in this instance, an employer is not answerable for the misconduct of an employee in illegally coercing a third person to do something, even though the coercion may have been exercised for the purpose of securing some advantage for the employer.²

that he was there assured by the master and owner that the brig was loading for the voyage back to Africa, and he should be returned to the port of his residence and nativity; and that the vessel made the voyage, but returned to New York without going to the place of the libellant's residence, and without sending him home or permitting him to leave the brig. Betts, J., ruled that, if the libellant was tortiously brought off from Africa, that was exclusively the act of the master, but found as a fact that he was employed by the master, not as a seaman, but solely for the master's individual comfort and assistance. The obvious explanation of this decision is that it was rendered at a date when the doctrine still prevailed (see § 2239, *ante*), that a master was not liable for the wilful trespasses of a servant, even though they were committed within the scope of his employment. It does not, as the court assumed in *The State of Missouri, supra*, go to the extent of asserting so broad a doctrine as "that the master is not liable for the tort of the servant, done in the service and for the benefit of the master, and with respect to a matter within the scope of the servant's employment."

In *Stoneseifer v. Sheble* (1866) 31 Mo. 243, the court affirmed the liability of the owner of a river steamboat for the malicious act of the captain in taking off to a lower landing a person who had come on board at one of the stopping places to transact some business. The question whether the act was within the scope of the captain's employment was not discussed.

²In *New Orleans, J. & G. N. R. Co. v. Harrison* (1873) 48 Miss. 112, 12 Am. Rep. 356, a boy fifteen years old, who was in no way connected with the defendant railway company, was standing at a crossing when the engineer or conductor of the train ordered him to go in and uncouple the cars. He refused at first, but ultimately, being in fear of some bodily harm from the railway employee, who had cursed and

threatened to beat him if he refused, was forced to perform the service required. After he had uncoupled the cars the train commenced moving, and he was knocked down and run over by the tender. There was no brakeman on the train. He was not bound to obey the orders under which he acted, and could have gotten away had he seen proper. Held, that the company was not liable for the injury. The court said: "It is urged by the counsel for Harrison, that, after the latter had gone in to uncouple the cars, the conductor knowing he was there on that service, it then devolved on the agent of the company to observe all the care and prudence which the law exacts in such cases. The rule invoked is a sound one, but its application to the facts of this case may well be questioned. Is not the case at bar as though the conductor had caught the boy with one hand and thus held him under the engine, while with the other he so managed the machinery as to purposely run over the lad and cut off his foot, doing this wilfully and maliciously to one not a passenger, but a stranger? If the boy went in through fear, it was equivalent to force, and thus did not the command, the threat, the obedience, the service, and the injury, constitute one act? Is the company liable in such a case? Suppose the boy had attempted to cross the street between the moving cars, and had been thus injured? What would have been the right of the parties in that case? In reason and according to the precedents, the company in such a case, would not be liable. In the case at bar, the train was backing into a switch, and Harrison in his testimony says it was moving when he went in to uncouple the flat cars from the engine. Accepting his theory of the case, it seems impossible to separate his presence between the cars in the act of uncoupling them, from the threats to which he says he yielded through fear. Upon this hypothesis, the injury was the result of a gross, wilful, malicious trespass upon a stranger to the com-

2381. Use of violent language.—For physical injuries caused by a servant's violent language his master may, under some exceptional circumstances, be held liable on the ground of his having used it in the course of his employment.¹ In most of the cases, however, in

pany, and not a passenger; an act in violation of orders, outside the scope of the engineer's duty and authority; a transaction for which, within the adjudications from the ruling of Lord Kenyon, in *M'Manus v. Crickett* (1800) 1 East, 106, 5 Revised Rep. 518, to the present time, the company is not responsible." In the opinion of the present writer this decision, in so far as it turned upon the applicability of the principle, *Respondet superior*, was erroneous. In constraining the boy to perform work in respect of the train, the railway employee was certainly transcending his authority. But the injury complained of was partially due to the manner in which the train was operated, and this was a matter within the scope of his employment. The theory of the court that all the occurrences which took place from the time when the employee gave the threatening command to the time when the injury was received should be regarded as constituting a single act seems to be altogether too fanciful and forced to win acceptance. With the other point involved, *viz.*, that the boy was guilty of contributory negligence, we are not here concerned.

In *Sherman v. Hannibal & St. J. R. Co.* (1880) 72 Mo. 62, 37 Am. Rep. 423, a boy who had attempted to steal a ride on a freight train was discovered by a brakeman, and compelled to assist in working the train. He was sent by the brakeman to readjust lumber which had become loose, and was hurt while engaged in that work. Held, that the brakeman had no authority to give such an order, and that the company was not liable for the boy's injury.

In *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 268, where a railway conductor, with a pistol in his hand, pursued a boy into his father's house, seized him, and carried him off on a train, the liability of the company was denied on the ground that these acts were plainly outside the scope of the conductor's employment.

Another authority which lends some support to the rule propounded in the

text is the statement made in *Jackson v. St. Louis, I. M. & S. R. Co.* (1885) 87 Mo. 422, 56 Am. Rep. 460, to the effect that "if a conductor knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive on the cars for transportation, he, and not the company, would be liable for his conduct." But, as pointed out in § 2347, note 6, *ante*, the principle relied upon as a basis for this statement, *viz.*, that a master "is not liable for the criminal acts of his servant," is not good law.

Compare also *Ray v. Keene* (1897) 19 App. Div. 147, 45 N. Y. Supp. 896, affirmed in (1899) 160 N. Y. 706, 57 N. E. 1123 (mem.) (§ 1466, note 1, *ante*).

¹In *Bouillon v. Laclede Gaslight Co.* (1910) 148 Mo. App. 462, 129 S. W. 401, the evidence showed that while the plaintiff was lying ill in a flat occupied by her, an employee deputed by a gas company to read meters attempted to open the door for the purpose of getting at the meter, and that this action of his brought on a controversy between him and the plaintiff's nurse, during which the language complained of was used. Held, that the gas company was answerable for the consequent injury sustained by the plaintiff. The court said: "In this case the servant committed the entire trespass while insisting upon his right to pass through plaintiff's apartment, to the end of reading the meter. Aside from the reprehensible and unlawful conduct of the servant, this was the execution of the very act defendant had employed him for and bade him to do. Having delegated authority to its servant to perform the act of reading meters, defendant must respond for the mode and manner in which he performed it, even though it be both wilful and unlawful." The contention that "for the time being the agent overstepped his authority, and entered into a controversy on his own account with plaintiff's nurse," was rejected.

which such language is complained of, it appears as a concomitant of an assault, and it is then viewed merely in the light of an element that warrants an award of increased damages.²

2381a. Preventing access to witnesses.—"There is no presumption that any mere local agent of a railroad is employed to stand between witnesses and those interested in their evidence, or that he is instructed to do so. To bring such an act within the sphere of delegated powers, there must be proof of the delegation."¹

² See, for example, *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842, where a conductor of a freight train, being asked by the plaintiff for the privilege of passage in the caboose, refused his request in "profane, vulgar, and abusive terms," and also assaulted him.

¹ *Marsh v. South Carolina R. Co.* (1876) 56 Ga. 274. As no such proof

was offered, it was held that whatever the agent did in that way must be supposed to have been done on his own motion, and not by procurement of the company. The point under discussion was the propriety of allowing the plaintiff's counsel to put leading questions to a witness to whom they had been denied access.

CHAPTER CII.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER, APART FROM PRIVITY OF CONTRACT, FOR THE WILFUL TORTS OF HIS SERVANTS. TORTS INJURIOUS TO PROPERTY.

A. FRAUD.

- 2382. Introductory statement.
- 2383. General principles.
- 2384. False statements in bills of lading and similar instruments.
- 2385. Effect of such statements as between the original parties.
 - a. Generally.
- 2386. Effect of such statements where persons other than the original parties are concerned. Doctrine that the bailee is not bound.
 - a. Generally.
 - b. Bailee not estopped by false statement.
 - c. Burden of proof.
- 2387. Same subject. Doctrine that the bailee is bound.
 - a. Generally.
 - b. Liability based on an estoppel.
- 2388. Same subject. General remarks concerning the conflict of doctrine.
- 2389. Effect of statutes with regard to bills of lading.
 - a. England.
 - b. Mississippi.
 - c. Alabama.
 - d. Missouri.
- 2390. Fraud in respect of the shares, debentures, and bonds of companies.
 - a. Scope of section.
 - b. Inducing persons to take shares.
 - c. Issuance of new stock.
 - d. Transfer of stock already issued to shareholders.
 - e. Cancellation of stock.
 - f. Certification of coupons of bonds.
- 2391. Fraud in respect of the business of banks.
- 2392. Fraud in respect of other kinds of transactions.
 - a. Acts done in the interest of the employer.
 - b. Acts done for the advantage of the employee himself.
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- 2393. Remedial rights of the defrauded party. Generally.

2394. —as against a corporation.

a. Action for rescission of contract induced by fraud.

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2395. Absence of benefit to employer, right of action how far affected by.

a. English decisions.

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B. MISCELLANEOUS TORTS INJURIOUS TO REAL PROPERTY.

2396. Nuisance.

2397. Other wrongful acts.

C. MISCELLANEOUS TORTS INJURIOUS TO PERSONAL PROPERTY.

2398. Damage resulting from an act done to protect the master's property.

2399. Words or conduct injurious to business interests.

a. Slander of title.

b. Making false statements regarding plaintiff's business.

c. Deterring subordinate servants from dealing with plaintiff.

d. Systematic refusal of carrier's servant to deliver goods to drayman.

e. Undue prolongation of work in premises occupied by plaintiff.

2400. Conspiracy.

2401. Unfair discrimination by the servant of a carrier.

2402. Infringement of patents.

2403. Conversion.

2404. Seizure of property for the satisfaction of debts.

2405. Other wrongful acts.

A. FRAUD.

2382. Introductory statement.—With regard to the footing upon which the cases reviewed in the subtitle have been selected, it will be proper to make two observations. In the first place, although the liability of principals for the fraud of their agents is ordinarily determined with reference to the same considerations, irrespective of whether those agents are or are not servants, cases which relate to the fraud of agents who are not servants are admitted only in so far as they may be useful for the purpose of illustrating rules which apply to agents who are servants.¹ Secondly, although strictly speaking, the subtitle purports merely to deal with fraud considered as a tort, it has been found impossible to compose a reasonably full dissertation upon that subject without referring to a large number of cases which turned upon the remedial rights of the plaintiffs in respect of contracts induced by fraud. It is stated in a well-known treatise that "the authorities establishing what is a cause of action for deceit are

¹ Cases involving the fraud of direct- the subject, the practitioner is referred
ors, therefore, will only be considered to treatises on the law of corporations.
incidentally. For full information upon

to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation," but that some discrimination between the two classes of cases is needful.²

So far, however, as the operation of the rule, *respondeat superior*, is concerned, it would seem that the need for such discrimination can no longer arise in any jurisdiction in which the doctrine that the deceit of a servant or agent may be imputed in an action of tort to the master or principal has been definitively established. See §§ 2393, 2394, *post*. Whether the object of a party prejudiced by the fraud of a servant or agent be the rescission of a contract or compensation for damage sustained, it is clear that, in so far as he relies upon the theory of a vicarious or constructive liability, the criterion of his right to recover must always be the scope of the servant's or agent's authority.

It should be observed, however, that the defrauded party need not necessarily base his claim upon that theory, if, as is frequently the situation in the cases presented to the courts, a benefit has accrued from the fraud to the master or principal before the demand for restitution or for damages is made. Under such circumstances, if he refuses to comply with the demand, he must be regarded as having adopted the fraud; and having thus assumed a personal liability, he may be sued on a footing which renders the extent of the authority of the actual wrongdoer a wholly immaterial factor.³

² Pollock, Torts, Wade's Am. ed. p. 352.

³ In *Swift v. Jewsbury* (1874) L. R. 9 Q. B. (Exch. Ch.) 301, where the right of recovery was denied on the grounds stated in § 2391, note 1, *post*.

Lord Coleridge, Ch. J., said: "This decision does not at all conflict with the case of *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, and cases of that description which have been brought before us, because I apprehend that there can be no doubt that a different set of principles altogether arises where an agent of a joint stock company, in conducting the business of the joint stock company, does something of which the joint stock company take advantage, and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act. Justice points out, and authority sup-

ports justice in maintaining, that where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency, and say that the act which has been done by the agent is not an act for which they are liable." This passage was quoted with approval by the privy council in *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473. See § 2391, note 1, *post*.

In *Kettlewell v. Refuge Assur. Co.* [1908] 1 K. B. (C. A.) 545, Buckley, L. J., said: "It is well established by authority that a principal cannot retain a profit made by the fraud of his agent, whether the principal authorized the fraud or not. That is the doctrine that was laid down in *Barwick v. English Joint Stock Bank*, *supra*. This general doctrine was thus expressed by Lord Coleridge, Ch. J., in *Swift v. Jewsbury* (1874) L. R. 9 Q. B. 301, at p. 312: "Justice points out, and authority sup-

A similar remark, of course, applies to any other classes of torts which enure to his benefit.

ports justice in maintaining, that where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency, and say that the act which has been done by the agent is not an act for which they are liable." The ground upon which I think the plaintiff is entitled to recover here is that, by the fraud of the defendants' agent, she was induced to pay them sums of money which are now in their pockets, and are profit derived by them from the fraud." The other members of the court relied upon another ground.

In *Lloyd v. Grace* [1912] A. C. 716, Lord Macnaghten said: "The only difference, in my opinion, between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground, and also on the ground that, by taking the benefit, he has adopted the act of his agent; he cannot approbate and reprobate."

In *Crump v. United States Min. Co.* (1851) 7 Gratt. 352, 56 Am. Dec. 116, 3 Mor. Min. Rep. 454, the court made the following remarks: "In the present cases, the principals demand the performance of the contract by the other parties, and, of course, recognize the authority of their agent to procure it, but deny that they can be affected by the alleged false and fraudulent representations employed by him for that purpose. This denial rests upon the alleged ground that Williams was an agent of limited powers, restricted by his principals from making any representations, true or false, on the subject of the contract, and made the mere medium for communicating to purchasers the terms of sale proposed by his principals, and their own representations of the description, condition, and value of the property. But the admissibility of evidence to prove the procurement of a contract by the fraudulent practices of an agent does not turn upon the extent or the limitations of his authority; for, if so, then, as the principal may in most cases recognize and confirm the authority of the agent, the consequences of his mis-

conduct would be visited, not upon the person whose confidence enabled him to commit the fraud, but upon its innocent victim. The fraudulent conduct of the agent in procuring a contract may be an abuse of his known authority, or it may be accomplished by means of the suppression or concealment of the limitations upon it; and in neither case can his principal give validity to the contract by repudiating the fraudulent practices employed to obtain it. That a person professing to act as agent for another does so wholly without authority, or transcends the authority actually conferred upon him by his principal, is no reason for enforcing the contract against the other party, when obtained from him by false and fraudulent representations."

In *Elwell v. Chamberlin* (1864) 31 N. Y. 611, the court thus commented upon the facts: "It is not material that the plaintiffs authorized or knew of the alleged fraud committed by their agent Mills in negotiating the sale of the note. They cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. They have ratified the sale by seeking to enforce payment of the check given for the thing sold. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity on the ground that the fraud was committed by his agent, and not by himself. *Bennett v. Judson* (1860) 21 N. Y. 238. The plaintiffs, therefore, stand in the same position as if they had made the representation or authorized it to be made, and they are equally guilty of a fraud whether the representation was made without knowledge of its truth or falsity, or whether at the time it was made it was known to be untrue." See also *Durst v. Burton* (1872) 47 N. Y. 167, 7 Am. Rep. 428, affirming (1869) 2 Lans. 137, where the fraud of an agent in regard to the manufacture of cheese was adopted by the principal.

2383. General principles.—The general rule which is exemplified by the cases reviewed in the following sections may be formulated thus: In respect of fraudulent acts done or words spoken by a servant or agent within the scope of his employment or authority, the master or principal, although personally innocent, is answerable to the aggrieved party in the same manner and to the same extent as if the acts had been done, or the words spoken, by himself.¹ This

The general rule is that "a person cannot avail himself of what has been obtained by the fraud of another, unless he is not only innocent of the fraud, but has given some valuable consideration." *Scholefield v. Templer* (1859) 4 De G. & J. 429.

In *Smith v. Tracy* (1867) 36 N. Y. 79, 83, it was laid down that "when an authorized agent, acting within the scope of his authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he is liable as for his own wrong." The cases cited were *Bennett v. Judson* and *Elwell v. Chamberlin*, supra. But the decisions referred to above show that the doctrine as propounded was not correct, if the clause "acting within the scope of his authority" was intended to assert that the existence of the situation described is a condition precedent to the enforcement of the principal's liability.

A similar misapprehension of the true rationale of the liability incurred by an employer who elects to resist the claim of the defrauded party is indicated by the second sentence of the following passage: "Where an agent makes a false representation, or in any other manner commits a fraud in a purchase or sale, with or without the privity or knowledge or assent of his principal, and the principal adopts the bargain and attempts to reap an advantage from it, he will be held bound by fraud of the agent, and relief will be given to the other party to the transaction. The principle is that fraud by an agent is fraud by the principal; that the principal should be bound by the fraud or misconduct of his own agent, rather than that another should suffer." Benjamin, Sales, p. 443, note, quoted in *Rhoda v. Annis* (1883) 75 Me. 17, 46 Am. Rep. 354. It seems clear that the principle thus invoked has no relevancy except in regard to cases in which re-

dress is claimed on the ground of a constructive liability.

¹ "With respect to the question whether a principal is answerable for the acts of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Willes, J., in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. (Exch. Ch.) 259, 12 Eng. Rul. Cas. 298. The statement of principles in this case has been approved in *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394, 411, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473; *Weir v. Bell* (1877) L. R. 3 Exch. Div. (C. A.) 238, 47 L. J. Exch. N. S. 704, 38 L. T. N. S. 929, 26 Week. Rep. 746 (all the judges except Bramwell, L. J.); *British Mutual Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. (C. A.) 714, 717, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150; *George Whitechurch v. Cavanagh* [1902] A. C. 117, 140, 85 L. T. N. S. 349, 17 Times L. R. 746, 71 L. J. K. B. N. S. 400, 50 Week. Rep. 218; *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176; *Swire v. Francis* (1877) L. R. 3 App. Cas. 106, 113, 47 L. J. P. C. N. S. 18, 37 L. T. N. S. 554; *Houldsworth v. Glasgow Bank* (1880) L. R. 5 App. Cas. 317, 326, 42 L. T. N. S. 194, 28 Week. Rep. 677; *Lloyd v. Grace* [1912] A. C. 716, 81 L. J. Q. B. N. S. 1140.

"If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it." Lord Loreburn in *Lloyd v. Grace*, 81 L. J. Q. B. N. S. 1140, reversing [1911] 2 K. B. (C. A.) 489, 104 L. T. N. S. 789, 80 L. J. K. B. N. S. 959, 27 Times L. R. 409, 55 Sol. Jo.

rule was first laid down in a case decided more than two hundred years ago.²

So far as the reports show, no question was raised with regard to its soundness during the eighteenth century and the earlier portion of the nineteenth.³

Subsequently, it was disapproved by several eminent judges, so far as it purported to render masters and principals liable to an

461. In this case Lord Shaw quoted with approval the following remarks of Lord Herschell in *Thorne v. Heard* [1895] A. C. 495, 64 L. J. Ch. N. S. 652, 11 Reports, 254, 73 L. T. N. S. 291, 44 Week. Rep. 155: "It appears to me perfectly clear that, in order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something, and purporting to do something, on behalf of the principal. If the person is doing something within the scope of his authority, and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for, or purporting to be acting for, the principal, it seems to me impossible to treat that as a fraud of the principal."

In *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168, the court thus commented on the contention of counsel that the principal is civilly answerable for all frauds committed by his agents: "It must strike the mind of every man of sense that this universal proposition will admit of, and indeed upon principles of common justice actually requires, considerable qualifications. No one will suppose, if my servant commits a fraud relative to a subject that does not concern his duty towards me, that I shall be civilly answerable for such fraud. If I send him to market, and he steps into a shop and steals, or upon false pretenses cheats the shopkeeper of his goods, I think all mankind would agree that I am not answerable for the goods he may thus unlawfully acquire; and yet the proposition as stated will embrace a case of this kind. The proposition can be true only when the agent or servant

is, while committing the fraud, acting in the business of his principal or master; and this was the state of things in both the cases which are cited to support the proposition; and they go upon the principle of an implied authority to do the act."

"The true test of the liability of the principal . . . is to ascertain whether, in committing a fraud, the agent was acting in the business of his principal. If he was engaged in the course of his employment, then parties injured by his misconduct or fraud can resort for redress to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency." *Fogg v. Griffin* (1861) 2 Allen, 1.

² *Hern v. Nichols* [1708] 1 Salk. 289. There an action on the case for a deceit was brought against a merchant, the gravamen of the complaint being that one kind of silk was represented to be sold as such, and another and an inferior sort of silk was supplied. Upon trial, not guilty being pleaded, it appeared there was no actual deceit by the defendant, but it was by his factor beyond the sea, and the doubt was whether this should charge the merchant. Chief Justice Holt was of opinion "that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

³ For cases in which it was applied during this period, see *Doe ex dem. Willis v. Martin* (1790) 4 T. R. 39, 2 Revised Rep. 324; *Wilson v. Fuller* (1843) 3 Q. B. (Exch. Ch.) 68, 3 Gale & D. 570; *Denton v. Great Northern R. Co.* (1856) 5 El. & Bl. 860, 25 L. J. Q. B. N. S. 129, 2 Jur. N. S. 185, 4 Week. Rep. 240.

action of tort. But with respect to this class of actions, as well as those sounding in contract, it has been placed by the most recent decisions quite beyond the reach of controversy.⁴

In a well-known English case it was held that fraud could not be pleaded as a defense to an action for the enforcement of a contract into which the defendant had been induced to enter by representations, the falsity of which was known to the plaintiff, but not to his agent by whom they were made.⁵ Two years afterward this doctrine was assumed by the board of Queen's bench to be good law, so far as the right of the plaintiff to maintain action for deceit was concerned. It was held, however, that under the given circumstances, he had been improperly nonsuited, because, "whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified; and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them."⁶

The exchequer chamber reversed this judgment on the ground that it could not be supported by application of the special verdict to the declaration, but declined to express any opinion with regard to the doctrine under review.⁷

⁴See the authorities cited in note 1, *supra*, and in §§ 2393, 2394, *post*.

⁵*Cornfoot v. Fowke* (1840) 6 Mees. & W. 358 (fact concealed was that there was a brothel next door to the house which was let to the plaintiff). Rolfe, B., said: "The present is not a question as to the power of an agent to bind his principal by contract, but as to his power to affect him by a representation collateral to the contract. Now, in order to do this, it is essential . . . to bring home fraud to the principal; and that was certainly not done in this case, where all the facts are consistent with the hypothesis that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself, or even with the stronger supposition that he expressly desired Clarke not to make any representation at all on the subject." Alderson, B., said: "I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any,—the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor

ever directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer bona fide." Parke, B., said: "The simple facts that the plaintiff knew of the existence of the nuisance, and that the agent, who did not know of it, represented that it did not exist, are not enough to constitute fraud; each person is innocent, because the plaintiff makes no false representation, and the agent, though he makes one, does not know it to be false; and it seems to me to be an untenable proposition that if each be innocent, the act of either or both can be fraud." Lord Abinger, C. B., dissented from the judgment.

⁶*Fuller v. Wilson* (1842) 3 Q. B. 58. The action was brought to recover the difference between the price paid to the defendant and the real value of the property bought.

⁷In the judgment delivered for the court of error, Tindal, Ch. J., said: "The declaration alleges, first, a false representation that the house yielded a net improved rent of £62, 10s.; secondly,

But although the case in which that doctrine was propounded has never, so far as the author has been able to ascertain, been formally condemned in England, the terms in which it has been criticized warrant the conclusion that it is no longer accepted in that country.⁸ It has been expressly rejected in one of the American states.⁹ In the case in which it was enunciated, it was declared to be subject to the qualification that, if the principal not only knew of the fact which was concealed, "but purposely employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud, and the contract would be avoided; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud."¹⁰ The

a fraudulent concealment of the fact that the rent payable by the tenant was subject to certain deductions for rates and taxes. As to the first charge, no representation by Mrs. Wilson herself is stated on the verdict. It appears only that she referred to Bass, who had a lien on the premises; and the jury find that she did not in any way further interfere. This is all that appears as the part taken personally by Mrs. Wilson. As to the representation made by Wadeson [Wilson's attorney], which, if fraudulent, it may be admitted, would bind her, it consisted of nothing more than the information he had received from Bass, and that was true. Secondly, as to the concealment, so far as Mrs. Wilson herself is concerned, there is nothing to affect her. She did not know what Wadeson had represented. She had referred him to Bass; there is nothing to show that Bass was not competent to give all the requisite information, and, for anything she knew, had done so. Then was there a fraudulent concealment by Wadeson, which, it must be admitted, would bind Mrs. Wilson if proved?" The conclusion arrived at with reference to this part of the case was that "Fuller did not act upon any representation or tacit assent by Wadeson, but grounded himself upon a supposed knowledge of the usual course of practice in such transactions."

⁸ In *Barwick v. English Joint Stock*

Bank (1867) L. R. 2 Exch. (Exch. Ch.) 259, 12 Eng. Rul. Cas. 298, Willes, J., remarked during the argument of counsel: "I should be sorry to think it supposed that *Cornfoot v. Fowke* turned upon anything but a point of pleading."

In *National Exch. Co. v. Drew* (1855) 2 Macq. H. L. Cas. 103, 145, 146, Lord St. Leonards observed that relief might have been given on the ground of misrepresentation independently of fraud. This was the rationale of the reversed judgment of the court of Queen's bench in *Fuller v. Wilson*, note 6, *supra*.

In *Ludgater v. Love*, note, 11 *infra*, although the decision was not in terms overruled, the language used by the members of the court of appeal indicates that they did not agree with it.

For adverse criticisms by text writers, see Pollock, Contr. *530; *Pasley v. Freeman*, 3 T. R. 51, 1 Revised Rep. 634, 2 Smith Lead Cas. 11th ed. 81 *et seq.*; Story, Agency, § 139, p. 168, note 1.

⁹ *Fitzsimmons v. Joslin* (1849) 21 Vt. 129, 52 Am. Dec. 46, where *Cornfoot v. Fowke* was vigorously criticized by Redfield, Ch. J.

¹⁰ Parke, B. (p. 374). The observations made by Rolfe, B., with regard to this phase of the principal's liability were as follows: "If the plaintiff, knowing of the nuisance, expressly authorized Clarke to state that it did

opinion thus expressed was afterward indorsed by the court of appeal.¹¹

A person who colludes with an agent for the purpose of cheating his principal clearly cannot hold the principal liable for the agent's fraud.¹²

2384. False statements in bills of lading and similar instruments.—

In some of the cases under this head the falsity of the statement under discussion was due to fraud; in others it was the result of a mistake. Although, strictly speaking, only those which belong to the former category come within the scope of the present subtitle, those which belong to the latter will also be cited in order to render the list of authorities more exhaustive. There is specific authority for the doctrine that the rights of the parties concerned are determinable upon the same footing, whether a false bill of lading is issued fraudulently or by mistake.¹

2385. Effect of such statements as between the original parties.—

a. Generally.—As between the bailor and the bailee, an ordinary bill of lading or other instrument of a similar description is deemed to be merely a receipt, and by consequence not conclusive either as to the shipment of the goods named in it, or as to the quantity said to have been received. This rule is, of course, controlling where the instrument is executed by an agent of the bailee, irrespective of any

not exist, or to make any statement of similar import; or if he purposely employed an agent ignorant of the truth, in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing,—in either of these cases he would be guilty of a fraud, and the truth of the plea would then, I think, have been established."

¹¹ *Ludgater v. Love* (1881) 44 L. T. N. S. 694, 45 J. P. 600. There the defendant's son, acting for the defendant and with the defendant's authority, represented that certain sheep which he sold to the plaintiff were all right. The defendant had fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound. Held, that the defendant was liable in an action to recover damages for fraudulent misrepresentation.

¹² *National L. Ins. Co. v. Minch* M. & S. Vol. VI.—452.

(1873) 53 N. Y. 144; *Smith v. Cash Mut. F. Ins. Co.* (1855) 24 Pa. 320. In the latter case the court said: "The principal is bound by the acts of his agent whilst he acts within the scope of the deputed authority; but if, departing from that sphere, or continuing in it, he commits a fraud on his principal, a *particeps criminis* shall not profit by the fraud. A merchant's clerk colludes with a customer and discharges his account without payment, or on receipt of less than is due. Does anybody imagine that the merchant is bound by such a settlement? Because he was the agent of his master and acting within the circle of his appropriate duties, a stranger or an innocent party might hold the master concluded, but not he who tempted to the fraud, shared in its perpetration, and sought its fruits."

¹ *The Lady Franklin* (1869) 8 Wall. 325, 19 L. ed. 455; *National Bank v. Chicago, B. & N. R. Co.* (1890) 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560.

question as to whether the execution was within the scope of his authority.¹ In a case where the transaction is fraudulent, and the person to whom the instrument is issued is aware of its character, his knowledge of the fraud is another and independent reason for refusing to allow him to maintain an action upon it.² But a ship-owner may, by an express stipulation, bind himself to accept the statement of the quantity shipped, though all the goods specified in the bill of lading are not in point of fact shipped.³

2386. Effect of such statements where persons other than the original parties are concerned. Doctrine that the bailee is not bound.—

a. Generally.—The general rule with reference to which cases not involving the rights of the original parties have been determined in most of the jurisdictions in which the subject has been discussed may be formulated thus: An agent who is merely empowered to execute in behalf of a bailee a bill of lading, or other similar instrument which contains an acknowledgment of the receipt of goods for transportation or storage, does not, even in respect of a bona fide indorsee for value, impose any liability upon his principal by falsely stating in the instrument that certain goods were delivered to him by a bailor. Thus, it has frequently been held that "the

¹ *Bates v. Todd* (1831) 1 Moody & R. 106; *The Lady Franklin* (1869) 8 Wall. 325, 19 L. ed. 455; *Sutton v. Kettell* (1855) 1 Sprague, 309, Fed. Cas. No. 13,647; *The J. W. Brown* (1855) 1 Biss. 76, Fed. Cas. No. 7,590; *Relyea v. New Haven Rolling Mill Co.* (1873; U. S. Dist. Ct.) 42 Conn. 579; *Fearn v. Richardson* (1857) 12 La. Ann. 752; *Fellows v. The R. W. Powell* (1861) 16 La. Ann. 316, 79 Am. Dec. 581; *Hunt v. Mississippi C. R. Co.* (1877) 29 La. Ann. 446; *Sears v. Wingate* (1861) 3 Allen, 103; *Dickerson v. Seelye* (1851) 12 Barb. 102; *Ellis v. Willard* (1854) 9 N. Y. 529; *Dean v. King* (1871) 22 Ohio St. 118.

In *Meyer v. Peck* (1864) 28 N. Y. 590, it was held that the operation of the general rule was not excluded by a stipulation in the bill of lading that "any damage or deficiency in quantity the consignee will deduct from balance of freight due the captain." In the opinion of the court such a stipulation was not to be understood as a guaranty that the captain had received the whole quantity of goods specified; or as an agreement to pay for that portion, if any, which shall be found to be deficient

of what he has received. The words "deficiency in quantity" related to the property shipped.

In *Kirkman v. Bowman* (1844) 8 Rob. (La.) 246, it was laid down that the second clerk of a steamer may execute on behalf of the boat a bill of lading in the ordinary way, and that his receipt for merchandise delivered on board will be binding; but that where it is a question of making a special contract which will bind the boat for articles not delivered on board, his authority must be shown.

In *Berkley v. Watling* (1837) 7 Ad. & El. 29, 2 Nev. & P. 178, 6 L. J. K. B. N. S. 195, the consignee was held to be chargeable with the knowledge of his agent that the goods in question, for the nondelivery of which the action was brought, had not been shipped.

² This phase of the matter is adverted to by Selden, J., in *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380.

³ *Lishman v. Christie* (1887) L. R. 19 Q. B. Div. (C. A.) 333, 56 L. J. Q. B. N. S. 538, 57 L. T. N. S. 552, 35 Week. Rep. 744, 6 Asp. Mar. L. Cas. 186 (charter party stated that the bill should be conclusive evidence).

master [of a vessel] is the agent of the shipowner in every contract made in the usual course of the employment of the ship, and . . . he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board."¹ The rationale of this

¹ *McLean v. Fleming* (1871) L. R. 2 H. L. Sc. App. Cas. 128, 4 Eng. Rul. Cas. 665 (action by consignee of cargo). This statement was approved in *Smith v. Bedouin Steam Nav. Co.* [1896] A. C. 70, 73, 65 L. J. P. C. N. S. 8.

In *Grant v. Norway* (1851) 10 C. B. 665, 24 Eng. Rul. Cas. 258, Jervis, Ch. J., in delivering the judgment of the whole court, said: "With regard to goods put on board, he [the master] may sign a bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and if a more limited one is given, a party not informed of it is not affected by such limitation. The master is a general agent to perform all things relating to the usual employment of his ship, and the authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him." *Smith, Mercantile Law*, p. 59. Is it then usual in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? For all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until goods are on board, for it begins by describing them as shipped. It was not contended that such a course is usual. . . . If, then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derived no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed when the goods therein mentioned were never shipped. . . . Here, the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and a party taking a bill of

lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."

In *Cow v. Bruce* (1886) L. R. 18 Q. B. Div. (C. A.) 147, 24 Eng. Rul. Cas. 268, a bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision: "If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks, and more marked with another of such marks, indicating an inferior quality, than stated in the bill of lading. Held, on the above facts, that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners, either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading. Lord Esher made the following remarks: "It is said that because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right,—that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant v. Norway*, *supra*. It is clearly impossible, consistently with that decision, to assert that the mere

doctrine has been said to be "that the master's authority was limited to the performance of all things usual in the management of the ship, and that it is not usual for him to sign bills of lading for goods not put on board, and therefore that a party taking a bill of lading must be assumed to take it with notice of such limitation of the master's authority."²

fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. . . . Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or if such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

In *Pollard v. Vinton* (1881) 105 U. S. 7, 26 L. ed. 998, another case in which the right of an indorsee for value to recover against the shipowner was denied, the court thus commented on *New York & N. H. R. Co. v. Schuyler* (1865) 34 N. Y. 30 (see § 2390, note 8, *post*): "Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us, it is a question of pure agency, and depends solely on the power confided to the

agent. In the other case, the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts."

See also *Hubbersty v. Ward* (1853) 8 Exch. N. S. 330, 22 L. J. Exch. N. S. 113 (master of vessel, relying on statement of shipper that he had destroyed one bill of lading, signed a second bill, which covered the same goods; bona fide holder of second bill held to have no recourse against the shipowner); *Brown v. Powell Duffryn Steam Coal Co.* (1875) L. R. 10 C. P. 562, 44 L. J. C. P. N. S. 289, 32 L. T. N. S. 621, 23 Week. Rep. 549, 2 Asp. Mar. L. Cas. 578; *Thorman v. Burt* (1886) 5 Asp. Mar. L. Cas. (C. A.) 563, 54 L. T. N. S. 349; *Louisiana Nat. Bank v. Laveille* (1873) 52 Mo. 380, and the cases cited in the following notes:

²This was the comment made upon *Grant v. Norway*, note 1, *supra*, by Crowder, J., in *Coleman v. Riches*, note 5, *infra*.

Similarly in *Cox v. Bruce*, note 1, *supra*, Lord Esher said with reference to *Grant v. Norway*: "The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed."

In *National Bank v. Chicago, B. & N. R. Co.* (1890) 44 Minn. 224, 9 L.R.A.

The common-law doctrine as to the implied limitation of the master's authority has been adopted by courts of admiralty. Accordingly, false bills of lading issued by the master of a vessel, without the knowledge of the owner, do not operate to create a maritime lien binding the owner's interest in the vessel. In favor of a bona fide holder of such bills of lading procured from the master by the fraud of an owner *pro hac vice*, the general owner is not estopped to show the truth, though the special owner would be.³

263, 20 Am. St. Rep. 566, 46 N. W. 342, the court made the following remarks: "The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that, so far as it is a receipt for the goods, it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill; the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority."

The notion that it is not within the scope of the master's authority to sign bills of lading for any property but such

as is put on board was also relied upon in *Sears v. Wingate* (1861) 3 Allen, 103.

³ *The Freeman v. Buckingham* (1855) 18 How. 182, 15 L. ed. 341. The court said: "There can be no implication that the general owner consented that false pretenses of contracts, having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel; and there is as little privity or connection between him, or his vessel, and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might commit. Nor can the general owner be estopped from showing the real character of the transaction, by the fact that the libellants advanced money on the faith of the bills of lading; because this change in the libellant's condition was not induced by the act of the claimant, or of anyone acting within the scope of an authority which the claimant had conferred. Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was the master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the

The general rule stated above has also been applied in cases where the instrument in question was signed by a ship's agent;⁴ by the servant of wharfinger,⁵ and of a warehouseman;⁶ and by a railway employee whose duty it was to receive and forward goods.⁷

owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more an apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises. But the authority, in each case, arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in the one case more than in the other; and his act, in either case, does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends." The above decision was followed in *The Loon* (1870) 7 Blatchf. 244, Fed. Cas. No. 8,499 (bill void as against person who had made advances on it). See also *The Lady Franklin*, note 4, *infra*.

⁴ *Jessel v. Bath* (1867) L. R. 2 Exch. 267, 36 L. J. Exch. N. S. 149, 15 Week. Rep. 1041; *Pollard v. Vinton* (1881) 105 U. S. 7, 26 L. ed. 998.

In *The Lady Franklin* (1868) 8 Wall. 325, 19 L. ed. 455, a clerk in a warehouse, acting as agent for one of several steamers issued by mistake a bill of lading for wheat which was no longer in the warehouse, and which was consequently never shipped. Held, that persons who had paid a bill of exchange drawn against the shipment could not maintain a suit against the vessel to charge it in respect of the nondelivery of the wheat.

⁵ *Coleman v. Riches* (1855) 16 C. B. 104, A, the servant of a wharfinger, fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C, no such wheat having in fact been delivered, and thereby wilfully in-

duced C to pay the price thereof to the pretended vendor. Held, that the wharfinger was not liable, although it was proved that C's course of dealing was to pay for all wheat delivered for him at the wharf, on the production by the vendor of the wharfinger's receipt, and that the latter knew it. Jervis, Ch. J., said: "I take it for granted . . . that it was known to Riches that it was Coleman's usual course of business to direct all corn purchased by him at the Bristol market to be delivered for shipment at Riches's wharf, and to pay the vendor the price on production of the wharfinger's receipt for the goods. But it is not pretended that there was any contract as between Coleman and Riches, that, in consideration that the former would cause his purchases to be delivered at the wharf of the latter, the latter should, on the receipt of the goods, give such vouchers as the former might act upon. If there had been any such contract, a very different question might have been raised; for, in that case, it might possibly have been said that the wharfinger had undertaken to employ competent persons faithfully to perform that duty. This, however, is simply the case of a wharfinger's receipt note; and, that being so, the case is disposed of. Board, the defendant's agent, had only authority to give receipts for goods which had in fact been delivered at the wharf." Cresswell, J., said: "I have looked carefully through the evidence, and have failed to discover anything from which we can infer any such course of dealing as would render the defendant liable to the plaintiff for the fraudulent representation of his agent. To do so, we must assume that there was some contract between the parties that a receipt should be given only upon the delivery of the corn, in order that the plaintiff might be protected from paying for it before it was sent. There clearly was no evidence to warrant that. It may be true that Coleman was in the habit of paying for the corn he purchased upon the production of a receipt vouching for its delivery at the wharf, and that Riches knew it.

But the defendant had nothing to do with the plaintiff's manner of conducting his business. It leaves the case just as it was before. Was there, then, any actual authority in Board to bind the defendant by his representations? Certainly not. Then, was the situation of Board such as to bring the act in question within the scope of his authority? I think it was not. He was not employed to represent that to be true which he knew to be false." Crowder, J., said: "*Grant v. Norway* is directly in point; and that, indeed, was a much stronger case, for the captain of a ship has, to a certain extent, a general authority to bind his owners in matters relating to the management of the ship.

. . . I am not prepared to say that that was a wrong decision; and it is a very strong authority to show that a person in the position of this man could have no right to bind his employer by an acknowledgment of the receipt of goods which had not actually come to hand. This is the case of a servant whose only duty was to give a receipt when the goods had been delivered. Board clearly was not acting within the scope of his authority, and therefore the nonsuit was right." In *Farmers' & M. Bank v. Butchers' & D. Bank* (1857) 16 N. Y. 125, 69 Am. Dec. 678, it was stated that "the difficulty in the way of a recovery in this case was that no privity of contract was established between Riches, or his agent, Board, and the plaintiffs, by means of which the misrepresentations made by Board could be considered as made to the plaintiffs. Had the receipt been a negotiable instrument, a privity would have been established."

"I cannot see how the knowledge by Riches of the course of business according to which Coleman paid on the production of the receipt would make the showing of the receipt by Lewis, even in Board's presence, a representation by Riches."

⁶ In *Second Nat. Bank v. Walbridge* (1869) 19 Ohio St. 419, 2 Am. Rep. 408, a warehouseman by mistake issued to the owner, at different dates, two warehouse receipts for the same property, the last of which the owner assigned for value to the plaintiff, to whom the defendant, the warehouseman, on demand delivered the property. Afterward, the assignee of the first receipt recovered the property in replevin

from the plaintiff. The plaintiff instituted the present suit to recover from the defendant the value of the property. Held, there being no privity of contract between the defendant as maker and the plaintiff as assignee of the receipt, the defendant, in the absence of all fraud, was not estopped from showing, as against the plaintiff, the mistake in the giving of the last receipt, as a defense to the action. The court distinguished *Griswold v. Haven* (1862) 25 N. Y. 596, 82 Am. Dec. 380 (see next section, note 2) as being a case in which the estoppel was held to arise on the false representation of Wright, one of the defendants, that the grain mentioned in the receipts was in store and in good order, and that this representation was made directly to and was relied upon by the plaintiff in making the advances.

⁷ In *Friedlander v. Texas & P. R. Co.* (1888) 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570, it was held that a bill of lading fraudulently issued by the station agent of a railroad company without receiving the goods named in it for transportation, but in other respects according to the customary course of business, imposed no liability upon the company to an innocent holder who received it without knowledge or notice of the fraud, and for a valuable consideration; and that this general rule was not affected in Texas by the statutes of that state. The court said: "It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Company. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became

particeps criminis with the latter in the commission of the fraud upon Friedlander & Company, and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the action maintainable on the ground of tort."

In *St. Louis, I. M. & S. R. Co. v. Knight* (1887) 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132, it was held that a bill of lading acknowledging the receipt by a common carrier of "the following packages, contents unknown, . . . marked and numbered as per margin, to be transported" to the place of destination, was not a warranty on the part of the carrier that the goods were of the quality described in the margin.

In *Baltimore & O. R. Co. v. Wilkens* (1876) 44 Md. 11, 22 Am. Rep. 26, the company was held not to be liable to a consignee who had made advances upon a bill of lading fraudulently issued by a station agent who was also the consignor. The court said: "If any doctrine of commercial law can be regarded as well settled, it is that the master has no authority to sign a bill of lading for goods not actually put on board the vessel, and therefore the owner of the ship is not responsible to parties taking or dealing with, or making advances on the faith of, such an instrument, which is untruthful in this particular. The consignee and every other party thus acting does so with notice of this limitation of the power of the master, and acts at his own risk, both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped. . . . Nor have we any difficulty in applying that doctrine to the instruments before us in this case. A bill of lading is a very ancient, but not exclusively a sea, document. It had been long used in both countries by carrying companies in transportation on lakes and rivers by steamboats, as well as sailing vessels and on canals, and in all such cases it has been denominated and treated as a commercial instrument. In later times similar documents have been commonly,

if not universally, used by railway companies in land carriage. What good reason exists why this principle should not apply to them, as well as to bills of lading used in shipping? We see none. On the contrary, are there not much stronger reasons for its application to this class of documents? The master of a ship is necessarily clothed with a real, as well as an apparent, authority much more extensive than belongs to the station agents of a railroad company. His control over the vessel, his power to make contracts respecting it, his discretion in the use and management of it for the benefit of his owners, on the high seas and in distant ports, reach far beyond those of the latter. A bill of lading signed by him and forwarded by mail oftentimes arrives at the port of destination months before the vessel and cargo, and the necessities, as well as the convenience, of commercial transactions requiring its transfer, and advances on the faith of it, are much stronger than can possibly exist in dealing with similar instruments in railway transportation. In the latter but a few days usually intervene between the arrival of the bill of lading by mail, and the goods by the cars, and besides this, the telegraph is at hand affording to anyone asked to make advances on the faith of such documents, easy and speedy means of ascertaining whether the goods have been in fact laden in the cars or received at the depot of shipment, or not. If, therefore, there be any good reason for exempting the owner of a vessel from responsibility for a bill of lading false in this respect, signed by the master, who is his agent, it must apply *a fortiori* to a railway company, with respect to similar acts of its station agents along its line of road." After referring to *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540, (see § 2390, note 9, *post*), where a company had been held liable for fraudulent stock certificates issued by its treasurer, the court proceeded thus: "A bill of lading performs a very different function. It evidences, and is a contract for, the transportation of goods, and not an instrument intended to give information as to the ownership of intangible property. The agent who signs it is not held out to the public as authorized to make statements like those in a certificate of stock, but only to make contracts to carry visible and

b. Bailee not estopped by false statement.—In several cases the nonliability of the bailee has been treated as being referable to the conception that a false statement in the instrument signed by his

tangible property. The property which is thus stipulated to be carried being visible and tangible, the fact whether it has been shipped or received at the depot for shipment, or not, can be determined and easily determined in a multitude of ways, without applying to the agent. To the general doctrines on which our decision in these stock cases was based, there is, and must be, the exception of the recognized and well-settled principle of commercial law in reference to bills of lading which we have stated, and which governs the present case."

See also *National Bank v. Chicago, B. & N. R. Co.* (1890) 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; *Robinson v. Memphis & C. R. Co.* (1883) 9 Fed. 129; *Hunt v. Mississippi C. R. Co.* (1877) 29 La. Ann. 446 (decision in *Grant v. Norway*, approved, *arguendo*); *Williams v. Wilmington & W. R. Co.* (1885) 93 N. C. 42, 53 Am. Rep. 450.

In *Erb v. Great Western R. Co.* (1877) 42 U. C. Q. B. 99, the company was held not to be liable for the amount of advances made by the plaintiff on shipping notes fraudulently issued by a station agent in favor of a firm in which he was a partner, for goods which had never been delivered to the company. The Ontario court of appeal was equally divided in regard to the correctness of this decision, (1879) 3 Ont. App. Rep. 446. But it was affirmed by a majority of four justices to two in the supreme court of Canada, (1881) 5 Can. S. C. 179. In the judgment of Burton, J. A., one of the members of the court of appeal whose views were thus indorsed, the following remarks are found: "The question is whether the company can be made responsible for the frauds of an agent with a limited authority, like a station master, where they have not benefited by the fraud,—in other words, whether they can be sued as wrongdoers by imputing to them the misconduct of the official whom their directors have employed. . . . If the representation made by the agent be within the scope of his authority, one can recognize a rational ground for making the company liable, even though

they derive no benefit from the transaction; but how can the granting of a false receipt or bill of lading in fraud of his employers, an instrument he was authorized to grant only after the receipt of the grain or produce referred to in it, be held to be within the scope of his authority? . . . If, however, the actual authority to the agent was to receive the goods, and upon receipt to grant a receipt or acknowledgment for them, then the power was limited to acts of the same character, but not of a character wholly different, though clothed in the same form. In order to bind the principal, the acts done must always be within the power." Speaking for the majority of the supreme court, Ritchie, Ch. J., said: "The authority of Carruthers was a limited authority; his power and authority to sign a bill of lading depended on the actual receipt and shipping of the goods. If the fact on which the power depended did not exist, the authority could not exist. . . . He certainly was not authorized to grant receipts for goods unless the goods were actually received, nor was he empowered to contract for the company that goods should be sent by the company, when no goods were ever received by the company to be sent, and consequently never could be sent. Nor, in like manner, had he any authority to sign a bill of lading declaring the property was shipped in apparent good order, when it never was shipped, and declaring the property was to be delivered in like good order, when there was no property in the possession of the company or of their agent to be delivered. . . . Be this as it may, it cannot be doubted that every person in business who deals with a railway company knows that, in the ordinary and usual course of business, no such receipts and bills of lading are ever given or issued unless the goods have been actually received to be shipped, and nobody so dealing but must know that if a freight agent, discharging the ordinary duties of a freight agent, did give or issue such receipts and bills of lading without the goods having been delivered, he would be acting in direct opposition to his duty and in fraud of his principals, and no

agent does not of itself operate as an estoppel against him.⁸ This view of his position is, of course, a necessary deduction from the theory that it is beyond the scope of the agent's powers to bind him by such a statement. It is manifest, however, that he may, either on the ground of estoppel or of an implied enlargement of the agent's authority, be held responsible, if the party whose claim is based upon the given instrument can show that the previous course of dealing between him and the principal was such as to justify him in assuming without inquiry that the declarations regarding the goods received were correct.⁹

one would knowingly act on a bill of lading so issued, when goods had never been delivered or actually shipped, unless, indeed, it could be shown that some specific authority had been given to the agent outside of the ordinary course of business, authorizing the signing of such documents without delivery of the articles."

The nonliability of the company was also affirmed in *Oliver v. Great Western R. Co.* (1877) 28 U. C. C. P. 143, by the court of common pleas, which was a case arising out of the same transaction. The decision in *McLean v. Buffalo & L. H. R. Co.* (1865) 24 U. C. Q. B. 271, in so far as it is to be regarded as embodying a different doctrine, is no longer good law in Canada. But in that case the authority of the agent was not discussed at all.

⁸ For cases in which this aspect of the matter was adverted to, see *Cox v. Bruce* (1886) L. R. 18 Q. B. Div. (C. A.) 147, 56 L. J. Q. B. N. S. 121, 57 L. T. N. S. 128, 35 Week. Rep. 207, 6 Asp. Mar. L. Cas. 152, 24 Eng. Rul. Cas. 268 (note 1, *supra*); *Robinson v. Memphis & C. R. Co.* (1883) 9 Fed. 129; *National Bank v. Chicago, B. & N. R. Co.* (1890) 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; *Second Nat. Bank v. Walbridge* (1869) 19 Ohio St. 419, 2 Am. Rep. 408.

In *Portland Bank v. Stubbs* (1810) 6 Mass. 422, 4 Am. Dec. 151, the court, referring to one question raised, *viz.*, "Whether the plaintiffs could be admitted to contradict the bill of lading in this case, by proving that no freight had been paid for the salt," laid it down that, if "the consignee was a stranger to the shipment, and no party to the bill of lading in making it, it is very clear that as to him the bill of lading cannot

be contradicted by proving that no freight had been paid." This case, which it will be observed was decided many years before the leading English cases, *Grant v. Norway* and *Coleman v. Riches* (see notes 1 and 5, *supra*), seems to indicate a different point of view with regard to the conclusive effect of a bill of lading, so far as strangers are concerned. Whatever may be the actual purport of the decision in this regard, the doctrine which now prevails in Massachusetts is clearly shown by *Sears v. Wingate* (1861) 3 Allen, 103 (action for recovery of balance due for freight of cargo consigned to defendant). The rules which governed the case were thus stated by the court: "The master is estopped, as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are, or ought to be, within his knowledge. . . . When the master is acting within the limits of his authority, the owners are estopped in like manner with him; but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board." This decision was followed in *Ryder v. Hall* (1863) 7 Allen, 456 (action to recover freight).

⁹ See *Coleman v. Riches*, note 5, *supra*. Some remarks made by the judges during the argument of counsel may also be quoted. Jervis, Ch. J., said: "I cannot see how the knowledge by Riches of the course of business according to which Coleman paid on the production

We also find decisions to the effect that the owner of a ship is bound by the master's statement in a bill of lading, that the freight has been paid,¹⁰ or that it is to be paid on a certain note.¹¹ Furthermore it has been held that a railway company whose agent has negligently executed two delivery orders covering the same consignment of goods will not be permitted, as against a person who has

of the receipt would make the showing of the receipt by Lewis, even in Board's presence a representation by Riches (*i. e.*, by the agent of Riches), and Justice Williams adds: 'Suppose Riches himself had given the fraudulent receipt, would that have constituted a representation by Riches to Coleman?' . . . Cresswell, J., said: 'There is the vice of the argument; I do not find any evidence of such course of dealing between the plaintiff and the defendant. The course of dealing proved was that which existed between the plaintiff and the vendors, and not between the plaintiff and defendant.'"

In *Erb v. Great Western R. Co.* (1879) 3 Ont. App. Rep. 446, the following remarks with regard to this aspect of the principal's liability were made by Burton, J. A.: "If the company had been aware that he was in the habit, for the convenience of shippers, of granting such documents before the articles they professed to represent had been actually received, and had recognized such a course of dealing on his part, an implied agency would thereby have been constituted to carry on the same dealings, and to do acts of the same character; and if the agent had abused the confidence thus reposed in him, and fraudulently granted receipts for his own benefit, well knowing that no goods were to be received to answer their requirements, I entertain a strong conviction that the company would properly be estopped from disputing the truth of those receipts and showing the actual facts, where the rights of bona fide dealers were concerned." It was urged by counsel that the element of a course of dealing which operated so as to enlarge the implied powers of the agent was present in the case, for the reason "that it has become a usual thing for bankers to make advances upon documents of this nature, which have been expressly recognized by statutes which give legal effect to their indorsement, and this is the mode in fact by which the produce

of the country is moved, and is well known to the whole commercial public; and that the defendants at all events cannot plead ignorance, as it was known to their agent, who effected the fraudulent issue of the documents in order that the firm of which he was a member might negotiate them." But the learned judge said: "I dissent altogether from this latter proposition, which appears to me to be a begging of the whole question. Carruthers's agency was limited to a particular and special sphere. When acting out of that sphere, he ceased to represent his principals. Any knowledge that he might acquire, either as to the general or special use of such documents, it was no part of his duty to communicate, and I apprehend that the true test in such cases is, Was the information of a character which it was the duty and business of the agent to communicate? If so, it binds his principal, otherwise not."

¹⁰ *Howard v. Tucker* (1831) 1 Barn. & Ad. 712 (estoppel asserted in favor of indorser for value). In *Hubbersty v. Ward* (1853) 8 Exch. 330, it was observed by Pollock, C. B., during the argument of counsel, that this case "proceeded on this principle that the captain was authorized to receive the freight; and if he chose to sign such a bill of lading without being paid, that was a matter between him and his employer; but that third persons who took the bill of lading upon the faith of his incorrect statement ought not to suffer loss by it."

The doctrine that, as against the consignee, a "bill of lading cannot be contradicted by proving that no freight was paid," was also applied in *Portland Bank v. Stubbs* (1810) 6 Mass. 425, 4 Am. Dec. 151, decided, it will be observed, before *Howard v. Tucker*, *supra*.

¹¹ In *Mitchell v. Scaife* (1815) 4 Campb. 298, 16 Revised Rep. 795, a ship was chartered for a particular voyage for a gross sum by way of freight. The captain signed bills of lading for the cargo,

made advances on both orders, to show that they related to a single consignment only.¹² But it seems impossible, without the aid of some extremely subtle and scarcely satisfactory distinction, to reconcile these rulings with the general doctrine discussed in the preceding subsection.¹³

c. Burden of proof.—With regard to the master of a vessel it has been laid down that “as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent.”¹⁴ The same rule is presumably applicable with respect to other classes of agents.

which was the property of, and consigned to, a third person, specifying a rate of freight amounting to a less sum than that mentioned in the charter party. Held, that the shipowners had no lien on the cargo beyond the freight specified in the bills of lading.

In *Gilkison v. Middleton* (1857) 2 C. B. N. S. 134, 26 L. J. C. P. N. S. 209, the shipowner claimed against bona fide holders of the bill of lading a lien for freight due under the charter, though the master had signed bills of lading at freights required by the charterer, without prejudice to the charterer. It was held that the shipowner had a lien only for the lower freight, on the ground that the master was his agent to sign bills of lading at a lower rate.

¹² *Coventry v. Great Eastern R. Co.* (1883) L. R. 11 Q. B. Div. (C. A.) 776, 52 L. J. Q. B. N. S. 694, 49 L. T. N. S. 641. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat.

¹³ In note (2), p. 56, of the most recent edition of Scrutton on Charter Parties (published since the learned author was raised to the bench), we find these remarks concerning *Grant v. Norway*, (note 1, *supra*): “At first sight this case appears inconsistent with such cases as *Gilkison v. Middleton* (1857) 2 C. B. N. S. 134, 26 L. J. C. P. N. S. 209; *Howard v. Tucker* (1831) 1 Barn. & Ad. 712; *Mitchell v. Scaife* (1815) 4 Campb. 298, 16 Revised Rep. 795, in which statements as to liability for freight were held to bind the owner as against the indorsee for value, though

such statements limited the charter, and were made without the owner's authority. The distinction seems to be that in these cases the owner recognizes a contract of carriage made by his master, but seeks to vary the terms of it; while in *Grant v. Norway* and similar cases, he repudiates any contract of carriage, for no goods were ever shipped to be carried, and therefore there was no contract of affreightment to embody in a bill of lading. The distinction is hardly satisfactory, especially to the innocent holder who has advanced money in good faith on the representation that there are goods in the ship to which his bill of lading entitles him. *Grant v. Norway* is really an illustration of the principle that a person, knowing that an agent has a limited authority, is put on inquiry as to whether the act was done within the authority.” *Coventry v. Great Eastern R. Co.* note 12, *supra*, is not commented upon.

¹⁴ *McLean v. Fleming* (1871) L. R. 2 H. L. Sc. App. Cas. 128, 4 Eng. Rul. Cas. 665. This statement was approved in *Smith v. Bedouin Steam Nav. Co.* [1896] A. C. 70, where Lord Watson remarked that when the master “signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can show that the whole or some part of it was in fact not shipped. If the owner is able to satisfy that *onus*, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder.”

For other authorities sustaining the

2387. Same subject. Doctrine that the bailee is bound.—*a. Generally.*—In New York a person who, without notice of the actual situation, pays out money on the faith of false statements on a bill of lading, or other similar instrument, executed by the agent of a bailee, is entitled to hold the bailee responsible for the amount so paid out.¹

The rationale of this doctrine is that, "where the authority of an agent depends upon some facts outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact. There is no difference in this respect between the liability of the principal for the fraud of his agent and that of a partnership for the fraud of one of its members."²

The same position has been taken in Pennsylvania, the liability of

rule in the text, see *Harrowing v. Katz* (1894) 10 Times L. R. (C. A.) 400, affirmed in H. L. Nov. 26, 1895; see note in [1896] A. C. at p. 73; *Hine v. Free Rodwell* (1897) 2 Com. Cas. 149; *Ben-nett v. Bacon* (1897) 2 Com. Cas. 102.

¹ "As between the shipper of the goods and the owner of the vessel, a bill of lading may be explained, so far as it is a receipt, that is as to the quantity of goods shipped and their condition and the like; but as between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained. *Portland Bank v. Stubbs* (1810) 6 Mass. 422, 4 Am. Dec. 151; *Abbott, Shipping*, 323, 324; *Bradstreet v. Lees*, MS. U. S. District Court. In such case the superior equity is with the bona fide assignee, who has parted with his money on the strength of the bill of lading." *Dickerson v. Seelye* (1851) 12 Barb. 99, 102, cited with approval in *Meyer v. Peck* (1860) 33 Barb. 532; *Ellis v. Willard* (1854) 9 N. Y. 529; *Armour v. Michigan C. R. Co.* (1875) 65 N. Y. 111, 22 Am. Rep. 603; *Van Santen v. Standard Oil Co.* (1879) 17 Hun, 140.

² *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380. That was a case in which one of a firm of warehousemen falsely represented to a person who advanced money on the faith of such representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage with the firm a certain quan-

tity of grain. But the responsibility of the innocent partners for the money advanced was discussed as a question arising under the law of principal and agent. A lengthy and elaborate opinion was delivered for the court by Selden, J., the essential part of his argument being contained in the following passage: "In the case of *Mechanics' Bank v. New York & N. H. R. Co.* (1856) 13 N. Y. 599, it is argued, in reference to cases of this sort, that 'a man can no more enlarge than he can create a power by any representation which he can make.' This is, no doubt, strictly true. But the answer is that, in the case supposed, and others of that class, the fact misrepresented forms no part of the power itself. The precise extent of the power admits of no doubt. It is known to all the parties concerned. But there is a fact *dehors* the power, well known to the agent, but misrepresented by him, which prevents his having a right to act. Who, in justice, should be responsible for this fraud of the agent? It seems to me eminently a case for the application of Lord Holt's rule, that where one of two innocent parties must suffer from the fraud or misconduct of a third, he who has reposed a trust and confidence in the fraudulent agent ought to bear the loss. *Hern v. Nichols* (1709) 1 Salk. 289. The existence of any such rule was, as I understand, virtually denied in the opinion referred to, in the case of the New York & New Haven Railroad Company. This denial was essential to the maintenance of the

the bailee being referred to the considerations that "the principal is bound by all the acts of his agent within the scope of the authority

principles there laid down, as the rule, if admitted, would embrace many cases which could not be reconciled with those principles. It would seem, however, too reasonable in itself, and too well established by authority, to be shaken. It has been quoted and adopted by many eminent judges, as well as by nearly every elementary writer upon the law of principal and agent, since the days of Lord Holt. . . . The liability of principals for the negligence and for the frauds of their agents rests upon the same grounds. The language of Lord Holt in *Hern v. Nichols* was evidently the result of a settled opinion, as he had previously laid down the same rule in reference to the liability of a principal for the negligence of his agent. In the case of *Lane v. Cotton* (1702) 12 Mod. 472, 490, he says: 'For when a trust is put in one person, and another whose interest is intrusted to him is damned by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damned.' . . . Mr. Justice Buller, also, in the case of *Fitzherbert v. Mather* (1785) 1 T. R. 16, adopts the same classification and confirms the rule in the following emphatic terms: 'It is the common question everyday at Guildhall, where one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit?' The English cases which had previously been decided were criticised and explained by the learned judge. After stating the facts in *Grant v. Norway* (1851) 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258, (§ 2386, note 1, *ante*), he remarked: "Upon the principles maintained here, this was a very plain case. The parties to whom the bill of lading was given had, of course, no right of action, because they were cognizant of the fraud; and the plaintiffs had none, because no representation was made to them. Had the bill of lading been a negotiable instrument, the plaintiffs would have been in precisely the same position as persons who become bona fide indorsers of the negotiable note of a partnership fraudulently issued by one of the partners. A privity between the parties would then have existed

through the negotiable character of the paper, and the defendants would have been estopped by the act of their agent from setting up that no goods had been shipped." The learned judge then referred to *Coleman v. Riches* (1855) 16 C. B. 104, 24 L. J. C. P. N. S. 125, 1 Jur. N. S. 596, 3 C. L. R. 795, 3 Week. Rep. 453, (§ 2386, note 5, *ante*), and the statement made by Creswell, J., during the argument of counsel, that "Riches or his agent made the representation as to the receipt to the party who delivered the goods, and not to the buyer." He expressed the opinion that "these remarks recognize most distinctly the real difficulty in the case, which was to make it appear that the false representation had been made by the agent Board to the plaintiff," and that it was "quite apparent, therefore, that if the agent of Riches had made the false representation as to the delivery of the wheat, directly to the plaintiff Coleman, the action would have been sustained."

A similar view as to the scope of the English cases had previously been put forward in the following passage of the opinion in *Farmers' & M. Bank v. Butchers' & D. Bank* (1857) 16 N. Y. 125, 69 Am. Dec. 678. "In neither of those cases was the document upon which the question arose negotiable. It was sought there to make the principal responsible for a false representation of the agent, not to the person to whom the representation was made, but to one with whom the agent had no dealings, and to whom he had made no representation. Upon a careful examination, it very plainly, I think, appears that this was the real obstacle to a recovery in each of these cases. When Sergeant Crowder, counsel for the plaintiffs in *Grant v. Norway*, cited the case of *Hern v. Nichols* . . . Justice Cresswell replied: 'There the factor entered into a contract with the plaintiff for his employer. Here you are a step further off. You say your agent, with whom I made no contract, has enabled a man, with whom I did contract, to cheat me.' This remark presents, in my judgment, the turning point of the case, and the only obstacle to the plaintiff's recovery, viz., the want of any privity of contract between the plaintiff and the agent. This

which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions;" and that "one who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority."³

obstacle was precisely that which the negotiability of the instrument, if established, would have removed; because the maker of a negotiable instrument is deemed in law to enter into a contract with everyone to whom it is afterwards negotiated; and where the instrument is made by an agent, it is in this way only that privity of contract can be established between such agent and the subsequent holders, without which the principal can never be held responsible for the false representations of the agent."

In *Armour v. Michigan C. R. Co.* (1875) 65 N. Y. 111, 22 Am. Rep. 603, reversing (1872) 3 Jones & S. 563, defendant's agent, upon delivery to him by M. of a forged warehouse receipt, issued to M. two bills of lading, each stating the receipt of a quantity of lard consigned to plaintiffs. The agent was informed by M. at the time of the delivery of the bills of lading, that he intended to use them at a bank. M. drew sight drafts on plaintiffs, by whom they were paid upon the faith and credit of the bills of lading. Held (Earl, C., dissenting), that defendant was bound by the acts of its agent. Defendant seized a quantity of lard in the possession of the warehouseman, in whose name the forged receipt purported to have been issued, and shipped it to New York. Upon its arrival it was replevied by parties claiming title; plaintiffs were notified of the replevin suit and called upon to defend. This they did not do, and the claimants obtained judgment. Held, that the judgment was no bar to the action by the present plaintiffs and in no way affected their rights. *Grant v. Norway* was again disapproved, in so far as it was adverse to the general view prevailing in the courts of New York, viz., that "where confidence has been reposed in an agent, and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of two innocent persons must suffer in such a case, that person must

bear the loss who reposed the confidence." But a distinction was taken between the case before the court and the one criticized, on the ground that, in the former the bill of lading was issued to a party who knew that the agent had no authority to issue it, and was transferred to a purchaser acting in good faith." It may accordingly be said with plausibility that the representation was not made to the assignee, who simply acquired the title of the fraudulent consignee. It would have resembled the case at bar if the plaintiffs had known of the forgery of Michaels when they took the bills of lading, and had then transferred them to persons paying value and acting in good faith. The case would then have been governed by the rule that an assignee of a thing in action must abide by the case of him of whom he buys."

In *Bank of Batavia v. New York, L. E. & W. R. Co.* (1887) 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433, a railway freight agent who was authorized to receive and forward freight, and give a bill of lading therefor, specifying the terms of the shipment, but who had no right to issue such bills except upon the actual receipt of the property for transportation, issued bills of lading for sixty-five barrels of beans to one W., who drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. No packages were in point of fact shipped by W., or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and the freight agent to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills. Held, that the railway company was liable upon the bill of lading.

³ *Brooke v. New York, L. E. & W. R. Co.* (1885) 108 Pa. 529, 56 Am. Rep. 235, 1 Atl. 206 (bill fraudulently issued). The court said: "It is conceded in this case that the company did not authorize the issuance of bills of lading

In Georgia the distinction has been taken that warehousemen are liable to bona fide holders of false receipts issued by their agents, where the form of the receipts is such as to indicate that they have been "adopted and always issued for the express purpose of enabling the bailor, or the person acknowledged as the bailor, to pledge them as security for money," but that "receipts, pure and simple, with only the incidents annexed to them by law, and none super-added by special contract or representation, are no more obligatory in the hands of bona fide holders for value than in the hands of the original bailor of the property stored."⁴

b. Liability based on an estoppel.—In Illinois and Nebraska, the bailee has been held responsible on the ground of estoppel.⁵

without receipt of the goods, but it put Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule."

⁴ *Planters' Rice-Mill Co. v. Merchants' Nat. Bank* (1887) 78 Ga. 574, 3 S. E. 327. Discussing the defense "that the agent did not have authority to bind the corporation, his principal, where no rice was in fact stored, and where the transactions on which the receipts purported to be based were wholly fictitious," the court said: "The evidence leaves no question that the agent was authorized to issue receipts of this character. The receipts belonged to a class which the agent had power to issue, and not only to issue, but to acknowledge; and every act of acknowledgment was a recognition of the rightfulness of the receipt. That was part of the purpose, doubtless, of having the acknowledgment; it was to have the receipt recognized as an obligatory instrument upon the rice-mill company, and this agent was the right agent, under the evidence, both to issue the receipt and to enter this acknowledgment of notice upon it. So that the paper, as a class, was paper he had power to issue and deal with, just as he did in these instances. An agent to tell the truth may bind his principal by telling a lie. A wrongful exercise of delegated authority is not the assumption of authority, but the abuse of it. Thus, an agent empowered to issue and acknowledge receipts of a given kind, based on real transactions,

does not, by wrongfully issuing and acknowledging receipts of a like kind, based on fictitious or simulated transactions, pass beyond the scope of his authority, but acts fraudulently within it. To hold otherwise would be to rule that an agent cannot commit a fraud and affect his principal by it. Here he had a rightful authority to do a certain class of acts. He did a number of those acts by the wrongful exercise of that authority. His principal must be responsible both for the authority conferred and for its faithful exercise, in so far as there is a right to rely upon the fidelity of its exercise. In many cases, the law will authorize strangers to rely upon the acts of an agent, and in many cases it will not. It authorized these banks to trust to the exercise of the authority, just as fully as they could trust to the existence of the authority; and the mill company is as much bound by the abuse as by the use of the authority which it conferred, the banks being entirely ignorant of such abuse until long after they parted with their money."

⁵ *St. Louis & I. M. R. Co. v. Larned* (1882) 103 Ill. 293, where the freight agent of a railroad company gave a bill of lading which recited that the property was then lying in a depot at a certain place, it was held that, as against persons who advanced money upon the bill, the company was estopped from showing that, at the time when the bill was given and indorsed, the goods were in the adverse possession of another person. This decision is apparently inconsistent with the doctrinal standpoint in one which had previously

been rendered by the court of appeals in *Stone v. Wabash, St. L. & P. R. Co.* (1881) 9 Ill. App. 48; but the supreme court did not refer to it. In that case B., a banker, advanced money on the faith of a bill of lading issued before the property specified had been received for shipment, to one L., who was not its owner. It was subsequently delivered for shipment in the ordinary course by S., the owner, who, while it was still *in transitu*, brought an action of replevin to recover possession of it. The court thus stated its conclusion: "We cannot see that Stone has been guilty of any negligence whatever in trusting Ledger with the property in question. In fact he would not trust him for anything. On the other hand, defendant's agent trusted Ledger's statement that the car was fully loaded when it was not. Had this agent seen to it that that the car was loaded before issuing the bill of lading, Ledger would have been powerless to perpetrate the fraud upon Bower. As to plaintiff, the bill of lading was fictitious when issued, and its transfer could confer upon Bower no rights to plaintiff's property. The fault lay wholly with defendant's agent in issuing it. As a general rule such instruments are void. *Hutchinson, Carr.* §§ 122, 123; *Berkley v. Watling* (1837) 7 Ad. & El. 29, 2 Nev. & P. 178, 6 L. J. K. B. N. S. 195; *The Freeman v. Buckingham* (1855) 18 How. 182, 15 L. ed. 341. Stone retained his control over the property up to the very time when a valid bill of lading could have first issued and then, upon Ledger's failure to perform his part of the contract, asserted his right to the hay. We see nothing in his conduct, or in any of the circumstances attending the transaction, whereby he ought now to be estopped from claiming his property. As the matter now stands, the property has gone forward, its proceeds have or can be applied to the payment of the draft cashed by Bower, and in this manner the wrong done him can be repaired, while the loss can properly be made to fall upon defendant, whose agent seems to have been the only party through whose fault Ledger was enabled to perpetrate the fraud. The judgment of the court below will be reversed, and the cause remanded for further proceedings in conformity with this opinion." From these remarks it seems apparent that

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the position of the court, broadly speaking, was that a bill of lading issued by an agent for property not actually shipped is, under ordinary circumstances, void as against the principal, but that this rule is subject to an exception in cases where the issue of such a bill is the consequence of the agent's failure to exercise reasonable care to see that the shipment has actually taken place. But the conception that a false statement may, when it is attributable to the negligence of the agent, be treated as binding upon the principal, seems to be opposed to the whole tenor and effect of the cases cited in the preceding section. They all proceed upon the theory that the principal's nonliability is predicable, irrespective of the cause from which the falsity resulted.

In *Sioux City & P. R. Co. v. First Nat. Bank* (1880) 10 Neb. 556, 35 Am. Rep. 488, 7 N. W. 311, a station agent of a railroad company issued bills of lading to a shipper for a larger amount of goods than was actually shipped. Drafts drawn by the shipper against the bills were in good faith discounted by a bank and forwarded for payment, but were protested, the shipper having absconded and leaving no property in the state. Held, that, as against the bank, the railroad company was estopped from denying that it had received the wheat. The court said: "This case presents every element necessary to constitute an estoppel *in pais*; a representation made with full knowledge that it might be acted upon, and subsequent action in reliance thereon, by which the defendants in error would lose the amount advanced if the representation is not made good. This principle was entirely overlooked in *Grant v. Norway* and the cases following it." "The question whether or not bills of lading are negotiable does not enter into the case. All the testimony shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and that he not only had authority to issue such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills, it will not do to say that the agent had authority to issue bills of lading duly signed only in cases where shipments were made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading, and

2388. Same subject. General remarks concerning the conflict of doctrine.—It seems difficult to deny that the doctrine of these courts which treat the bailee as being bound by the misrepresentation of his agent is more consistent than the opposite view with the theory now fully established, that the vicarious liability of a master or principal extends to all tortious conduct which is incident to the class of acts which the tort-feasors are engaged to perform. In the point of view it is perhaps not unworthy of observation that the earlier cases, by which the law was settled in England, and which have been followed in most of the American jurisdictions, were decided several years before that theory was clearly and definitely formulated.¹ It may be that, if those cases had been presented after it had been fully accepted in the broad sense in which it is now understood, judicial opinion would have taken a different course. The doctrine respecting the nonliability of the master or principal has been unfavorably criticized by judges, even in the countries in which it prevails.²

when duly issued they are not the bills of the agent, but of the railroad company. The representation, therefore, thus made in the bills, that the company has received a certain quantity of grain for shipment, is a representation to anyone who, in good faith relying thereon, sees fit to make advances on the same. If these representations are false, who should bear the loss? The party who appointed, placed confidence in, and gave authority to make the bills, or the one that, in good faith relying thereon, purchased or advanced money on the same?"

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, the leading case, was decided in 1867, sixteen years after *Grant v. Norway*, 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258, was decided in 1851, and four years after *Coleman v. Riches*, 16 C. B. 104, 24 L. J. C. P. N. S. 125, 1 Jur. N. S. 596, 3 C. L. R. 795, 3 Week. Rep. 453. See § 2386, notes 1, 5, *ante*.

² In *George Whitechurch v. Cavanagh* [1902] A. C. 117, Lord Robertson remarked: "It seems to me extremely doubtful whether *Grant v. Norway* (1851) 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258, can be held, or has ever been held,

to represent the general law, or to do more than determine the law about ship-masters and bills of lading; and whether, assuming it to have the wider bearing, it is reconcilable with the doctrine of Lord Selborne in *Houldsworth v. City of Glasgow Bank* (1880) L. R. 5 App. Cas. 326, 42 L. T. N. S. 194, 28 Week. Rep. 677, I find it extremely difficult on principle to hold that the scope of an agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it, when the question of liability to be decided is whether a loss is to be borne by the principal, who placed him there, or by an innocent third party who had no voice in selecting him." In the same case Lord Macnaghten said: "Having regard to the authority which the master undoubtedly possesses, and the important part which bills of lading play in the commerce of the country, there was much to be said in favor of an opposite view. It was argued in *Grant v. Norway* (1851) 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258, that the doctrine for which the ship-owner was contending would go far to destroy the negotiability of bills of lading, and that, as the master had an unlimited authority to sign bills for goods

It must be admitted, however, that the practical importance of such expressions of disapproval is greatly diminished by the circumstance that the English bills of lading act (see § 2389, *post*) was passed after that doctrine had been enunciated, and that no provision abrogating it was inserted by a legislature whose sole object was to

received, and was for some purposes regarded as the general agent of the owner, it was but just that the owner should be responsible if the master exceeded his authority or deceived third persons. But, for all that, the principle of the decision was accepted in *Coleman v. Riches* (1855) 16 C. B. 104, 24 L. J. C. P. N. S. 125, 1 Jur. N. S. 596, 3 C. L. R. 795, 3 Week. Rep. 453, and the decision itself has been recognized in this house as sound law (*McLean v. Fleming* (1871) L. R. 2 H. L. Sc. App. Cas. 128, 25 L. T. N. S. 317, 1 Asp. Mar. L. Cas. 160, 4 Eng. Rul. Cas. 665), and the commerce of the country has not suffered, nor has the credit of bills of lading been impaired in consequence."

In *National Bank v. Chicago, B. & N. R. Co.* (1890) 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560, the court, after citing the cases reviewed in the preceding section, proceeded thus: "The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that, where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith, in the ordinary course of business. This rule this court in effect adopted and applied in *McCord v. Western U. Teleg. Co.* (1888) 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315, 318. It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence, and not distrust; and that for

these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was *res integra*, we confess that it seems to us that this argument would be very cogent. But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property; and that, if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law, the Federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the Federal courts."

promulgate a body of rules which should be most suitable for the transaction of the business of the greatest commercial nation in the world.

2389. Effect of statutes with regard to bills of lading.—*a. England.*—By § 3 of the English bills of lading act (18 & 19 Vict. chap. 111), it is declared that “every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped.” The doctrine that a bailee is not bound by a false statement of his agent that certain goods were received for transportation (see § 2386, *ante*) has not been changed by this provision.¹

¹ In *Meyer v. Dresser* (1864) 16 C. B. N. S. 646, 33 L. J. C. P. N. S. 289, 10 L. T. N. S. 612, 12 Week. Rep. 983, it was laid down that the provision did not operate so as to render a receipt given by the master of a vessel conclusive evidence as against the owner, that the goods specified were put on board.

In *Jessel v. Bath* (1867) L. R. 2 Exch. 267, Bramwell, B., said that the provision only means “that the person actually signing the bill of lading shall be liable. If, for instance, an owner had signed, it would be conclusive against him, but it would not be so against the other owners. If, then, the bill of lading is only conclusive against the person actually signing, the defendants, not being the signers of the bill in question, are not made liable by the statute.”

In *Brown v. Powell Duffryn Steam Coal Co.* (1875) L. R. 10 C. P. 562, by a charter party for the conveyance of a cargo of coal, it was stipulated that the master should “sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charter party.” On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by 32 tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees. *Held*, that the owners, not being legally liable to pay for such deficiency, could not maintain an action against the charterers to recover

the amount paid by them. Brett, J., commenting upon the above remark of Bramwell, B., said that he did not understand it to mean that “it must be the manual signature of the party, because, if a man authorizes another to sign his name, he is equally bound as if he had signed it himself. But the authority given to the master here was, not to sign the name of his owners, but to sign for himself, though to sign an unusual bill of lading. The statute means, I think, the signature of the name of the person who is intended to be bound. It seems to me, therefore, that, although the plaintiffs authorized the master to sign these bills of lading, there is no estoppel as between them and the consignees, either at common law or by the statute, and no binding of them by the bill of lading; and that they were not bound to deliver to the consignees a greater amount of cargo than they actually received on board. Upon the true construction of this charter party, therefore, there was no such express or implied warranty as has been contended for.”

In *Thorman v. Burt* (1886; C. A.) 5 Asp. Mar. L. Cas. 563, 54 L. T. N. S. 349, where *Jessel v. Bath*, *supra*, was followed, Lord Esher, M. R., remarked that the phrase “person signing the same” does not necessarily mean the person who actually signs the document. “But in the present case the signature was not that of a mere clerk or servant, but that of an agent.”

b. Mississippi.—By the Mississippi act of March 16, 1886, “every bill of lading acknowledging the receipt” of goods is declared to be conclusive evidence, in the hands of bona fide holders, that the goods were actually received for transportation. In a case where the agent of a steamboat line signed a bill of lading for cotton as shipped “on board the good steamboat called ———, or any other boat in the employ of same line,” it was held that the right of parties under the instrument was not affected by the provision, since there was no acknowledgment of the receipt of any cotton, or of its shipment on any named boat.²

c. Alabama.—By the Civil Code 1907, § 6136 (4223) (1179); Sess. Laws 1881, p. 133, it is enacted that “if any common carrier, not having received things or property for carriage, shall give or issue a bill of lading or receipt as if such things or property had been received, . . . such carrier . . . or person is liable to any person injured thereby, for all damages, immediate or consequential, therefrom resulting.” With reference to this provision it has been laid down that a bona fide transferee of a bill of lading may hold the carrier responsible for the truth of its recitals, and for damages to the extent that he may have advanced on the faith of its genuineness and truth.³

d. Missouri.—By Rev. Stat. 1889, chap. 18; Rev. Stat. 1909, § 11955, it is enacted that no “master, owner, or agent” of any vessel, nor any forwarder or officer or agent of any railroad, transfer, or transportation company, or other person,” shall sign or give “any bill of lading, receipt, or other voucher or document for any merchandise or property,” by which it shall appear that such merchandise or property has been shipped, unless the same shall have been actually shipped. It has been held that a bill of lading issued in contravention of this statute does not convey any title to the property specified in it,⁴ and that a person who sustains

² *Wilbourn v. Hegler* (1894) 10 C. C. A. 454, 22 U. S. App. 344, 62 Fed. 407.

³ *Jasper Trust Co. v. Kansas City, M. & B. R. Co.* (1892) 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546.

⁴ In *Ætna Nat. Bank v. Water Power Co.* (1894) 58 Mo. App. 532, a railway company issued its bill of lading reciting it had received a carload of flour in apparent good order, for transportation to N. O., the flour being then in another state and in the possession of another company. Held, that the instrument

was void and carried no title; and that its delivery was not a constructive delivery of the commodity named therein, although at the time of its issue the receiver of the bill surrendered the bill of lading given by the other company; and that an action of replevin for the flour was not maintainable by a bank which held the bill itself and also a draft of the consignee in its favor. The court relied upon the doctrine that in an action of replevin the plaintiff must rely on the strength of his own title, and not on the weakness of the defendant's title.

injury from the carrier's breach of the law is entitled to recover damages.⁵

2390. Fraud in respect of the shares, debentures, and bonds of companies.—a. Scope of section.—As the directors of a corporation are its general agents in respect of the conduct of its business, any fraud of which they may, in their official capacity, be guilty in dealing with the corporate stock, is necessarily imputable to it. For information regarding this phase of the subject, which plainly falls outside the scope of the present treatise, the practitioner is referred to text-books which deal with the law of corporations and agency.¹ In this section it is not proposed to refer, except incidentally, to any cases except those in which the fraudulent party was an employee.

b. Inducing persons to take shares.—It has been laid down that a court cannot merely from its own knowledge of the manner in which business is conducted, say that a mere secretary of a company has, by virtue of general usage, implied authority to induce persons to take shares in it.² Nor is a company bound by the fraudulent statement

As the plaintiff's title was founded upon a fraudulent, void, and unlawful bill of lading, it was immaterial what the defendant's title was.

The rule stated in the text was also applied in *Aetna Nat. Bank v. Union P. R. Co.* (1896) 69 Mo. App. 246.

⁵ *Smith v. Missouri P. R. Co.* (1897) 74 Mo. App. 48; *Watkins Nat. Bank v. Cleveland, C. C. & St. L. R. Co.* (1905) 117 Mo. App. 249, 93 S. W. 846.

¹ The English authorities are reviewed in Lindley, *Companies*, 5th ed. pp. 68 *et seq.*; and in *Laws of England, "Companies,"* pp. 127 *et seq.* For the American decisions, see *Thomp. Corp.* § 5485.

² In *Newlands v. National Employers' Acci. Asso.* (1885; C. A.) 54 L. J. Q. B. N. S. 428, it was held that, in the absence of specific evidence as to the authority in this regard of the defendant company's secretary, a person whom he had induced to take shares was not entitled to maintain an action against it for the rescission of the contract, or for damages in respect of the misrepresentation. Brett, M. R., said: "A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can anyone assume that statements made by him are necessarily to be accepted as trustworthy, without further inquiry, any more than in the case of a merchant

it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts. In all such cases it is clearly the duty of persons who wish to be accurately informed on matters which are of importance, to refer to the principal." Bowen, L. J., said: "It is . . . obvious that the plaintiff cannot recover any damages from the company or its directors, inasmuch as the misrepresentation which induced him to apply for the shares was not made by anyone save Allen, the secretary, so that the company cannot be liable in an action for deceit. The plaintiff alleges that the company cannot retain the benefit of a contract induced by the fraudulent misrepresentation of their agent. But that raises the important question whether the secretary was the agent of the company to make this fraudulent misrepresentation. Allen was the secretary of the company; there is no legal definition of that term, and there is no evidence that he, as secretary, had any such authority; but it is urged that the word 'secretary' includes *prima facie* the authority to make statements such as this secretary made, and to induce persons to enter into contracts with the company. But it appears to me that *prima facie* the functions of a secretary are clerical and ministerial only; that a secretary is not a person authorized

of its secretary with regard to the extent of the liability which a person taking shares in it will incur under the deed of settlement.³ *A fortiori* is a company not chargeable with a fraudulent misstatement made by a clerk with regard to its flourishing condition.⁴ A case in which a claim for damages in respect of misrepresentations made by a secretary as to the validity of certain stock was rejected on the ground that they were made for his own benefit is reviewed in another place.⁵

c. Issuance of new stock.—In England the liability of a corporation in respect of the fraudulent issue of stock by its employees has, up to the present time, been treated as a matter depending solely upon the extent of the actual powers conferred upon them. In this point of view, it has been held by the House of Lords that the authority of an agent of a company to make a representation or give a warranty that a share certificate is genuine cannot be inferred from evidence which merely shows that he held the office of secretary, and one of his functions was the delivery of such instruments.⁶

to induce persons to take shares, or authorized to get shares taken; it is not his duty to make bargains, or to make conditions in respect of shares; he is not an officer authorized to act as an agent in the course of business to do such things; nor is he a person intrusted with the duty of or power of bargaining as to the issue of shares."

³ *Re Joint Stock Cos. Winding-up Acts* (1859) Johns. Ch. 451, 28 L. J. Ch. N. S. 325, 5 Jur. N. S. 216. Page-Wood, V. C., said: "No representation by the company's secretary as to the purport of the deed could have any effect, if the deed were different from what he represented it to be. . . . It has never yet been held that an officer of a company misrepresenting the effect of a deed which it was no part of his duty to expound could release the party signing from his liability to contribute," *i. e.*, in winding up proceedings.

⁴ *In Re Royal British Bank* (1861) 3 L. T. N. S. 843, 9 Week. Rep. 328, where a person who had taken shares on the faith of the misstatement was held liable as a contributory in winding up proceedings, Kindersley, V. C., remarked *obiter* that not even the misstatements of a director or manager are imputable to a company. But at the present day this assertion would probably not be accepted without much qualification.

⁵ See § 2395, note 2, *post*.

⁶ *Ruben v. Great Fingall Consolidated* [1906] A. C. 439, affirming [1904] 2 K. B. (C. A.) 712. There the plaintiffs advanced in good faith a sum of money to the secretary of the defendant company for his own purposes, on the security of a share certificate of the company issued to them by the secretary, certifying that the appellants were registered in the company's register of shareholders as transferees of shares. In point of form this certificate was in accordance with the company's articles of association, inasmuch as it bore the seal of the company, and appeared to be signed by two of the directors and countersigned by the secretary. The seal of the company was, however, affixed to it by the secretary fraudulently and without authority, and the signatures of the two directors were forged by him. Held, that an action could not be maintained against the company for damages for refusing to register the plaintiffs as owners of the shares. The following passage from the judgment of Stirling, L. J., in the court of appeal, may be quoted: "The third question is: 'Are the plaintiffs entitled to recover damages against the company for a wrongful act of the secretary committed in the course of his employment? It is said that the secretary of the company, while acting in the course of the company's business and for the company's benefit,

In New York a position was at first taken which, for practical purposes, seems to have been virtually identical with that of the English

made a representation on the faith of which the plaintiffs acted and suffered damage, and that, although the secretary had no express authority to make the misrepresentation, still he had the authority to do that class of acts, and that the company must be answerable for the manner in which he did the business which the company had intrusted to him. *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at pp. 265, 266, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298. To this there appear to me to be two answers: "First, if I am right in the answer which I have given to the second question, the secretary had no authority to make representations as to the genuineness of certificates; he was merely intrusted to the ministerial duty of delivering certificates to those entitled to them. The making of such representations, therefore, was not included in the class of acts which the company intrusted to him. Secondly, the secretary, in delivering the certificate, was not acting in the interests of the company, but in his own; and the case of *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. 714, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, appears to me to be a direct authority that in these circumstances the company is not liable. It is true that part of the reasoning found in the judgments of Bowen, L. J., and Fry, L. J., has been disapproved by the House of Lords in *Balkis Consol. Co. v. Tomkinson* [1893] A. C. 396, at p. 407, 63 L. J. Q. B. N. S. 134, 1 Reports, 178, 69 L. T. N. S. 598, 42 Week. Rep. 204, but the decision has never been overruled, and in fact was cited as an authority by Lord Brampton in the recent case of *George Whitechurch v. Cavanagh* [1902] A. C. 117, at p. 141, 71 L. J. K. B. N. S. 400, 50 Week. Rep. 218 [see note 11, *infra*]. In my opinion, therefore, it is binding on this court." In the House of Lords the following remarks were made by Lord Loreburn, L. C.: "Another ground was pressed upon us, namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or war-

ranty that the certificate was genuine. He had not, or was held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or issue of the document. No precedent has been quoted in support of the plaintiff's contention, except the case of *Shaw v. Port Philip Gold Min. Co.* (1884) L. R. 13 Q. B. Div. 103, 53 L. J. Q. B. N. S. 369, 50 L. T. N. S. 635, 32 Week. Rep. 771. I agree with Stirling, L. J., in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was in fact held out as having authority to warrant the genuineness of a certificate. If that be not so, then in my opinion the decision cannot be sustained." Lord Macnaghten said: "The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors, which purport to authenticate the sealing, are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right, or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so. Then, how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the be-

lief that this thing was the company's deed. Without such a representation, there can be no estoppel. The fact that this fraudulent certificate was concocted in the company's office, and was uttered and sent forth by its author from the place of its origin, cannot give it an efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company. I could have understood a claim on the part of the appellants if it were incumbent on the company to lock up their seal and guard it as a dangerous beast, and if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it has been disposed of for good and all by the case of *Bank of Ireland v. Evans' Charities* (1855) 5 H. L. Cas. 389, 3 Week. Rep. 573, in this House." Lord Davey said: "It is admitted that Rowe was the proper person to deliver certificates to those entitled to them. From this harmless proposition, the appellants slide into another and a very different one, that it was the secretary's duty to warrant on behalf of the company the genuineness of the documents he delivered. There is no evidence that any such duty or power was in fact intrusted to Rowe, and it is too great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents. But, even if I could make the implication that the appellants desire, I do not think it would assist them, for I agree with the learned judges in the court of appeal that every part of the legal proposition stated by Willes, J., in his well-known judgment in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at p. 265, 12 Eng. Rul. Cas. 298, is of the essence of it. Willes, J.'s words are these: 'The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit.' Where, therefore (as in the present case), the secretary is acting fraudulently for his own illegal purposes, no

representation by him relating to the matter will bind his employers. And in my opinion it would be a matter of reproach if the law were otherwise. The reason for the qualification is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master."

In *Shaw v. Port Philip & C. Gold Min. Co.* (1884) L. R. 13 Q. B. Div. 103, referred to by Stirling, L. J., and Lord Loreburn, in the above case, it was the duty of the secretary of a company to procure the execution of certificates of shares in the company with all requisite and prescribed formalities, and to issue them to the persons entitled to receive the same. By a resolution of the directors of the company, it was provided that certificates of shares should be signed by one director, the secretary, and the accountant. The secretary of the company, having executed a deed purporting to transfer certain shares in the company to G., a purchaser of such shares, issued to G. a certificate stating that he had been registered as the owner of the shares. Such certificate was in the usual and authorized form, and sealed with the company's seal, but the signature of the director appended thereto was a forgery, and the seal of the company was, in fact, affixed thereto without the authority of the directors. G. deposited the certificate with the plaintiff as a security for advances, and subsequently executed a transfer of the shares to the plaintiff. Neither G. nor the plaintiff had any knowledge or reason to suspect that the certificate was otherwise than a genuine document, or that the matters stated therein were untrue. The company refused to register the plaintiff as owner of the shares, stating that there were not such shares standing in G.'s name in their books. Held, that the company were estopped by the certificate issued by their secretary from disputing the plaintiff's title to the shares. Mathew, J., rested his decision "on the ground that the company is responsible for the fraud committed by its agent while acting within the ordinary scope of his employment. Upon the statements contained in the case, I cannot doubt that it was within the scope of their secretary's employment to do what he did here. . . . It never

courts.⁷ But under the theory subsequently adopted, the right of action is viewed as being determinable with reference to a broad doctrine which was thus stated in the leading case: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to

could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had, in fact, been complied with. It seems to me, therefore, that the secretary is held out by the company as their agent to warrant the genuineness of the certificate. It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud."

⁷ In *Mechanics' Bank v. New York & N. H. R. Co.* (1856) 13 N. Y. 599, which involved the fraud of the same transfer agent as the one referred to in the following note, the purport of the evidence was assumed to be that he "was merely authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books and upon the surrender of the previous certificates." (So stated in *Farmers' & M. Bank v. Butchers' & D. Bank* [1857] 16 N. Y. 125, 142, 69 Am. Dec. 678. See also the comments of the court in the *Schuyler Case*, note 8, *infra*. One K. had borrowed money of the plaintiff, and assigned as security a spurious certificate for eighty-five shares fraudulently issued by the transfer agent. It was held that the company was not bound either to pay the value of the stock so certified, or to permit it to be transferred to the plaintiff. Commenting on this decision in *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380, Selden, J., observed that it was a sufficient answer to the action that K., to whom the certificate was issued, being privy to the fraud, had, of course, no claim against the company, and that his assignees could have no greater rights

than himself. That this was one of the considerations relied upon in the earlier case is clear from the statement that "no rights would be acquired by a party not dealing with the agent in good faith, and receiving a certificate of stock without paying any value therefor. . . . On this ground it was in his hands spurious and void, and this is a conclusion which is reached without calling in question the power of the corporation to create the stock, or of Schuyler as agent to issue the proper evidence thereof to a purchaser in good faith." But the certificate in the hands of K. was also declared to be void for the other reasons, *viz.*: "1. Schuyler, as the agent of the company, had no power to issue a certificate for shares of stock, except upon the conditions precedent of a transfer on the books by some previous owner, and the surrender of that owner's certificate. He was the transfer agent merely, and his powers were expressly limited to that department of the business of the corporation. He had no general certifying power, nor any power at all to certify, except as incidental to a transfer of stock by its owner to someone else, and as an incidental power it could only be exercised upon the conditions named. 2. Neither the board of directors by whom Schuyler was appointed agent, nor the whole body of the corporation, had power to create the stock which the certificate issued to Kyle professed to represent; and if the stock itself could not be brought into existence by the whole power of the corporation, the certificate issued as the evidence of its existence and the right of the holder thereto was necessarily void." The court also rejected the contention that the stock certificates were negotiable instruments in such a sense that the railway company could be held liable on the ground of estoppel.

the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."⁸

⁸ *New York & N. H. R. Co. v. Schuyler* (1865) 34 N. Y. 36, affirming (1862) 38 Barb. 653. The evidence there presented was taken as showing clearly that the authority of one Schuyler, the "transfer agent" of a railway company, was complete in regard to the issuance of its stock to original subscribers; that he was also empowered to receive transfers of stock to himself in behalf of the company, and assign the same to purchasers; that he acted to some extent as the financial agent of the company; and that he kept its stock accounts in New York. The facts assumed by the court were therefore different in some important respects from those upon which the decision in the case cited in the preceding note was founded. It was held that certain persons who had acquired spurious stock issued by him were not entitled to become stockholders, but were entitled to be indemnified by the company for his fraudulent acts. After stating briefly the essential facts involved in some earlier cases, the court proceeded thus: "So, in this case, in the narrow view in which we are now considering it, the condition upon which the agent could issue the certificate was a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist by the certificate itself. I can see no shade of difference between the question in this case and in those cited, and which seem to me to settle the law. The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by Selden, J., in *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380: 'The mode in which the liability is enforced in all these cases is by estoppel *in pais*. The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented.' . . . In truth, the power conferred in these cases is of such a nature that the agent cannot do an act appearing

to be within his scope and authority, without, as a part of the act itself, representing expressly or by necessary implication that the condition exists upon which he has the right to act. Of necessity, the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without, as *res gestæ*, making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation, which, if true, is, of course, binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may he takes, because he gives the confidence and credit which enable its falsity to prove injurious to an innocent party."

In *Titus v. Great Western Turnp. Road* (1872) 5 Lans. 250, 255, the defendant corporation was held liable for money advanced to its treasurer by an innocent third person, upon spurious certificates of stock issued by the treasurer to himself, and signed by him in conformity with their by-laws.

In *Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co.* (1893)

This doctrine has also been applied in Maryland,⁹ and in Pennsylvania.¹⁰

137 N. Y. 231, 19 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378, it appeared that A., the defendant's secretary, treasurer, and transfer agent, had, by virtue of his office, the custody of the books relating to the issue and transfer of stock. Under the company's by-laws all certificates were to be "issued and signed by the president and treasurer and countersigned by the transfer agent." A. filled out a blank certificate taken from defendant's certificate book, forged the name of its president thereto, signed his own name as treasurer, then countersigned it, and impressed thereon the corporate seal. The testimonium clause recited that defendant had caused the certificate to be signed by its president and countersigned by its treasurer and transfer agent, and sealed with its corporate seal. One H. procured of plaintiff a loan upon his note secured by a pledge of the certificate. Before acting upon the application of H. for the loan, plaintiff sent a clerk with the certificate to defendant's office, who showed it to A., who was in charge of the office; he stated that the certificate was genuine and all right, and that H. was a stockholder, and, relying thereon, plaintiff discounted the note. In an action to recover damages because of defendant's refusal to recognize the certificate as valid evidence of title to the shares of stock stated therein, it was held that plaintiff was entitled to recover. The court said: "It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but those were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of . . . [the secretary's] employment as the agent of the company, and within the scope of the general authority conferred upon him. . . . The learned counsel for

the defendant seeks to distinguish this case from the authorities cited, because the signature of the president to the certificate was not genuine; but we cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer, and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the shares of stock it might issue, and where their acts, in the apparent exercise of this power, are accompanied with all the indicia of genuineness, it is essential to the public welfare that the principal should be responsible to all persons who receive the certificates in good faith and for a valuable consideration, and in the ordinary course of business, whether the indicia are true or not."

⁹ In *Tome v. Parkersburg Branch R. Co.* (1873) 39 Md. 36, 17 Am. Rep. 540, under the by-laws of the defendant railroad company, its treasurer was made the custodian of the ledger and other books relating exclusively to the ownership and transfer of the capital stock of the company; and he was required to prepare and countersign all certificates of ownership of stock and scrip that might be issued, and to receive and enter upon the proper books all transfers thereof. It was also made his duty to affix the seal of the company to all certificates of ownership of stock and scrip properly issued by the company and signed by the president. The treasurer fraudulently issued sundry certificates of stock signed by himself and the president, sealed with the corporate seal, and purporting to be genuine in every respect. Upon the stock so issued, the treasurer, through the agency of a broker, borrowed large sums of money from a person who did not know for whom the money was wanted, and advanced it solely upon the faith of the certificates, which he believed to be genuine. Subsequently, it was discovered that there had been a fraudulent issue of stock to a large amount by the treasurer, who soon after the discovery absconded. In an action brought against the company by the holder of the above certificates for its refusal to exchange them for new

As the recognized powers of the employees who committed the frauds discussed in the case decided by the House of Lords and in the earliest of the New York cases were less extensive than those of the agents referred to in the more recent American cases, it would be possible to contend that, upon the facts, the former cases are not necessarily to be regarded as inconsistent with the latter. But as the latter are based upon a doctrine which, when once it is ascertained that the specific function of the given agent was to issue stock, operates quite independently of the precise scope of the power which may actually have been conferred upon him, the decisions manifestly cannot be reconciled upon this footing.

d. Transfer of stock already issued to shareholders.—It has recently been held by the House of Lords, that, in permitting its secretary to certify transfers of shares, a company does not authorize the secretary to do more than give a receipt for certificates of shares which are actually lodged in the office. If the secretary gives a receipt or an acknowledgment for certificates which have not been lodged, the company is not estopped from setting up the true facts.¹¹ In view of

certificates, it was held that the defendant was liable for the fraudulent acts of its agent; and that the jury, in assessing the damages to which the plaintiff was entitled, might allow him the amount of the money advanced on the stock, with interest, or the amount of the market value of the stock at the date of the loan, with interest (if they deemed it proper to allow interest)—the amount allowed, however, not to exceed the amount of the money loaned with interest, if the value of the stock should be greater than the loan and interest. The *ratio decidendi*, as explained in the subsequent case of *Baltimore & O. R. Co. v. Wilkens* (1875) 44 Md. 11, 22 Am. Rep. 26, was that the treasurer "was in fact constituted the executive officer of the corporation with large discretionary powers, and was held out by the company to the public as the proper party from whom information as to the ownership of its stock was to be ascertained, and in fact as the source of information on that subject. In this way the public were, by the acts of the corporation, 'exposed to the risks of fraudulent devices most dangerous because most difficult to detect.'"

¹⁰ *Bank of Kentucky v. Schuykill Bank* (1846) 1 Pars. Sel. Eq. Cas. 180.

¹¹ *George Whitechurch v. Cavanagh*

[1902] A. C. 117. In that case transfers of shares in a company having been lodged with the company's secretary without the certificates for the shares, the secretary fraudulently certified upon the transfers that the certificates for the shares were in the company's office. In an action brought by the proposed transferee against the company for refusing to register him as the owner, it was held (Lord Robertson doubting) that the company was not estopped from showing that the proposed transferer had no shares to transfer, and that the action would not lie. Lord Macnaghten, after laying down the law almost in the words used in the text, said that if authority were wanted for this proposition, it could be found in *Grant v. Norway* (1851) 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258. See § 2386, note 1, *ante*. His conclusions were stated thus: "It seems to me that it would be most unreasonable in any case, whether the transaction takes place on the Stock Exchange or not, to hold a company estopped by the certification of its secretary, if the secretary certifies a transfer without having received the certificates. The supposed estoppel, therefore, founded on Wells's certification, in my opinion, fails altogether; and for the

the general doctrine which has been formulated by the New York court of appeals with regard to the effect of extrinsic circumstances known to the agent, and not to the third person with whom he is dealing (see preceding subsection), it seems unlikely that this conclusion would be approved in that state.

In a case where a person lent money to the cashier of a bank for his own use, and, as security for its repayment, and on his false representation that he owned and had transferred to the lender a certificate of stock to an equal amount in the national bank, received from him a certificate which the president had signed and left with him to be used if needed in the president's absence, it was held that these representations must be taken to have been made by the cashier in his personal, not his official, capacity; that the bank was therefore not responsible for them; and that no action could be maintained against it for the value of the certificate.¹²

same reason the case founded on alleged misrepresentation by the company fails also." Lord Brampton said: "I entirely agree in the views expressed by Lord Macnaghten as to the limited authority of such a secretary as Wells. I do not intend to say that it was no part of the duty of Wells on occasion when a certificated transfer was required for shares in the appellant company, to exercise an honest discretion to grant it, and to certify to the truth as he knew or believed it to be, and, if in framing such a certificate, he by mere negligence made an erroneous statement, causing injury to the person to whom it was handed, that he might act upon the faith of it, I do not say that an action might not be sustained against the company, his employers, to recover such damages as might be occasioned by such negligence. But the charge made against Wells was in no sense one of negligence, but one of deliberate fraud, utterly unconnected with the course of his duty as secretary. He simply lent himself to Raymond, in whose service he still was as clerk, and became a mere tool in his hands. Raymond, in arranging with Cavanagh to give him 10,350 shares 'to be represented by certificated transfers,' knew that he did not possess one single share of those he intended to include in his transfer. . . . These he could only obtain by the assistance of Wells, who made them knowing that he was uttering deliberate falsehoods,

without even a semblance of excuse. Having done so, he allowed Raymond to take them away, not knowing or even inquiring for what purpose they were to be used. The jury rightly, as I think, found Wells's action to be fraudulent, but they found also that it was committed for the benefit of the company as well as for Raymond. How they could have arrived at such a conclusion passes my understanding; there was not, in my opinion, a *scintilla* of evidence to support it. They also found that it was in the ordinary course of Wells's business as secretary, to give certificates of this character. That may have been so on occasions when he honestly believed the facts certified to be true, and when he was dealing with persons in the ordinary course of a business transaction; but this was no business transaction at all, nor was it intended to be. Wells was not even colorably discharging a duty. The facts I have stated stamp both Wells and Raymond to have been a pair of fraudulent knaves acting without authority and in disregard of duty. In my opinion the appellant company is not responsible for that fraud, and to argue that such certificates so prepared should operate to create estoppels against the company, preventing it from asserting and proving the truth, requires some courage."

¹² *Moore v. Citizens' Nat. Bank* (1883) 111 U. S. 156, 28 L. ed. 385, 4 Sup. Ct. Rep. 345. The court said:

e. Cancellation of stock.—In Louisiana it has been held that a company is liable for the acts of its president and secretary in taking advantage of their position as officers, to practise a fraud upon the plaintiffs by wrongfully canceling their certificates of stock, and transferring them to other persons.¹³

f. Certification of coupons of bonds.—In a Maryland case a railway company which had appointed an employee to issue certificates for mortgage coupons which were to be deposited by bondholders in pursuance of a funding scheme was held to be liable to a bona fide purchaser of forged certificates issued by him.¹⁴

2391. Fraud in respect of the business of banks.—Banks have been held responsible for the fraud of their employees under the following circumstances: Where a manager made a false representation concerning the financial solvency of a third person; ¹ where the paying teller

"There is no evidence that the plaintiff understood, or had any reason to understand, that those representations were made by him in behalf of the bank. The duty of transferring his stock to the plaintiff before taking out a new certificate in her name was a duty that he, and not the bank, owed to the plaintiff. The making of such a transfer was an act to be done by him in his own behalf as between him and the plaintiff, and in the plaintiff's behalf as between her and the bank."

¹³ *Factors' & T. Ins. Co. v. Marine Dry Dock & Shipyard Co.* (1879) 31 La. Ann. 149.

¹⁴ *Western Maryland R. Co. v. Franklin Bank* (1802) 60 Md. 36. The court said: "In the present case, there can be no question but that it was within the employment and scope of duties of young Harden to act officially as the agent of the defendant, in receiving coupons and filling up and supplying certificates to the owners or depositors of such coupons. In the absence of the higher officials of the company, he was the sole representative of the latter in respect to that particular business. The printed, formal certificates, ready, signed, and sealed, were placed in his keeping, to be used when required; and the usual and ordinary course of the business was such that, when coupons were received to be refunded, he filled up the certificates, and took the same, with the coupons, to the office of the Safe Deposit & Trust Company, and procured the signature of

the treasurer of that company to the receipt attached to the certificates. The filling up the certificates, and procuring the signature to the receipts thereto, were strictly within the regular course of his employment, and required his active agency from the beginning to the completion of the transaction. The certificates thus procured and delivered were his representations as to the reality and genuineness of the transactions, as expressed on the face of the certificates. And when he issued such a certificate and delivered it to a third party who acted without knowledge and in good faith, paying value for it, such party had a right to act upon the presumption that the representations of such certificate were truthful, and not false and fraudulent."

¹ In *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, the plaintiff was induced to continue to supply oats to a customer of the bank, a contractor with the government, on a guaranty from its manager to the effect that the customer's check in the plaintiff's favor, in payment for the oats supplied, should be paid on receipt of the government money, in priority to any other payment "except to this bank." The manager fraudulently concealed from the plaintiff that the customer was indebted to the bank £12,000. The result was that the plaintiff was induced to advance money. The plaintiff having brought an action for

of the M. Bank, by conspiring with the paying teller of the A. Bank, enabled a person who had no funds at the M. Bank to cash a check upon it at the A. Bank, and then received the proceeds from the payee for the purpose of covering a shortage in his accounts as teller;² where a cashier issued false certificates of deposit;³ where a cashier

false representation, and for money had and received, it was held, first, that there was evidence to go to the jury that the manager knew and intended that the guaranty should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so. Secondly, that the defendants would be liable for such fraud in their agent. Thirdly, that the fraud was properly charged in the declaration as the fraud of the defendants.

In *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 416, 30 L. T. N. S. 180, 43 L. J. P. C. N. S. 31, 22 Week. Rep. 473, the cashier of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A which, by omitting a material fact, misled A, and induced him to accept a bill in which the bank was interested; and A was compelled to pay the bill. Held, that A could recover from the bank the amount so paid.

In both the above-mentioned cases the defendants had taken advantage of the representations made by their agents, and their liability might have been affirmed on that ground alone. In cases from which the element of benefit to the principal is absent, the right of recovery must be determined not only with reference to the scope of the tort-feasor's employment, but to any provision of a statute of frauds which may affect the technical sufficiency of the representation itself. In *Swift v. Winterbotham* (1873) L. R. 8 Q. B. 244, a banking company was held liable in respect of a fraudulent guaranty by their manager of the solvency of a person, although the bank derived no benefit from the representation. In the exchequer chamber this decision was reversed. (See *Swift v. Jewsbury* (1874) L. R. 9 Q. B. 301,) on the technical grounds; (1) That, by 9 Geo. iv. chap. 14, § 36, a false representation as to the credit of another person, in order to maintain an action,

must be signed by the person making it, and not by an agent; and that, therefore, if the manager were to be considered an agent, the banking company was not liable; (2) that the signature of the manager to the letter could not be considered the signature of the banking company itself; and (3) that the letter was the representation of the manager, and not the representation of the banking company. Bramwell, B., said: "It seems to me that Mr. Day's argument is that there must be a sort of exception put in the statute to meet the necessity of the case. If this were a necessary thing for the purpose of the banking company carrying on their business, it might be otherwise; but it is not a necessary thing for the purpose of carrying on their business; it is no part of their business; it is a thing which can be done, and it is done, by bankers and their officers individually and personally; therefore there is no such necessity as Mr. Day's proposition would assume." "In my opinion the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means, unless he puts it down in writing, and acknowledges his responsibility for it by his own signature. He is neither to have the words proved by word of month, nor the authority given to an agent for whose act it is sought to make him responsible proved by word of mouth." Adopting the doctrine so laid down, the court of appeal held, in *Hirst v. West Riding Union Bank Co.* [1901] 2 K. B. 560, that the word "person," as used in the statute, includes a corporation; and an incorporated company is, under the terms of this section, not liable for a false representation of the kind contemplated by it, made in a letter written and signed by their agent.

² *Atlantic Bank v. Merchants' Bank* (1858) 10 Gray, 523. It was held that the M. Bank could not, as against the A. Bank, hold the money paid on the check.

³ *Barnes v. Ontario Bank* (1859) 19 N. Y. 156.

to whom application had been made at the bank for payment of a personal debt used his employer's money to pay the debt, and then, in order to cover his fraud, induced the creditor to sign a check upon the supposition that it was merely a receipt, and entered the transaction in the bank books as a loan from the bank to the creditor;⁴ where a bank, by the fraud of its agent, obtained, through another bank, certain assets as security for its liabilities;⁵ where a manager received deposits at a time when he knew the bank to be insolvent;⁶ and where a teller and bookkeeper, after having paid certain worthless checks of a company, the manager of which was also cashier of the bank and administrator of an estate, took the cashier's checks against the estate's account to cover his company checks, thus depleting the resources of the estate for a purpose which they knew to be wholly foreign to its affairs.⁷ On the other hand, it has been held that a bank is not bound by the act of a bookkeeper in giving a customer false credits in the ledger, and then transcribing them from thence into the customer's bank book;⁸ nor by the act of a local man-

⁴ *Foster v. Green* (1862) 31 L. J. Exch. N. S. 158, 7 Hurlst. & N. 881, 6 L. T. N. S. 390.

⁵ *Johnston v. Southwestern R. Bank* (1848) 3 Strobb. Eq. 263, the bank was held to be bound to make good the representations of its agent, and to answer positively for his acts.

⁶ *Cragie v. Hadley* (1885) 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537.

⁷ *Lowndes v. City Nat. Bank* (1909) 82 Conn. 8, 22 L.R.A.(N.S.) 408, 72 Atl. 150.

⁸ *Manhattan Co. v. Lydig* (1809) 4 Johns. 377, 4 Am. Dec. 280. In an action of assumpsit for money had and received, viz., a sum paid by the plaintiffs on the defendant's checks, the evidence showed that, under the regulations of the bank, it was the duty of the bookkeeper to keep the ledger only, and to post from the cash book kept by the teller all entries of cash into the ledger; that he had no right to receive money, that there had been instances where a bookkeeper, on account of a great pressure of business, has assisted the receiving teller, or supplied his place during his absence or sickness; but that there was a particular place in the bank appropriated for the teller, where all money was regularly paid, and that the person who acted as teller was required to receive deposits at that place

only. The sums received from the defendant were embezzled with other moneys by the clerk, who absconded. Discussing the question whether the bookkeeper did not act as the agent of the defendant in making the deposits, and whether, as such, he was not enabled to commit the frauds of which the plaintiffs complain, the court said: "It is certain that the defendant did send money by Brower, at several times, to make deposits; and if it can be ascertained that, in discharge of that trust, he falsely obtained credits for the defendant beyond the amount deposited, so far I think the defendant liable. Brower was the servant of the plaintiffs when in their employ and in their office, and, for acts there done, the plaintiffs are answerable (*Middleton v. Fowler* (1699) 1 Salk. 282); but for acts not done in execution of the authority given him by the plaintiffs, they are not chargeable. In making deposits for the defendant, Brower acted, not as the servant of the plaintiffs, but as the agent of the defendant, and the defendant would be answerable for any deficit in the deposits in the same manner as though he himself had been guilty of a fraud in making them." It was held that the trial judge had correctly charged the jury that the plaintiffs ought not to recover if the money for which credit was claimed had been

ager in overdrawing an account opened by him in his capacity as the treasurer of a county, and applying the money so obtained to the payment of debts due by the county for interest on debentures and other claims which he ought to have paid out of the moneys received by him as treasurer.⁹

In Massachusetts the nonliability of a bank for the fraudulent certification of a check by the teller of a bank has been asserted on the ground that such an employee has no original power in respect of certification, and that a general custom among banks which should operate so as to invest him with such a power would be bad, as conflicting with the public interests.¹⁰ In one New York case it was deemed unnecessary to determine the soundness of this doctrine, because it appeared, not only that the teller in question was in the habit of certifying the checks of customers, with the knowledge of the superior officers of the bank, but also that he was furnished with a book for the express purpose of keeping a memorandum of such checks. In view of this evidence it was held that, as against a bona fide holder, his wrongful act in certifying a check for the mere accommodation of the drawers was imputable to the bank, and that the circumstance of his having been expressly prohibited from certifying checks in the absence of funds did not operate so as to restrict his

received into the bank, but that the submission of the question whether the bank used due and proper diligence in detecting and rectifying the frauds or mistakes of their bookkeeper in the accounts balanced and rendered to the defendant was erroneous, for the reason that there were no grounds on which to found the charge of a want of due diligence on the part of the bank.

⁹ *Gore Bank v. Middlesex County* (1857) 16 U. C. Q. B. 595. The court said: "The fact is that the agent of the bank who made these payments knew all the facts, and therefore knew that he was not bona fide advancing the money on behalf of the bank for the purposes of the county, and relying on the county for repayment; but he was, without the knowledge of the bank, diverting their funds to purposes of his own,—that is, to making up his own deficiencies,—and not relying upon the county for recognizing the payments as advances made by the bank on their behalf. . . . The present is in some of its circumstances an unusual case, but we may take one of a more ordinary

character that will illustrate the principle which must govern it. If A should send a clerk or servant with money to make a purchase for him, who, instead of paying for the goods as he ought to have done with the money given to him, should spend that money for some purpose of his own, and should afterwards borrow money from a friend to pay for the goods, the person lending the money would surely have no right of action against him for whom the goods were purchased. The fair way, I think, in which to look upon the transaction now under our consideration, is that the money with which the payments against the county were made was not money in any sense paid for or lent to the county by the bank, but was money of the bank which their agent improperly took upon himself, without their privity, to lend to himself, in order to replace the funds of the county, which he had, without the sanction or knowledge of the municipality, appropriated to purposes of his own."¹⁰

¹⁰ *Mussey v. Eagle Bank* (1845) 9 Met. 306.

implied authority to cases in which the bank actually had funds in hand.¹¹

¹¹ *Farmers' & M. Bank v. Butchers' & D. Bank* (1857) 16 N. Y. 125, 69 Am. Dec. 678. The court said: "It may be doubted whether such a prohibition adds anything to the restrictions which would otherwise exist upon the powers of the agent. A teller, acting under a general power to certify checks, would be guilty of an excess of authority and a clear violation of duty, if he certified without funds. The powers of the cashier himself, or other principal financial officer of the bank, would no doubt be subject to the same limitation. To certify a check when the bank has no funds to meet it is to make a false representation; and neither the incidental power of the cashier, nor a general power conferred upon any other officer, could be construed to authorize that. Hence, if a bank is holden, in any case, upon a certificate of its cashier that a check is good, when it has no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized. It would seem, therefore, that the defense insisted upon here would have been equally available if the checks in question had been certified by the cashier himself. . . . It is no more within the apparent power of a cashier to certify that the bank has funds, when it has none, than it is within that of a teller expressly authorized to certify only when the bank has funds. Every person would be bound to take notice of the limitation imposed by law upon the powers of the cashier or other general agents, no less than of that which is in terms imposed upon the powers of the teller as special agent. Hence, it cannot be pretended that a person who should take and pay value for a check, with knowledge that the bank had no funds of the drawer to meet it, would acquire any valid claim against the bank, although such check was certified by the cashier himself. He would be presumed to know that it was contrary to the duty of the cashier to certify without funds, and this knowledge would have the same effect as that which everyone who should take a check certified by the teller would be presumed to have of any express restriction upon his powers. It will be seen that, if these views are correct, the present case does not turn in any degree upon the rules applicable to special agencies, but that the question would have been precisely the same if the check had been certified by the cashier or other principal financial officer of the bank. . . . The defense assumes that principals are bound only by the authorized acts of their agents, and admits of no qualification of this general rule except where the agent has been apparently clothed with an authority beyond that actually conferred. But this proposition is too broad to be sustained. Principals have been repeatedly held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different. . . . The certificate of the teller is a positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss? The reasoning of Lord Holt, in the case of *Hern v. Nichols* (1708) 1 Salk. 289, applies here with peculiar force. The bank selects its teller and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank, through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be held responsible? It is worthy of consideration that the fact misrepresented in this case is not only one peculiarly within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed by the bank, and which it is his especial province and duty to know, and which could scarcely be definitively ascertained except by application to him. These circumstances would seem to bring the case decidedly within the principles adopted in *Hern v. Nichols* and in the subsequent decisions based upon that case. This conclusion

The effect of subsequent decisions in this state is that a general authority to the president of a bank to certify checks does not extend to the certification of checks drawn by himself;¹² that a bank is bound by the fraudulent certification of a check by its teller;¹³ that only a bona fide holder of a check certified by a cashier is entitled to enforce it, where it was drawn by a person having no funds;¹⁴ and that a certification of a check by an assistant cashier, appointed specially for the purpose of signing notes for circulation, is not binding upon his principals, even in favor of a bona fide purchaser, where no evidence is adduced as to the habitual practice of the bank in question, or of usage among banks generally.¹⁵ By the Supreme Court of the United States and the Federal district court of Massachusetts evidence of this character has been held to warrant the conclusion that a cashier was impliedly authorized to certify checks.¹⁶ This theory would seem to be more in harmony with general principles than that which has been applied by the supreme court of Massachusetts. See *supra*.

2392. Fraud in respect of other kinds of transactions.—a. Acts done in the interest of the employer.—Actions have been held to be maintainable against employers under the following circumstances: Where an employee, while acting as agent for the sale or purchase of real or personal property, made a false statement regarding matters which affected its value,¹ or concealed from the other party matters

is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that everyone taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective and unauthorized. To discover that, he must not only have notice of the limitations upon the powers of the teller, but of the extrinsic fact, that the bank had no funds, and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend." The court was not satisfied with the *Mussey Case*, *supra*.

¹² *Irving Bank v. Wetherald* (1867)

36 N. Y. 335. The certification was held to be invalid, even though a purchaser for value was concerned, the court taking the position that he had notice from the face of the paper that the acceptance was a fraud, and was consequently not a bona fide purchaser.

¹³ *Meades v. Merchants' Bank* (1862) 25 N. Y. 146, 82 Am. Dec. 331.

¹⁴ *Cooke v. State Nat. Bank* (1873) 52 N. Y. 96, 11 Am. Rep. 667, affirming (1867) 50 Barb. 339.

¹⁵ *Pope v. Bank of Albion* (1874) 57 N. Y. 126, reversing (1871) 59 Barb. 226 (no fraud involved).

¹⁶ *Merchants' Nat. Bank v. State Bank* (1870) 10 Wall. 648, 19 L. ed. 1019, followed in *Morse v. Massachusetts Nat. Bank* (1873) Holmes, 209, Fed. Cas. No. 4,832.

¹ *Hern v. Nichols* (1701) 1 Salk. 289; *Udell v. Atherton* (1861) 7 Hurlst. & N. 172, 30 L. J. Exch. N. S. 337, 7 Jur. N. S. 777, 4 L. T. N. S. 797; *Taylor v. Green* (1837) 8 Car. & P. 316; *Jardine*

of that description;² where the treasurer of a company, who acted as its managing agent, purchased goods on credit from a person whom he deceived by making false representations with regard to the company's resources;³ where an insurance agent misrepresented the financial condition of his principals, and their ability to fulfil contracts with persons who should take out policies;⁴ where an agent appointed by a railway company to solicit donations and obtain subscriptions obtained a grant of land by making false representations with regard to the early construction of a new road;⁵ where an agent, by promising that the price of land sold would be paid, induced the owner to execute a deed for it;⁶ where an agent of a vender collected the price of articles never delivered to the purchaser;⁷ where the negotiations for the sale of a patent were purposely protracted by the agent of a foreign corporation, his object being to prevent the patentee for a while from using his invention, and thus get time for the corporation to exploit another invention in which it was interested;⁸ where an agent fraudulently delayed entering a judgment in order that he might favor a mortgagee by giving priority

v. Carron Co. (1864) 2 Sc. Sess. Cas. 3d series, 1128; *Upton v. Tribilcock* (1875) 91 U. S. 45, 23 L. ed. 203, affirming (1874) 3 Dill. 496, Fed. Cas. No. 16,800; *Doggett v. Emerson* (1845) 3 Story, 700, 735, Fed. Cas. No. 3,960; *Mason v. Crosby* (1846) 1 Woodb. & M. 342, 358, Fed. Cas. No. 9,234; *Reed v. Peterson* (1878) 91 Ill. 288; *Witherwaæ v. Riddle* (1807) 121 Ill. 140, 13 N. E. 545; *Rhoda v. Annis* (1883) 75 Me. 17, 46 Am. Rep. 354; *Jewett v. Carter* (1882) 132 Mass. 335; *Concord Bank v. Gregg* (1843) 14 N. H. 331; *Presby v. Parker* (1876) 56 N. H. 409; *Bennett v. Judson* (1860) 21 N. Y. 238; *Elwell v. Chamberlin* (1864) 31 N. Y. 611; *Smith v. Tracy* (1867) 36 N. Y. 79; *Krumm v. Beach* (1884) 96 N. Y. 398; *Sandford v. Handy* (1840) 23 Wend. 260; *Peebles v. Patapasco Guano Co.* (1877) 77 N. C. 233, 24 Am. Rep. 447; *Haynor Mfg. Co. v. Davis* (1908) 147 N. C. 267, 17 L.R.A.(N.S.) 193, 61 S. E. 54; *Erie City Iron Works v. Barber* (1884) 106 Pa. 125, 51 Am. Rep. 508; *Fitzsimmons v. Joslin* (1849) 21 Vt. 129, 52 Am. Dec. 46; *Crump v. United States Min. Co.* (1851) 7 Gratt. 352, 56 Am. Dec. 116, 3 Mor. Min. Rep. 454; *Waldo v. Chicago, St. P. & F. du L. R. Co.* (1861) 14 Wis. 576; *Law v. Grant*, (1875) 37 Wis. 548, 7 Mor. Min. Rep.

56; *Latham v. Crosby* (1863) 10 Grant, Ch. (U. C.) 308.

² *Jeffrey v. Bigelow* (1835) 13 Wend. 518, 28 Am. Dec. 476 (agent employed to sell a flock of sheep failed to inform the purchaser that some of them were diseased); *Locke v. Stearns* (1840) 1 Met. 560, 35 Am. Dec. 382 (foreman of manufacturing firm sold article, knowing it was of inferior quality). As to these cases, see further on § 2229, note 4, ante.

³ *Hunter v. Hudson River Iron & Mach. Co.* (1855) 20 Barb. 493, 507 (action to reclaim goods).

⁴ *Fogg v. Griffin* (1861) 2 Allen, 1; *Sunbury F. Ins. Co. v. Humble* (1882) 100 Pa. 495.

⁵ *Henderson v. San Antonio & M. G. R. Co.* (1856) 17 Tex. 560, 67 Am. Dec. 675.

⁶ *Bowers v. Johnson* (1849) 10 Smedes & M. 169.

⁷ *Scofield Rolling Mill Co. v. State* (1875) 54 Ga. 635.

⁸ In *Butler v. Watkins* (1871) 13 Wall. 457, 463, 20 L. ed. 629, 630, it was held that the jury had been erroneously instructed that, if the corporation never gave any authority to the managing agent to assent to the draft of agreement in their behalf and in their name, and never sanctioned it as a corporate

to his mortgage;⁹ where the clerk of a firm of brokers caused a loss to a customer by fraudulently representing that a certain bid for a commodity still remained open;¹⁰ where a settlement of accounts was obtained by the false representations of an agent;¹¹ where the holder of an insurance policy, who had determined to give up paying the premiums, was induced to continue the payments by the false representations of the insurance company's agent that she would be entitled to a free policy if she paid the premiums for a certain time;¹² and where a railway time-table incorrectly stated that a train started at a certain hour.¹³

In a case where the defendant had become surety for a debt owed to the plaintiffs by a firm of which his son was a member, it was held that the defendant's liability had not been discharged as a result of the act of his manager in so contriving that certain money which, under the contract of guaranty, was to be devoted to the relief of the defendant from his obligation should be applied to the payment of a loan which the manager had, on his individual capacity, made to the firm before the contract of guaranty was entered into.¹⁴ The liability

act, suit for such a fraud as above indicated could not be maintained. The suit not being on any contract, the corporation might be, notwithstanding, responsible for the fraud.

⁹ *Musser v. Hyde*, (1841) 2 Watts & S. 314.

¹⁰ *Malcolm v. Waterhouse* (1908) 24 Times L. R. 854, the theory of the defense was that the misstatement of the servant was made for the purpose of concealing the results of his own negligence in having previously allowed the bid to lapse. But Walton, J., was of opinion that his object was to get a better bid and so save both his employers and the plaintiff from loss.

¹¹ *Rogers v. Ullman* (1879) 27 Grant, Ch. (U. C.) 137.

¹² *Kettlewell v. Refuge Assur. Co.* [1908] 1 K. B. 545, affirmed in [1909] A. C. 243, 78 L. J. K. B. N. S. 519, 100 L. T. N. S. 306, 25 Times L. R. 395, 53 Sol. Jo. 339, the company having refused to grant a free policy, the plaintiff sued to recover back the premiums paid since the false representations were made. In the court of appeal, it was held by Lord Alverstone, Ch. J., and Sir Gorell Barnes, President, that, the contract contained in the policy being, under the circumstances, voidable at the plaintiff's option, the fact that the defendants had

during the whole of the four years been subject to a risk of having to pay the sum assured in the event of the life dropping during that period did not amount to a part performance of the contract, so as to bar the plaintiff from the exercise of her option to avoid it, and that the premiums consequently could be recovered back as money had and received to her use. Buckley, L. J., who dissented from this view, was of opinion that the premiums could be recovered as money obtained for the defendants by the fraud of their agent. He relied upon the "cases which show that, if the agent is there to do the business for the benefit of the principal, the principal is responsible for the representations made by the agent in the course of the business." No judgments were delivered in the House of Lords.

¹³ *Denton v. Great Northern R. Co.* (1856) 5 El. & Bl. 860, 25 L. J. Q. B. N. S. 129, 2 Jur. N. S. 185, 4 Week. Rep. 240.

¹⁴ In *McGowan v. Dyer* (1873) L. R. 8 Q. B. 141, the plaintiffs, a limited company of which C. was managing director, had begun printing a periodical for D. & Co., a firm consisting of the defendant's son and two others, and the periodical was being sold on commission

of the defendants was also denied: In cases where a railway conductor stated to a laborer that, if he went to a certain place, he would be employed on construction work, and that he would be well taken care of on the way;¹⁵ where a road master authorized to contract for

by S. The plaintiffs, represented by C., refused to go on printing without a guaranty, and the defendant consented to become security by drawing a bill on D. & Co. and indorsing it to the plaintiffs, upon the misunderstanding that he was to have funds to meet it out of the debt accruing from S. to D. & Co. C. was told of this arrangement. Before the defendant drew this bill, C. had lent money to D. & Co. on his private account, and held their acceptance to a draft drawn in his own name. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & Co., without the knowledge or consent of the defendant or his son, and under this order C. obtained the amount due from S. to D. & Co. and appropriated it to the payment of this bill, the amount being more than sufficient to cover the defendant's bill. The plaintiff's having sued defendant on his bill, it was held, that the defendant had no defense as against the plaintiffs; for that the plaintiffs were not responsible for what C. did in getting his private debt paid, as, though he was their managing director, he was not then acting for them or in pursuance of any authority from them. Blackburn, J., said: "I was of opinion at the trial: First, that there was no evidence of any such arrangement between the defendant and the firm of Dyer & Co., so brought to the notice of Christie, the managing director of plaintiff's company, as to make it inequitable in Christie to receive payment of his own debt from Dyer & Co. out of the money due to them from Smith; and, secondly, that, though (if there was such an arrangement), the effect might be to make Christie liable personally to the defendant, it could not affect the right of the plaintiffs (the company) to recover, the act of Christie, in taking payment of his own debt being in no way done for the company or in pursuance of any authority, express or implied, from them. . . . If the first point had been the only one in the case, we should probably have granted a new trial on the ground that the evidence was such that the opinion of the jury

should have been taken on that point; but on the second point we agree that there is not any reason for holding the company responsible for the manner in which Christie received payment of his own private debt, though he happened to be also their managing director." After quoting the statement from Story on Agency, § 452, concerning the liability of a principal for torts committed by an agent in the course of his employment, the learned judge proceeded thus: "Christie, as managing director, had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt, and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer would be answerable for the act of his agent not acting within the scope of his authority. It could not be said, if goods or funds pledged to a surety were improperly taken by a person acting for himself, that the surety would be discharged, if it could be shown that the wrongdoer was a clerk or other agent of the principal creditor, though not acting in any way for his employer when he did the wrongful act, nor in pursuance of any authority, express or implied, from him. The case would have been quite different if the loan from Christie, though in his own name, had really been on behalf of the company, but of that there was no evidence."

¹⁵ *Olson v. Great Northern R. Co.* (1900) 81 Minn. 402, 84 N. W. 219. The court said: "A train conductor is not, by reason of that position, authorized impliedly to hire men for his employer in construction work. This difficulty seems to be recognized by counsel for plaintiff, who asserts in his brief that plaintiff is not suing for a breach of contract to furnish employment, but for a wrong, for which he claims dam-

the erection of a building fraudulently represented to a subcontractor that his claim would be provided for in the settlement of accounts with the principal contractor, and thus induced him to abstain from recording his lien;¹⁶ and where an agent merely authorized to procure rights of way for a railroad procured a grant of land by false representations, to the effect that a station would be built on the grantor's property.^{16a}

ages to the extent of \$1,000; the wrong consisting of the false representations of the price of labor at a distant point, the neglect directly to provide suitable accommodation for plaintiff, and the refusal of defendant to return the plaintiff to his starting point. These were acts of the conductor, which do not appear to have been authorized by the defendant; and it is extremely doubtful, under the previous rule of this court, whether a recovery could be had therefor in a suit by plaintiff against the conductor himself in such a case. *North v. Johnson* (1894) 58 Minn. 242, 59 N. W. 1012."

¹⁶ *Hamilton v. Georgia R. Co.* (1886) 78 Ga. 328. The road master made representations to a subcontractor, who painted the building, to the effect that the subcontractor need not record his lien; that the company owed the contractor largely more than the latter owed the subcontractor; that it was the intention of the road master not to settle with the contractor until all debts for work done on the building were brought in and included in the settlement; that the company had other work for the contractor to do; and that the subcontractor was certain of his money. The subcontractor, relying on these statements, failed to record his lien; and the road master immediately thereafter settled with the main contractor and paid him in full. Held, that the plaintiff had been properly nonsuited in an action of deceit. The court said: "Here the company authorized him (the road master) to contract for the whole job of building to completeness a depot, including the painting of it; and in accordance with this authority, the road master did make a contract with Lawton for this entire work, and thereby the company was bound. Now if, in contracting with Lawton to do this job, or in supervising him in it, or in paying it, or promises to pay it out of any particular fund, he cheated, deceived, defrauded Lawton, the com-

pany would be bound to account for the iniquity of its agent, and in damages for the deceit to make Lawton, the party dealt with, whole from the wrong of its agent's acts, because he was about its business intrusted to him as its agent with Lawton; but when he went clear off the limit of his power and got beyond it, and in dealing with Hamilton, with whom he had authority to make no contract, and had made none, acted deceitfully and fraudulently about retaining money from Lawton to pay him, the company is not responsible, no matter how badly he acted and how justly responsible for the damage he would individually be. Within the scope of the business intrusted to him, his conduct, like his contract, is that of the corporation; outside of the business so intrusted to him, his conduct, like his contract, is his own, not the company's; as the company would not be responsible for the contract he was not empowered to make, so it is not responsible for what he did or said or promised about it in the making or performing it. In our judgment, the application of the familiar principle, that the agent cannot act beyond the scope of his authority, to the facts of this case, controls it." The soundness of the decision seems to be quite dubious. In the opinion of the present writer it could not be said as a matter of law that the authority of the road master did not extend to making any arrangement that he might deem proper with regard to the disposition of the money to be paid for the work; and if such arrangements were within the scope of his authority, it would apparently have been warrantable to deduce the further inference that he was acting as the agent of the company in respect of any statements which he might make to a subcontractor, concerning the time and manner in which he would pay the principal contractor.

^{16a} *Houston & T. C. R. Co. v. McKinney* (1881) 55 Tex. 176.

In a recent English case the liability of a firm of partners for the act of one of them in bribing the clerk of the plaintiff, a competitor in business, to break his contract of service by dishonestly and improperly communicating to him knowledge obtained in the course of the clerk's employment, was affirmed upon grounds which would have been equally applicable, if the tort-feasor had been merely an employee.¹⁷ In another case, involving somewhat peculiar circumstances, the decision denying the right of recovery turned upon the scope of the fraudulent partner's employment as an official of the complaining company.¹⁸

b. Acts done for the advantage of the employee himself.—The liability of the employer has been affirmed in cases where an employee,

¹⁷ *Hamlyn v. Houston* [1903] 1 K. B. (C. A.) 81. Collins, M. R. reasoned thus: "It is too well established by the authorities to be now disputed that a principal may be liable for the fraud or other illegal act committed by his agent within the general scope of the authority given to him; and even the fact that the act of the agent is criminal does not necessarily take it out of the scope of his authority. If the act done by the agent is within the general scope of the authority given to him, it matters not for the present purpose that it was directly contrary to the instructions of his principal, or even that it may have been an offense against society itself. The test is that which is applied to this case by the learned judge. Was it within the scope of the authority given to Houston to obtain this information by legitimate means? If so, it was within the scope of his authority for the present purpose to obtain it by illegitimate means, and the defendants are liable. That is the law as expressed in the partnership act 1890, and as laid down by decisions previous to that act, in which it has been held that a principal is liable for the fraud or other wrongful act of his agent if committed within the scope of his employment."

¹⁸ In *Tendring Hundred Waterworks Co. v. Jones* [1903] 2 Ch. 615, G., a partner in the firm of J. & G., solicitors, was secretary to a company. The company purchased property, and for their own convenience had it conveyed to G. in his own name, without any declaration of trust in the conveyance. The transaction was carried through, and the conveyance settled by the firm of J. & G.

as the company's solicitors. The conveyance, the only title deed handed over, was retained by G. G. fraudulently raised money by deposit of the conveyance, and afterwards executed a legal mortgage to the equitable mortgagee. J. had no notice that the conveyance had been made to G. alone, or of any part of the transaction, except such notice as was implied by his firm having acted for the company. The partnership deed made the secretaryship a part of the partnership business. Held, that J. was not liable for his partner's fraud. Farwell, J., took the position that G. having a legal right as trustee to the possession of the deed, it was no part of the duty of the firm to see that he did not obtain it without the direction of his *cestui que trust*; the company assuming that the firm would have been liable for any negligence of G. in his duty as secretary, it was not part of such duty to act as trustee of the company's property. J. was therefore not liable for his partner's fraud. And that, if it were assumed that the partnership contract bringing G.'s secretaryship into the common partnership fund imposed on the defendant liability for G.'s default in the performance of his duties as secretary, "it was no part of such duty either to accept a conveyance of the company's real estate, or to take charge of their deeds, or to advise them. The functions of a secretary are prima facie clerical and ministerial only. . . . No loss has been occasioned to the plaintiffs by anything done or omitted by G. in his capacity of or within the scope of his employment as secretary."

while conducting the business of forwarding merchants, received and appropriated to his own use the proceeds of a bill of exchange which the drawees had paid in reliance upon a statement falsely made by him that money had been advanced on certain goods intended for them;¹⁹ where the managing clerk of a solicitor, to whose office a woman had come to seek advice regarding some investments with which she was dissatisfied, induced her to give him instructions to sell or realize her property, and for that purpose to give him the deeds and to sign two documents, which she neither read nor knew the tenor of, but which put into his possession her interest therein, and then dishonestly disposed of her property and appropriated the proceeds;²⁰ where a clerk who was the general agent of a merchant

¹⁹ *Swire v. Francois* (1877) L. R. 3 App. Cas. (P. C.) 106. It was held that the proceeds of the bill having been received by the employee, acting throughout within the scope of his authority, belonged to the respondent; and that he having thus been paid money without consideration, the appellants were entitled to recover back the same. The court said: "Their Lordships are of opinion that it was within the scope of the authority of Mr. Shaw, as that expression has been defined in many cases, to make out the account which is spoken of in paragraph 9; to insert in it the advances made on goods on account of the plaintiffs; and to draw the bill for the purpose of covering the balance of the account. All this was in the ordinary course of business. It is of course not to be assumed that he was authorized to commit a fraud by making the false entry of the advance of 5,800 taels; but it would have been within the scope of his authority to make an advance of that kind, and to enter it in the account when made, and the case therefore, in their Lordships' opinion, falls within the principle which is well stated by Mr. Justice Willes in the case of *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298."

²⁰ *Lloyd v. Grace* (1912) 81 L. J. Q. B. N. S. 1140, reversing [1911] 2 K. B. (C. A.) 489, 104 L. T. N. S. 789, 80 L. J. K. B. N. S. 959, 27 Times L. R. 409, 55 Sol. Jo. 461. The defendant was ignorant of the whole transaction until after the discovery of his clerk's fraud, and the plaintiff believed throughout

that she was a client of the defendant. It was agreed by the parties that any supplementary finding of fact which it became necessary to decide should be made by the trial judge. Under that agreement he found as facts "that it was within the scope of . . . [the clerk's] employment to advise clients, who came to the firm to sell property, as to the best legal way to do it and the necessary documents to execute; that the client did rely on the representations of . . . [the clerk] professing to act on behalf of the firm; that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representation of . . . [the clerk] without reading and trying to understand the documents tendered to her." Lord Macnaghten was of opinion that this was "a clear finding that the fraud was committed in the course of the clerk's employment." Lord Loreburn said: "It is clear, to my mind, upon these simple facts that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorized to receive deeds, and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm—and she so treated him throughout—to realize her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed, and

in respect of selling goods and receiving the price thereof collected money on false bills;²¹ where a telegraph operator sent a false despatch prepared by himself;²² and where the treasurer of a corpora-

put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and intrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal."

In the court of appeal it was held by Farwell and Kennedy, L. J. J., that in taking into his own name a conveyance of the plaintiff's freehold property and a transfer of her mortgage, the managing clerk was not acting within the scope of his authority as managing clerk of the defendant, and that the defendant was not liable to recompense the plaintiff for the loss sustained by her through the fraudulent act of the managing clerk. Vaughan Williams, L. J., held that upon the facts there was evidence of such a holding out of the defendant of the managing clerk as being authorized to act on his behalf as would estop the defendant from denying the authority of his managing clerk to deal with the plaintiff's deeds.

²¹ *Adams v. Cole* (1861) 1 Daly, 147. The *ratio decidendi* was the general principle stated by Holt, Ch. J., in *Hern v. Nichols* (1701) 1 Salk. 289, that as someone must be a loser by the deceit, it was more reasonable that he who employed and confided in the deceiver should be the loser than a stranger.

²² *McCord v. Western U. Teleg. Co.* (1888) 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315. The court said: "The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim, *Respondeat superior*, does not apply in such a case, because the agent in sending the despatch was not acting for his master, but for himself, and about his own business, and was in fact the sender, and to be treated as having transcended

his authority, and as acting outside of, and not in the course of, his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule. *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543; *Fishkill Sav. Inst. v. National Bank* (1880) 80 N. Y. 162, 168, 36 Am. Rep. 595; *Potulni v. Saunders* (1887) 37 Minn. 517, 35 N. W. 379. Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract, or be a common-law duty growing out of the relations of the parties. 1 Shearm. & Redf. Neg. 4th ed. §§ 149, 150, 154; Taylor, Corp. 2d ed. § 145. And it is immaterial in such case that the wrongful act of the servant is in itself wilful, malicious, or fraudulent." "As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by plaintiff, and acted on by him in good faith. The action is one sounding in tort, and based upon the claim that the defendant is liable for the fraud and misfeasance of its agent in transmitting a false message prepared by himself. . . . The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving despatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrust-

tion paid a deficit in his accounts with it by drawing checks on another corporation.²³

c. Acts done in the interest of third persons.—The employer was held liable in a case where an employee who was authorized to draw and indorse notes in his name and for his benefit made certain notes which purported on their face to have been executed in pursuance of the authorization, but which were in fact given for the accommodation of third persons.²⁴

ed with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a despatch to investigate the question of the integrity and fidelity of the defendant's agents in the performance of their duties, before acting. Whether the agent is unfaithful to his trust, or violates his duty to, or disobeys the instructions of, the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send despatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation."

²³ *Atlantic Cotton Mills v. Indian Orchard Mills* (1888) 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496 (corporation receiving the check was held bound to repay the amount for which it was drawn. See § 2229, note 4, *ante*).

²⁴ *North River Bank v. Aymar* (1842) 3 Hill, 262. The bank in which the employer's letter of attorney was deposited, having cashed the notes in the regular course of business, and without notice of the purpose for which they were given, was held to be entitled to recover from him the amount so paid, though as between him and the employee they were unauthorized and fraudulent. The court said: "If the acts of the attorney, independent of all extrinsic circumstances, be such as come within the words of the power, and he profess at

the time to be doing the business for his principal, the latter will in general be bound; and this though the attorney was in truth dealing for himself or a third person, and in fraud of the principal. Otherwise, if the person dealing with the attorney be chargeable with notice of the fraud." This decision was reversed by the court of appeal on grounds not stated; but it was subsequently approved by that tribunal in *New York & N. H. R. Co. v. Schuyler* (1865) 34 N. Y. 36, where the following comments were made upon it. "That case stands altogether upon the doctrine of agency. The bank held the power of attorney under which the agent acted. The paper, on its face, notified the bank that it was made by the agent. The power, by express words, limited the authority to notes made in the business of the principal. The character of the paper was, therefore, of no moment on this point, for its negotiability could not shut out a question which arose on the face of the instruments. (See per Selden, J., in *Griswold v. Haven* [1862] 25 N. Y. 601, 82 Am. Dec. 380, and per Comstock *Farmers' & M. Bank v. Butchers' & D. Bank* [1857] 16 N. Y. 153, 155, 69 Am. Dec. 678). The paper, in fact, was not made in the business of the principal. The question was where the peril of that fact rested, and its solution altogether depended upon the question, Was the bank 'bound to inquire and to ascertain at its peril whether the transaction was not only in appearance, but in fact, within the authority?' The court appreciated the point, and therefore discussed and decided the question distinctively, on the law of principal and agent. . . . We have already seen what principle was involved in that case, and it is impossible to escape the conclusion that the law of this state, as settled by adjudication at this day, is, as put by H. R.

2393. Remedial rights of the defrauded party. Generally.—In cases where the fraud of a servant or agent was committed within the scope of his employment or authority, the remedial rights of the defrauded party are the same as in cases where the element of service or agency is not involved.

(1) If the fraud has operated as an inducement to enter into a contract, those rights are as follows:

(a) He may affirm the contract, and insist, if that is possible, on being put in the same position as if the fraud by which his conduct was determined had not been perpetrated.¹

(b) He may, generally speaking, rescind the contract within a reasonable time after discovering the misrepresentation. In this point of view he is entitled to demand the annulment of the contract;² or to invoke the fraud as a defense to an action brought to enforce it;³ or to recover money paid on property transferred in pursuance of it.⁴ The right of the defrauded party to obtain redress in this

Selden, J., in *Griswold v. Haven*, 'that where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact.' The contrary rule, though asserted with confidence and vindicated with great force in the case of the *Mechanics' Bank* (16 N. Y. 125, 69 Am. Dec. 678), was not necessarily adopted by the court, and that case does not so determine. It may with confidence be asserted that all the cases in this state, both before and since, lay down a different rule from that supposed in the *Mechanics' Bank Case*, to have been established by the court of errors, and so do the elementary writers upon whom we are accustomed to rely." The *Aymar Case* was also approved in *Bank of Batavia v. New York, L. E. & W. R. Co.* (1887) 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433.

¹ *Shaw v. Port Phillip Gold Min. Co.* (1884) L. R. 13 Q. B. Div. 103, 53 L. J. Q. B. N. S. 369, 50 L. T. N. S. 685, 3 Week. Rep. 771 (regarding the extent to which this case is good law, see § 2390, note 6, ante).

² *Traill v. Fernie* (1876) 3 Sc. Sess. Cas. 4th series, 770; *Doggett v. Emerson* (1845) 3 Story, 700, 735, Fed. Cas. No. 3,960; *Mason v. Crosby* (1846) 1 Woodb. & M. 342, 358, Fed. Cas. No.

9,234; *Reed v. Peterson* (1878) 91 Ill. 288; *Witherwax v. Riddle* (1887) 121 Ill. 140, 13 N. E. 545; *Wolfe v. Pugh* (1884) 101 Ind. 293, 304; *Fogg v. Griffin* (1861) 2 Allen, 1; *Concord Bank v. Gregg* (1843) 14 N. H. 331; *Presby v. Parker* (1876) 56 N. H. 409; *Smith v. Tracy* (1867) 36 N. Y. 79; *Krumm v. Beach* (1884) 96 N. Y. 398; *Wright v. Calhoun* (1857) 19 Tex. 413; *Fitzsimmons v. Joslin* (1849) 21 Vt. 129, 52 Am. Dec. 46; *Waldo v. Chicago, St. P. & F. du L. R. Co.* (1861) 14 Wis. 576.

³ *Haskit v. Elliott* (1877) 58 Ind. 493; *Jewett v. Carter* (1882) 132 Mass. 335; *American Ins. Co. v. Kuhlman* (1879) 6 Mo. App. 523; *Phoenix Ins. Co. v. Owens* (1899) 81 Mo. App. 201; *Ellwell v. Chamberlin* (1864) 31 N. Y. 611; *Sandford v. Handy* (1840) 23 Wend. 260; *Sunbury F. Ins. Co. v. Humble* (1882) 100 Pa. 495; *Tagg v. Tennessee Nat. Bank* (1872) 9 Heisk. 479; *Jones v. National Bldg. Asso.* (1880) 94 Pa. 215; *Crump v. United States Min. Co.* (1851) 7 Gratt. 352, 56 Am. Dec. 116, 3 Mor. Min. Rep. 454; *Law v. Grant* (1875) 37 Wis. 548, 7 Mor. Min. Rep. 56.

⁴ *Crockford v. Winter* (1807) 1 Campb. 124, 127; *Stone v. City & County Bank* (1877) L. R. 3 C. P. Div. (C. A.) 282, 47 L. J. C. P. N. S. 681, 38 L. T. N. S. 9; *Leazie v. Williams* (1850) 8 How. 134, 12 L. ed. 1018; *Scofield Rolling Mill Co. v. State* (1875) 54 Ga. 635;

form is not conditioned upon his ability to show that the fraud in question was perpetrated by the servant or agent within the scope of his employment or authority.⁵ Rescission, however, ceases to be an available remedy, where it has become impossible to restore the parties to the position in which they would have been if the contract had not been made, or where any third person has, in good faith and for value, acquired an interest under the contract.⁶

(2) He may bring an action of tort for the recovery of damages. Within a comparatively recent period there was still a difference of

Atlantic Bank v. Merchants' Bank (1858) 10 Gray, 532; *Bowers v. Johnson* (1849) 10 Smedes & M. 169; *Craigie v. Hadley* (1885) 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Unitype Co. v. Ashcraft Bros.* (1911) 155 N. C. 63, 71 S. E. 61; *Bank of Kentucky v. Schuyllkill Bank* (1846) 1 Pars. Sel. Eq. Cas. 180; *McDonald v. Todd* (1852) 1 Grant, Cas. 17; *Pennsylvania R. Co. v. Zug* (1864) 47 Pa. 482.

In *National Exch. Co. v. Drew* (1855) 2 Macq. H. L. Cas. 103, the directors and manager of a company, with a view to raise the value of the shares, offered money to two shareholders to purchase additional shares, the stipulation being that they should not be called on for further payments until the stock could be sold at a profit. Held that the company was not entitled to recover back the money advanced for the purchase.

⁵ See cases cited in § 2382, note 3, ante.

⁶ In *Houldsworth v. City of Glasgow Bank* (1880) L. R. 5 App. Cas. 317, two of the points which Lord Hatherley considered to be concluded by authority were: "First, that an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable, if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. . . . Thirdly, that, if there cannot be a *restitutio in integrum*, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived." In the same case Lord Blackburn said: "I do

not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or, in the language of the civil law, when there is *dolus dans locum contractui*, the contract is not void, but only voidable. And it follows from this that, though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind."

In that case it was held that a person who had been induced to take shares in a company by the fraudulent misrepresentations of the directors could not rescind the contract after the company had gone into liquidation. For other cases in which this doctrine was applied, see *Mixer's Case* (1859) 4 De G. & J. (C. A.) 575, 1 L. T. N. S. 19, 7 Week. Rep. 677 (overruling *Brockwell's Case* [1857] 4 Drew. 206, 26 L. J. Ch. N. S. 855, 3 Jur. N. S. 879, 5 Week. Rep. 858); *Oakes v. Turquand* (1867) L. R. 2 H. L. 325, 36 L. J. Ch. N. S. 949, 16 L. T. N. S. 808, 16 Week Rep. 1201, affirming (1867) L. R. 3 Eq. 576; *Tenant v. Glasgow Bank* (1879) L. R. 4 App. Cas. 615; *Stone v. City & County Bank* (1877) L. R. 3 C. P. Div. (C. A.) 282, 47 L. J. C. P. N. S. 681, 38 L. T. N. S. 9.

In *Ogilvie v. Knox Ins. Co.* (1859) 22 How. 380, 16 L. ed. 349, the fact that subscriptions to the stock of a company were procured by the fraud of an agent was held not to be a defense to an action by judgment creditors to compel the subscriber to pay the balance due on the subscriptions.

opinion in England regarding the right of an aggrieved party to pursue this remedy.⁷ But in that country it is now "settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority."⁸

⁷The right was first asserted (according to the construction usually put upon the case; but see *infra*) by Lord Holt in *Hern v. Nichols* (1701) 1 Salk. 289. It was predicated by him upon the consideration that "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

In *Cornfoot v. Fowke* (1840) 6 Mees. & W. 358, Parke, B., said, *arguendo*: "It must be conceded, that, if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commits a fraud in making it, not only is the contract void, but the principal is liable to an action." (As to the precise point on which this decision turned, see § 2383, note 5, *ante*.)

A similar opinion was afterwards expressed by the same learned judge in *Moens v. Heyworth* (1842) 10 Mees. & W. 157, 10 L. J. Exch. N. S. 177, by Tindal, Ch. J., in delivering the judgment of the exchequer chamber in *Wilson v. Fuller* (1845) 3 Q. B. 68, 3 Gale & D. 570, and by Wilde, B., and Pollock, C. B., in *Udell v. Atherton* (1861) 7 Hurlst. & N. 181, 30 L. J. Exch. N. S. 337, 7 Jur. N. S. 777, 4 L. T. N. S. 797.

In *Wilde v. Gibson* (1848) 1 H. L. Cas. 605, Lord Campbell remarked, during the argument of counsel: "In an action upon contract, the representation of an agent is the representation of the principal, but in an action on the case for deceit, the representation or concealment must be proved against the principal." In his judgment, as only personal fraud was alleged, he declined to express any definite opinion upon the general question whether a principal is chargeable with the fraudulent representations of an agent.

In *Udell v. Atherton*, *supra*, Bramwell and Martin, B. B., took the position that an action of deceit could not be maintained against an innocent principal. The former judge sought to escape the authority of *Hern v. Nichols*, *supra*, by explaining it as action on a warranty, formerly called an action for

deceit, and treated the remarks upon the subject in *Wilson v. Fuller*, *supra*, as being mere *obiter dicta*, because fraud was not proved.

⁸*Mackay v. Commercial Bank* (1874) 30 L. T. N. S. 180. The following passage may be quoted from the judgment: "There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine. It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of, or gave a general authority to commit frauds; at the same time, it is not easy to define with precision the extent to which this liability has been carried."

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Willes, J., in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. (Exch. Ch.) 259, 12 Eng. Rul. Cas. 298. For further information as to this case, see § 2391, note 1, *ante*.

In *Weir v. Bell* (1878) L. R. 3 Exch. Div. (C. A.) 238, 47 L. J. Exch. N. S. 704, 38 L. T. N. S. 929, 26 Week. Rep. 746, Bramwell, L. J., reiterated the opin-

The same remark applies to the United States.⁹ In England it has now been definitely settled that action for damages may be main-

ion expressed in the above case, and strongly criticized the reason in *Barwick v. English Joint Stock Bank*, *supra*. But his criticisms have not been favorably received by any court. They were founded partly on the assumption that a master was not, as a rule, liable for the wilful wrong of his servant,—a manifest error on the part of the learned judge, as will be seen from the historical review in § 2239 *et seq.*, *ante*, which shows the state of the English law upon this subject at the time when his assertion was made,—and partly on the ground that the cases relied upon, being concerned with the liability of a principal for the acts of his agent, were not applicable as precedents, where the liability of a master for the acts of his servant was in question—a theory for which no authority was cited, and which, it may safely be said, is opposed to the general current of the modern decisions.

See also *Ludgater v. Love* (1881) 44 L. T. N. S. (C. A.) 694, 45 J. P. 600.

⁹ In *Bennett v. Judson* (1860) 21 N. Y. 238, the court laid it down that a principal cannot enjoy the fruits of a bargain made by his agent “without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity on the ground that the fraud was committed by his agent, and not by himself.”

In *Rhoda v. Annis* (1883) 75 Me. 17, 46 Am. Rep. 354, the court made the following remarks: “It is said that being personally innocent of the fraud, she [the defendant] cannot be convicted of that which has been committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable, that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties

which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or, in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. If he rescinds the contract he may, perhaps, lose all the consideration paid; and it would be difficult, if not impossible, to ascertain the amount received on account of the fraud, if that should be held to differ from the amount of damages recoverable in this form of action. But how does this change of form relieve the defendant's feelings or reputation? In either case the action is founded upon a fraud, and one which must be proved. In either case it is not her own fraud, but that of another, for whose doings she is legally, though perhaps, not morally, responsible. The counsel relies largely, if not entirely, upon the English cases to support his views, and some of them do so. But an examination of them will show that they are conflicting, many of them decidedly sustaining the instruction given to the jury in this case. It will, however, be noticed that in the most, if not all of them, the form of the action is not considered material. The object is to limit the extent of the liability to the advantages received from the fraud, applying a somewhat different test to the amount of damages to be recovered. It is unnecessary to refer to these cases in detail. They will be found collected and commented upon in Benjamin on Sales, §§ 462-467; Bigelow, Leading Cases in Torts, pp. 25-33. The American cases are more uniform, and sustain the instruction complained of, both as to the form of action and extent of liability.”

For other cases in which the right to maintain an action sounding in tort was affirmed, see *Hopkins v. Snedaker* (1874) 71 Ill. 449 (principals here had put it out of their power to reconvey land acquired by their agent's fraud);

tained against the principal, even though he may have received no benefit from the fraudulent transaction;¹⁰ the preponderance of authority in the United States seems to be so far opposed to this view.¹¹

2394. —as against a corporation.—*a. Action for rescission of contract induced by fraud.*—That the fraud of the agents of a corporation who have power to bind it as regards the given subject-matter is imputable to it, in so far that a benefit accruing from a contract induced by such fraud cannot be retained by it without the assent of the defrauded party, is a doctrine which apparently has never been questioned by any court.¹

Du Souchet v. Dutcher (1888) 113 Ind. 249, 15 N. E. 459; *Locke v. Stearns* (1840) 1 Met. 560, 35 Am. Dec. 382; *White v. Sawyer* (1860) 16 Gray, 586; *Haskell v. Starbird* (1890) 152 Mass. 117, 23 Am. St. Rep. 809, 25 N. E. 14; *Busch v. Wilcox* (1890) 82 Mich. 315, 46 N. W. 940; *McCord v. Western U. Teleg. Co.* (1888) 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; *Hornblower v. Crandall* (1879) 7 Mo. App. 220, 231, affirmed in (1883) 78 Mo. 587, 47 Am. Rep. 126; *Jeffrey v. Bigelow* (1835) 13 Wend. 518, 28 Am. Dec. 476; *Bennett v. Judson* (1860) 21 N. Y. 238; *Brown v. American Teleph. & Teleg. Co.* (1909) 82 S. C. 173, 63 S. E. 744; *Cleghon v. Barstow Irrig. Co.* (1906) 41 Tex. Civ. App. 531, 93 S. W. 1020; *Ladd v. Lord* (1863) 36 Vt. 194; *Lane v. Black* (1883) 21 W. Va. 617; and the cases cited in note 3 to the following section.

In *Kennedy v. McKay* (1881) 43 N. J. L. 288, 39 Am. Rep. 581, the position was taken that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting the sale. The authorities cited were the judgments of Bramwell and Martin, B. B., in *Udell v. Atherton* (1861) 7 Hurlst. & N. 181, 30 L. J. Exch. N. S. 337, 7 Jur. N. S. 777, 4 L. T. N. S. 797 (see note 8, *supra*), and of Lord Chelmsford in *Western Bank v. Addie* (1867) L. R. 1 H. L. Sc. App. Cas. 145. The other English decisions to a contrary effect which had already been rendered (see §§ 7, 8, *supra*) were, it seems, not brought to the attention of the court. *Kennedy v. McKay* was followed in *Titus v. Cairo, & F. R. Co.* (1884) 46 N. J. L. 393, and *Hutchinson v. Warwick* (1884) 46 N.

J. L. 200. Having regard to the present state of the authorities in other jurisdictions, it seems unlikely that the court of New Jersey would now approve the doctrine laid down in the *Kennedy Case*.

¹⁰ See cases cited in § 2392, *b, ante*, and § 2395, *post*.

¹¹ See § 2395, *b, post*.

¹ For case in which the doctrine was recognized, see *Ranger v. Great Western R. Co.* (1854) 5 H. L. Cas. 72 (fraud not established); *New Brunswick & C. R. & Land Co. v. Conybeare* (1862) 9 H. L. Cas. 711, 31 L. J. Ch. N. S. 297, 8 Jur. N. S. 575, 6 L. T. N. S. 109, 10 Week. Rep. 305 (fraud not established); *Western Bank v. Addie* (1867) L. R. 1 H. L. Sc. App. Cas. 146; *Oakes v. Turquand* (1867) L. R. 2 H. L. 325, p. 344, 36 L. J. Ch. N. S. 949, 16 L. T. N. S. 808, 15 Week. Rep. 1201; *Newlands v. National Employers' Acci. Asso.* (1885) 54 L. J. Q. B. N. S. (C. A.) 428, 53 L. T. N. S. 242, 49 J. P. 628; *Jardine v. Carron Co.* (1864) 2 Sc. Sess. Cas. 3d. series, 1128; *Upton v. Englehart* (1874) 3 Dill. 496, Fed. Cas. No. 16,800, affirmed in (1875) 91 U. S. 45, 23 L. ed. 203; *Scofield Rolling Mill Co. v. State* (1875) 54 Ga. 635; *American Ins. Co. v. Kuhlman* (1879) 6 Mo. App. 523; *Phoenix Ins. Co. v. Owens* (1899) 81 Mo. App. 201; *Unitype Co. v. Ashcraft Bros.* (1911) 155 N. C. 63, 71 S. E. 61; *Carolina Glass Co. v. State* (1910) 87 S. C. 270, 69 S. E. 391; *Union Bank v. Campbell* (1843) 4 Humph. 394; *Henderson v. San Antonio & M. G. R. Co.* (1836) 17 Tex. 560, 67 Am. Dec. 675; *Nelson v. Title Trust Co.* (1908) 52 Wash. 258, 100 Pac. 730 (fraud of subagent here); *Waldo v.*

b. Action of tort.—The right to maintain an action of tort against principals in respect of the fraud of their agents has been conceded

Chicago, St. P. & F. du L. R. Co. (1861) 14 Wis. 576.

In *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394, it was observed: "There can be no doubt that where an agent of a corporation or a joint stock company, in conducting its business, does something of which the joint stock company take advantage and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and authority supports justice in maintaining, that they cannot afterwards repudiate the agency, and say that the act which has been done by the agent is not an act for which they are liable."

In *Houldsworth v. City of Glasgow Bank* (1880) L. R. 5 App. Cas. 317, where the remedial rights of a person who had been induced by the fraud of the directors of a bank to take shares in it, one of the points concluded by authority was said by Lord Hatherley to be: Secondly, "that a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual."

In *Lynde v. Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178, Romer, J., remarked: "A person suing a company to obtain rescission of an agreement to take shares in it must, generally speaking, bring his case under one of the following heads: (1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf. (2) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority, including the case of a person constituted agent by subsequent adoption of his acts. (3) where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentation. (4) Where the contract is made on the basis of certain representations, whether the particulars thereof were known to the company or not,

and it turns out that some of them were material and untrue."

In *Upton v. Tribilcock* (1875) 91 U. S. 45, 23 L. ed. 203, affirming (1874) 3 Dill. 496, Fed. Cas. No. 16,800, the opinion was expressed that, "where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid instalments, when suit is brought by the corporation; and if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation."

In *Atlantic Bank v. Merchants' Bank* (1858) 10 Gray, 532, the court observed: "A bank is a corporation which can only act by agents; all the transactions of the bank, in buying or selling, borrowing and lending, every act by which they can convey property or acquire it, must be done by agents. When any one of these transactions is of such a character that false representations, practice of fraud, or knowledge of fraud practised by another, would avoid the transaction, if done by an individual, it will equally affect a corporation, if done or had by the agent in the same transaction, for a corporation."

In *Fogg v. Griffin* (1861) 2 Allen, 1, the court said: "A corporation can act only through agents. If they, while exercising the authority conferred on them, are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom."

In *Craigie v. Hadley* (1885) 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, where an action was held to be maintainable for the recovery of drafts which had been received for deposit for the manager of a bank at a time when he knew it to be insolvent, the court said: "The further rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract, and reclaim the property, unless it has come to the possession of a bona fide holder, is equally well settled, and does not at all depend upon the character of the wrongdoer,

with somewhat greater reluctance as against corporations than as against individuals.² But the existence of the right is no longer open

whether a corporation or natural person. A corporation may be in a legal sense guilty of a fraud. As a merely legal entity it can have no will, and cannot act at all, but in its relations to the public it is represented by its officers and agents, and their fraud in the course of the corporate dealings is in law the fraud of the corporation. There is more difficulty in establishing a fraud against a corporation, than against an individual. This arises from the difficulty in many cases of determining whether the fraud charged is imputable to the corporation. There may be knowledge of a fact by an agent of a corporation, which, if brought home to the corporation itself, would create responsibility in a given case, but as to which, notice will not be imputed to the corporation merely from the fact that it was known by the agent. We need not enter into the distinctions upon this subject. But the general rule is well established that notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation, in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion. (*Holden v. New York & B. Bank* (1878) 72 N. Y. 286; *Bank of United States v. Davis* (1842) 2 Hill, 452)."

As to the circumstances under which a person who takes shares in a company is entitled to rescind the contract on the ground of the fraudulent representations of the directors, see Lindley on Companies, 5th ed. pp. 68 *et seq.*; Laws of England, Vol. V. pp. 127 *et seq.*

² In *Dodgson's Case* (1849) 3 De G. & S. 85, 14 Jur. 386 (followed in *Bernard's Case* [1852] 5 De G. & S. 289, 21 L. J. Ch. N. S. 468, 16 Jur. 810), the reason assigned for the refusal of the court to remove from the list of the contributors, in proceedings for the winding up of an insolvent company, the name of a person who had been induced by the fraud of the directors to take shares, was that they were not the

agents of the company in respect of the commission of a fraud of this description.

In *Ranger v. Great Western R. Co.* (1854) 5 H. L. Cas. 86, where the plaintiff alleged that, by the fraud of the company's engineer, he had been induced to contract to do, and had done, works for them at a price grossly below their real cost, it was held that the evidence did not establish fraud. But Lord Cranworth used the following language: "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." This passage was cited in *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473, as an authority for the doctrine that an action of deceit may be maintained against a corporation. But, having regard to the views expressed by Lord Cranworth in other cases, it seems, it is clear, that he did not intend to take this position. In *Re Hull & L. Life Assur. Co.* (1858) 2 De. G. & J. (C. A.) 275, 4 Jur. N. S. 1005, 6 Week. Rep. 384, he declined to offer any definite opinion as to the correctness of the proposition, that directors are to be regarded as the agents of the company for the purpose of making representations by which the public shareholders were deceived. But some years afterwards, in *Western Bank v. Addie* (1867) L. R. 1 H. L. Sc. App. Cas. 145, he stated explicitly that in *Ranger v. Great Western R. Co. supra*, he did not mean to give it as his opinion that company could have been made to answer as for a tort in an action for deceit. In another part of his judgment he remarked that an attentive consideration of the cases had convinced him

to dispute, either in England or in the United States.³ With respect to one particular description of fraud, however, it is subject to an

that the true principle is that corporations "may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrongdoers, by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." In the same case Lord Chelmsford said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally." These latter statements were adverted to in the judgment delivered in *Mackay's Case*, *supra*, but were treated as being mere *obiter dicta*, not necessary for the decision, and therefore not authoritative. But the remark of Lord Cranworth as to what he had meant by his language in *Rangers' Case* was, strangely enough, overlooked. In *Houldsworth v. City of Glasgow Bank* (1880) L. R. 5 App. Cas. 317, p. 328, Lord Selborne approved of the general rule enunciated in *Barwick's Case* (see next note), and also expressed the opinion that the doctrine laid down by Lord Cranworth was "in principle right." But this opinion was apparently conditioned on the hypothesis that, in Lord

Cranworth's view, an action of tort was maintainable as long as the circumstances were such as to admit of a *restitutio in integrum*; at all events it is not easy to see on what other ground Lord Cranworth's doctrine can be reconciled even partially with the language used in *Barwick's Case*. But having regard to his statements in earlier cases than the one which contains the passage commented upon by Lord Selbourne, such an hypothesis would seem to be scarcely tenable. It should be observed that the concluding sentence of that passage is, to say the least, susceptible of the construction that Lord Cranworth, when he adverted to the inability of the defrauded party to sue the corporation after a *restitutio in integrum* had become impossible, had in mind the lapse, not of two concurrent remedies, but of the only remedy which was available at any time. In *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 76, the doctrine propounded by him was understood by the privy council as being one which imported an absolute denial of the right to sue a corporation in tort, and was disapproved on that ground.

³ In *Denton v. Great Northern R. Co.* (1856) 5 El. & Bl. 860, 25 L. J. Q. B. N. S. 129, 2 Jur. N. S. 185, 4 Week. Rep. 240, it was taken for granted that an action for deceit would lie against a corporation.

But apparently the earliest case in which the right to maintain such an action was explicitly affirmed was *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. (Exch. Ch.) 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298. That case was approved in *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394, 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473, where the contention that it was at variance with *Western Bank v. Addie* (1867) L. R. 1 H. L. Sc. App. Cas. 145, was rejected by the privy council on the ground that the point upon which the decision of the House of Lords had turned was one which was not presented to the exchequer chamber at all. But see note 2, *supra*.

important qualification, viz., that "when one has been induced by the fraud of the agents of a joint stock company to contract with that company to become a partner in that company he can bring no action of deceit against the company whilst he remains a partner in it."⁴

In a case where a railway company was induced by the false representations of an employee to deliver to him goods belonging to a person other than his employer, it was held that the question whether the employer could be held liable in an action of deceit, or merely on

In *Weir v. Bell* (1878) L. R. 3 Exch. Div. (C. A.) 238, 47 L. J. Exch. N. S. 704, 38 L. T. N. S. 929, 26 Week. Rep. 746, where the action was against directors personally, the majority of the court expressed the approval of the decision in *Barwick's Case*, *supra*.

For later English cases in which this form of redress was treated as being available against corporations, see *George Whitechurch v. Cavanagh* [1902] A. C. 117, 85 L. T. N. S. 349, 17 Times L. R. 746, 11 L. J. K. B. N. S. 400, 50 Week. Rep. 218; *Ruben v. Great Fingall Consolidated* [1906] A. C. 439, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248; *Newlands v. National Employers' Acci. Asso.* (1885) 54 L. J. Q. B. N. S. (C. A.) 428, 53 L. T. N. S. 242, 49 J. P. 628; *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. (C. A.) 714, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150; *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 76.

For American cases in which the same position was taken, see *Butler v. Watkins* (1871) 13 Wall. 463, 20 L. ed. 630; *Lynch v. Mercantile Trust Co.* (1883) 5 McCrary, 623, 18 Fed. 486; *Morton v. Scull* (1861) 23 Ark. 289; *Hamilton v. Georgia R. Co.* (1886) 78 Ga. 328; *McCord v. Western U. Teleg. Co.* (1888) 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315; *Lamm v. Port Deposit Homestead Asso.* (1878) 49 Md. 233, 33 Am. Rep. 246; *Western Maryland R. Co. v. Franklin Bank* (1882) 60 Md. 36; *Fitzgerald v. Fitzgerald & M. Constr. Co.* (1894) 41 Neb. 374, 59 N. W. 838; *Erie City Iron Works v. Barber* (1884) 106 Pa. 125,

51 Am. Rep. 508; *Mechanics' Bank v. New York & N. H. R. Co.* (1856) 13 N. Y. 599; *Haynor Mfg. Co. v. Davis* (1908) 147 N. C. 267, 17 L.R.A.(N.S.) 193, 61 S. E. 54; *Houston & T. C. R. Co. v. McKinney* (1881) 55 Tex. 176.

"A corporation aggregate being an artificial body,—an imaginary person of the law,—so to speak, is from its nature incapable of doing any act, except through agents, to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising; hence it is liable to the same extent, and under the same circumstances, that a natural person is chargeable with the acts or negligence of his agent, and if the agent conducts himself fraudulently, the same principles prevail where the principal is a corporation." *Tome v. Parkersburg Branch R. Co.* (1873) 39 Md. 36, 80, 17 Am. Rep. 540.

For a general discussion of the liability of corporations in respect of fraud, see Thompson on Corp. §§ 5470 *et seq.*

⁴ *Houldsworth v. City of Glasgow Bank* (1880) L. R. 5 App. Cas. 317, per Lord Blackburn, who added: "There are reasons which would not apply to every case in which a contract has been induced by fraud; as, for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind."

the ground of conversion, would depend upon whether the employee was aware of the falsity of the representations.⁵

2395. Absence of benefit to employer, right of action how far affected by.—a. English decisions.—The exchequer chamber, not long before its abolition, laid down the doctrine that a principal cannot be held liable for the fraud of an agent from which he derived no benefit.¹ The same position was subsequently taken by the court of appeal.² The doctrine thus enunciated seems to have been based, in

⁵ *Pennsylvania R. Co. v. Zug* (1864) 47 Pa. 482. There certain rags had been forwarded by a railway company to the wrong place, and the action was brought by it to recover the amount that it had been compelled to pay to the consignee, after the defendant's servant had taken the rags to his master's paper mill. The form of action was held to have been misconceived. The court said: "Undoubtedly a wagoner who hauls away goods in the course of his usual employment may involve his employer, to whose place of business he takes them and where they are used, in the consequences of a taking; but it by no means follows that by a taking he commits his employers to the consequences of a fraud. It requires more than this to create liability, in an action founded directly upon the fraud."

¹ *Swift v. Jewesbury* (1874) L. R. 9 Q. B. 301, 43 L. J. Q. B. N. S. 56, 30 L. T. N. S. 31, 22 Week. Rep. 319, reversing (1873) L. R. 8 Q. B. 244 (see § 2391, note 1, ante).

² In *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. (C. A.) 714, the secretary of a company answered questions which were put to him as secretary as to the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own benefit. In an action against the company for loss arising from the representations, the jury found that the secretary was held out by the company as a person to answer such inquiries on their behalf. Held (reversing the decision of the Queen's Bench division) that the company was not liable. Lord Esher, M. R., said: "The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely on behalf of

the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendants, but for himself. He had a friend whom he desired to assist and could assist by making the false statements; and as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms, that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal, since if there is authority to do the act it does not matter if the principal is benefited by it." Bowen, L. J., said: "There is, so far as I am aware, no precedent in English law, unless it be *Swift v. Winterbotham* (1873) L. R. 8 Q. B. 244, a case that was overruled upon appeal, *Swift v. Jewesbury* [see note 1, supra], for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. . . . It was argued on behalf of the plaintiffs in the present appeal that the defendant company, although they might not have authorized the fraudulent answer given by the secretary, had nevertheless authorized the secretary to do 'that class of acts' of which the fraudulent answer, it was said, was one. This is a misapplication to a wholly different case of an expression which in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298, was perfectly appropriate with regard to the

part at least, upon the hypothesis that certain judicial statements concerning the liability of a master or a principal in respect of acts

circumstances there. In that case the act was done, though not expressly authorized, was done for the master's benefit. With respect to acts of that description, it was doubtless correct to say that the agent was placed there to do acts of 'that class.' Transferred to a case like the present, the expression that the secretary was placed in his office to do acts 'of that class' begs the very question at issue, for the defendants' proposition is, on the contrary, that an act done not for the employer's benefit, but for the servant's own private ends, is not an act of the class which the secretary either was or could possibly be authorized to do. It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation, unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? The action against them, therefore, to be maintainable at all, must be an action of tort founded on deceit and fraud. But how can a company be made liable for a fraudulent answer given by their officer for his own private ends, by which they could not have been bound if they had actually authorized him to make it, and promised to be bound by it? The question resolves itself accordingly into a dilemma. The fraudulent answer must have either been within the scope of the agent's employment or outside it. It could not be within it, for the company had no power to bind themselves to the consequences of any such answer. If it is not within it, on what ground can the company be made responsible for an agent's act done beyond the scope of his employment and from which they derived no benefit? This shows that the proposition that the secretary in the present case was employed to do that 'class of acts' is

fallacious, and cannot be maintained. The judgment of the court below is based upon the view that the act done was in fact within the scope of the secretary's employment, and if this proposition cannot be maintained, the judgment must fall with it." It would seem to be extremely questionable, to say the least, whether the doctrine postulated as one of the steps in the foregoing argument, *viz.*, that a corporation has no power to consent to a fraud, was ever accepted in England, except with regard to transactions wholly outside the scope of the corporate character. See §§ 2242, 2243, *ante*. This aspect of the matter was not adverted to in the subsequent case in which the House of Lords declined to adopt the opinion of the learned judges. See note, 5, *infra*.

In *Thorne v. Heard* [1894] 1 Ch. (C. A.) 599, affirmed in [1895] A. C. 495, 64 L. J. Ch. N. S. 652, 11 Reports, 254, 73 L. T. N. S. 291, 44 Week. Rep. 155, the defendants, the first mortgagees of property, sold it under their power of sale in 1878, and employed S., a solicitor, to conduct the sale for them. S. received the sale moneys, and, after having satisfied the defendants' mortgage debt, retained the surplus sale moneys, falsely representing to the defendants that he, S., had the authority of the plaintiff, the second mortgagee, to receive the same. S. applied the surplus to his own use, and until March, 1891, concealed his fraud by continuing to pay the plaintiff interest on the second mortgage as though it were still existing. In February, 1892, S. became bankrupt, and the true facts were discovered; whereupon the plaintiff brought an action against the defendants for an account of the sale moneys, and payment of what was due to him on his second mortgage. Held, that the fraud of S. could not be regarded as the fraud of the defendants,—that is, as a fraud committed by S. as agent for them or for their benefit, so as to render them responsible notwithstanding they were innocent of the fraud.

For a Scotch case in which the judges assumed that no action could have been maintained against the employer, if the evidence had not shown that he had been benefited by a certain forgery,

done by an agent for his benefit were to be construed as including by implication the converse proposition, that liability could not be predicated except in cases where the element of benefit to the master or principal was present.³ For a while it seemed not improbable that this view would be adopted by the House of Lords.⁴ But that tribunal has now definitely pronounced in favor of the theory that a fraud committed by an agent within the scope of his employment may be imputed to the principal, even though the principal may have derived no benefit from the fraudulent transaction.⁵ It should be remarked that the correctness of this theory had been taken for

see *Clydesdale Bank v. Paul* (1877) 4 Sc. Sess. Cas. 4th series, 626, 14 Scot. L. R. 403. See § 2493, note 3, *post*.

In *Gibbons v. Wilson* (1889) 17 Ont. Rep. 290, Ferguson, J., laid it down as the doctrine embodied in the English cases so far decided, that the fraud of an agent "does not bind his principal, unless done for his benefit, or he knows, or assents to, or takes advantage of it." No reference was made to this point by either of the two courts to which the case was subsequently carried on appeal. (1890) 17 Ont. App. Rep. 1 (1897) 28 Can. S. C. 207.

³ See especially the passage quoted in § 2383, note 1, *ante*, from the judgment of Willes, J., in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. (Exch. Ch.) 259, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298. For the true meaning of this passage, see note 5, *infra*.

Compare also the remark of Wilde, B., in *Udell v. Atherton* (1861) 7 Hurlst. & N. 172, 30 L. J. Exch. N. S. 337, 7 Jur. N. S. 777, 4 L. T. N. S. 797, that the doctrine applied to in *Grant v. Norway* (1851) 10 C. B. 565, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258, and *Coleman v. Riches* (1855) 16 C. B. 104, 3 C. L. R. 795, 24 L. J. C. P. N. S. 125, 1 Jur. N. S. 596, 3 Week. Rep. 453 (see § 2386, notes 1 and 5, *ante*), was "not applicable to fraud committed in the making of contracts which the principal has adopted, and of which he has claimed and obtained the benefit."

⁴ The former of the cases cited in note 3, *supra*, was referred to with approval in *George Whitechurch v. Cavanagh* [1902] A. C. 117, 85 L. T. N. S.

349, 17 Times L. R. 746, 71 L. J. K. B. N. S. 400, 50 Week. Rep. 218.

In *Ruben v. Great Fingall Consolidated* [1906] A. C. 439, Lord Davey expressed the opinion that when a servant "is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers."

⁵ *Lloyd v. Grace* [1912] A. C. 716, 81 L. J. Q. B. N. S. 1140, reversing [1911] 2 K. B. (C. A.) 489, 104 L. T. N. S. 789, 80 L. J. K. B. N. S. 959, 27 Times L. R. 409, 55 Sol. Jo. 461. In this case, the managing clerk of a firm of solicitors misappropriated the proceeds of a client's property of which he had obtained control. Lord Macnaghten thus discussed the defense which was rested on the fact that the fraud was committed not for the benefit of the firm, but for the benefit of the clerk himself: "It was contended that *Barwick's Case* is an authority for the proposition that a principal is not liable for the fraud of his agent, unless the fraud is committed for the benefit of the principal. *Barwick v. English Joint-Stock Bank* is, no doubt, a case of the highest authority. It was decided in the exchequer chamber, and the judgment was delivered by Mr. Justice Willes. But I agree with my learned and noble friend Lord Halsbury that the case has been misunderstood in late years, and that it does not decide any such proposition as that for which it was cited in the court of appeal. It decided two things. It decided that the learned trial judge was wrong in nonsuiting the plaintiff. It also decided that if, on a new trial, the jury should come to the conclusion that the agent of the bank had in fact committed the fraud which in the pleadings was charged as the fraud of the bank

granted in a case decided by the privy council more than thirty years before the opinion of the House of Lords was declared.⁶ But this aspect of the defendant's liability was not explicitly referred to or discussed.

then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded. And I think it follows from the decision, and the ground on which it is based, that in the opinion of the court a principal must be liable for the fraud of his agent committed in the course of his agent's employment, and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not. . . . With the most profound respect for Lord Bowen and Lord Davey, I cannot think that the opinions expressed by Lord Bowen in *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) 56 L. J. Q. B. N. S. 449 L. R. 18 Q. B. Div. 714, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150, and by Lord Davey in *Ruben v. Great Fingall Consolidated* [1904] 2 K. B. 712, 73 L. J. K. B. N. S. 872, 53 Week. Rep. 100, 91 L. T. N. S. 619, 20 Times L. R. 720, 11 Manson, 353; in H. L. [1906] A. C. 439, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times L. R. 712, 13 Manson, 248, in reference to the question under discussion, can be supported either on principle or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both. The only difference, in my opinion, between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approve and reprobate." Lord Loreburn said: "That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it in the sense in which Mr. Justice Willes means the word 'benefit' is not true upon the admitted facts. Mr. Justice Willes cannot have meant that the

principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that." Lord Halsbury said: "So far from giving any authority for the proposition in favor of which it is quoted, the court went out of its way to disclaim there being any doubt about the principle that the principal is answerable for the act of his agent in the course of his master's business, and the words added, 'and for his benefit,' obviously mean that is something in the master's business; and the judgment in question says that that question was settled as early as Lord Holt's time,—a tolerably strong indication that the judges thought there was not much doubt about what the law is now." The case referred to is *Hern v. Nichols* (1708) 1 Salk. 289. See § 2383, note 2, ante.

⁶ *Swire v. Francis* (1877) L. R. 3 App. Cas. 106.

In a case decided three years previously the same tribunal had used the following language: "It is not necessary to determine whether or not the plaintiffs could have maintained their verdict if they had proved only they had sustained damage from the fraudulent representation of an agent of the defendants made within the scope of his authority, without proof of the defendants having profited thereby; nor whether they could have maintained it, if they had not proved the representation of Sancton to be within the scope of his authority, but had proved that the defendants accepted the benefit of it, with notice of the fraud,—propositions which have been contended for at their Lordships' bar. It is enough in this case to decide that the plaintiffs, having established that they have suffered damage and that the defendants commensurately profited by the fraudulent representation of Sancton made within the scope of his authority, are entitled to maintain their verdict." *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 416.

b. American decisions.—Some authority, more or less explicit, for the doctrine that an employer cannot be held liable for the fraud of an employee from which no benefit has accrued to him, may be found in the American reports.⁸ But that doctrine is inconsistent—having regard to the circumstances under review—with several decisions of the New York court of appeals.⁹ So far as the future is concerned, the judgment of the House of Lords that is reviewed in the preceding section will presumably be accepted by American judges as an authoritative statement of doctrine.

B. MISCELLANEOUS TORTS INJURIOUS TO REAL PROPERTY.

2396. Nuisance.—The cases on which the liability of an employer in respect of a nuisance created by the negligent or wilful act of his servant has been affirmed or denied on the ground that it was or was not done within the scope of the servant's employment are collected in the subjoined note.¹

⁸ "The liability of the principal for the fraudulent acts of the agent, done within the scope of his employment, is limited to those cases in which the principal derives a benefit from the act of the agent." *Lothrop v. Adams* (1882) 133 Mass. 471, 43 Am. Rep. 528, *arguendo*.

In *Erie City Iron Works v. Barber* (1884) 106 Pa. 125, 51 Am. Rep. 508, it was laid down that an action of deceit lies against a corporation where the agent's fraud was committed within the scope of his authority, and the principal was benefited by it.

In *Lowndes v. City Nat. Bank* (1809) 32 Conn. 8, 22 L.R.A. (N.S.) 408, 72 Atl. 150, where the cashier of a bank issued worthless checks for his own purposes, the circumstance that his employers were not benefited by the fraud was treated as negating the inference of a vicarious liability on their part. But they were held responsible on the ground of negligence in so managing their business as to give him an opportunity to commit such irregularities. See § 2223, note 3, *ante*.

See also Bigelow, *Fraud*, pp. 362, 363.

⁹ *New York & N. H. R. Co. v. Schuyler* (1865) 34 N. Y. 36; *Griswold v. Haven* (1862) 25 N. Y. 595, 82 Am. Dec. 380; *Armour v. Michigan C. R. Co.* (1875) 65 N. Y. 111, 22 Am. Rep. 603.

In a treatise of high reputation it is

stated that the weight of authority is in favor of the doctrine that "when an officer of a corporation does an act which constitutes a fraud upon a third person, or upon another corporation, of which he is also an officer, the first-mentioned corporation is chargeable with notice of the nature of the transaction, although the fraud is perpetrated for his own benefit, where he also represents the corporation in the transaction." Quoted with approval in *First Nat. Bank v. Stribling* (1905) 16 Okla. 41, 86 Pac. 512. But this statement only touches one particular class of cases.

¹(a) *Obstructions of navigable river.*—In *Reg. v. Stephens* (1866) L. R. 1 Q. B. 702, 7 Best & S. 710, 35 L. J. Q. B. N. S. 251, 12 Jur. N. S. 961, 14 L. T. N. S. 593, 14 Week. Rep. 859, where the rubbish from a slate quarry was deposited by the owner's servants in a navigable river, it was conceded that a civil action would lie against the defendant.

In *Enos v. Hamilton* (1869) 24 Wis. 658, where the obstruction complained of was created by the logs which the defendant's servants were running, an instruction by which the jury were told that the plaintiff was entitled to recover even though the defendant's servants put in the obstruction by order of the boom company was approved. The

court said: "It is very clear that, if the boom company had no authority, under their charter, to obstruct the navigation of the river, they could not authorize other persons to obstruct it. As was well remarked by the counsel for the plaintiff, if the company itself could not do the act complained of, it evidently could not authorize others to do it. It would be merely directing them to do an unlawful act, which direction is no protection whatever to the persons acting unlawfully. Therefore, that the servants of the defendants obstructed the river in the manner they did, by the direction of the boom master, manifestly is no sufficient warrant or justification."

(b) *Obstruction of public highway.*—In *Harlow v. Humiston* (1826) 6 Cow. 189, an action was held to be maintainable where the plaintiff's horse was killed by running against some logs which the defendant's servant had, in the ordinary course of his duties, left on a highway in a place where the defendant had been accustomed for many years to leave them.

In *Sullivan v. McManus* (1897) 19 App. Div. 167, 45 N. Y. Supp. 1079, the driver of a wagon, acting under the direction of a servant in charge of a stable where it was customarily left each day in pursuance of a contract with the servant's employers, placed it in the street adjacent to the stable. Held, that a person injured by the obstruction thus created was entitled to recover damages from the proprietors of the stable. The court said: "The question that we have to determine is whether or not these appellants, against whom the jury have rendered their verdict, participated in the creation or maintenance of this nuisance so as to render them responsible for the damage which it has caused. It was no defense to say that they had no personal knowledge of the particular instructions given to the driver by their employee on the morning in question. He was employed by them to attend at the stable. He and the foreman were in charge of the stable at the time the wagon was left there. They were the ones to whom a person coming with a wagon to be placed in the stable at that time were required to deliver it: and it could not be doubted that had either of them put this wagon into the street, in discharge of their duty as the per-

sons in charge of this stable at that time, the defendants would have been liable. And so, when this driver came to the stable with the wagon, it was the duty of the men to receive the wagon and store it upon the premises. Instead of doing so, one of them directed the driver to leave the wagon in the street, and that the driver did. It seems to us that this act was directly within the authority conferred upon the men when in charge of the stable to take care of the horses and wagons left with the proprietors of the stable for safe-keeping; and this wagon having been thus unlawfully stored in the street under direction given by one acting in the discharge of his duty in the custody of the stable at the time, the proprietors of the stable were responsible. If the driver had driven this wagon into the stable, and the stableman in charge had put it back upon the street, there would be no doubt of the participation of the defendants in the erection and continuance of the nuisance. The substance of what this stableman did was just that."

In *Pittsburgh, Ft. W. & C. R. Co. v. Maurer* (1871) 21 Ohio St. 421, it was held that a railroad company was not liable for injuries resulting from the obstruction of a highway crossing by refuse removed from its cars by a brakeman and placed in the highway for his own use.

(c) *Objects calculated to frighten animals.*—The action was held to be maintainable in *Phelon v. Stiles* (1876) 43 Conn. 426 (horse frightened by some bags of bran which the driver of a delivery wagon left on a highway while he went up a side road)—*Tinker v. New York, O. & W. R. Co.* (1893) 71 Hun, 431, 54 N. Y. S. R. 528, 24 N. Y. Supp. 977 (horse frightened by some old planks which a railroad section crew, after having removed them from a crossing, had left close by upon the right of way); *Baxter v. Chicago, R. I. & P. R. Co.* (1893) 87 Iowa 488, 54 N. W. 350 (horse frightened by carcass deposited by railway employees whose duties required them to remove from the track the carcasses of animals killed by trains).

As to the master's liability for sporadic acts calculated to frighten animals, see § 2379, *ante*.

On the other hand, in *Smith v. Spitz* (1892) 156 Mass. 319, 31 N. E. 5, it

was held that the employer of a person hired to post bills was, as a matter of law, not liable for the death of a horse frightened by a heap of bills which he had left on a highway at a place 15 miles away from that at which they were to be posted. See § 2342, *ante*. Compare the cases cited in § 2295, *ante*.

(d) *Disagreeable odors*.—In *Hopkins v. Western P. R. Co.* (1875) 50 Cal. 190, where the laborers engaged on the construction of the defendant's railroad used as a privy a culvert which had been built to carry the line, but which was within the limits of a street, it was held that a person whose house adjoined the culvert could not hold the defendant responsible for the annoyance thus caused. The court said: "The employees of defendant were not moving within the scope of their employment in the acts complained of, but on their own account; and it does not appear that the additional easement was enjoyed exclusively by the defendant. The doctrine *respondet superior* does not apply." It is possible, however, that the action might have been maintained on another ground, *viz.*, that, in view of the natural wants of the defendant's employees which it must be presumed to have understood, some such nuisance as that complained of was likely to result from a failure on its part to furnish them with suitable accommodations in convenient proximity to the place of work. But the theory of a personal misfeasance did not occur either to counsel or to the court.

(e) *Deposit of dangerous substances at a place where they may inflict injury*.—In *Burke v. Shaw* (1882) 59 Miss. 443, 42 Am. Rep. 370, the owner of a foundry for years had given the ashes to his engineer in consideration of his removing them after working hours. To the knowledge of his employer he deposited them on an adjacent uninclosed lot with the permission of the parties who owned it, and sold them to third persons and to the defendants. A young child, while running across that lot, fell into a quantity of the hot ashes and was burned. Held, that the owners of the foundry were not liable therefor. The court said: "The second theory on which the defendants' liability must be rested is more plausible, but depends for its soundness upon the assumption that

Elliott was the agent or servant of the defendants in depositing and in failing to guard the ashes committed to his custody. Undoubtedly he was their agent in taking them from the furnace, and so long as they remained upon their premises the defendants would be liable for any nuisance created in their deposit. While removing them from the furnace he was their servant, doing for them that which was indispensable to the working of the foundry. If they permitted him to so deposit them upon their premises as to create a nuisance, they would be liable to those having business there, regardless of the ownership of the material by which or the persons by whom it was created. Does their liability extend beyond this? If the ashes had been given to some person entirely disconnected from the foundry, in payment for their removal from the furnace, it seems clear that a transportation of them from the premises by such person would have terminated the defendants' responsibility for them in any shape. Is the result changed by the fact that Elliott was their engineer? If I give to my domestic servant the sweepings of my premises, in payment or partial payment of his wages, am I responsible for any nuisance which he may create with them after he has carried them to his own lot? Does the fact that I know the disposition which he is making of them impose any liability on me? If a farmer makes payment to his harvest hands in a portion of the hay cut by them, and one of them stores the portion received by him, in open view of the employer from whom he obtained them, but on his own premises, and in such close proximity to a fire that his adjoining neighbor's fence or residence is destroyed, is the farmer made liable either by having given the hay to his employee, or by his knowledge of the manner in which his employee was dealing with it? To ask these questions is to answer them; and it seems difficult to draw a satisfactory distinction between them and the case before us. If Elliott had not been the employee of the defendants in other respects, or if, being their employee, he had transported the ashes to his own lot at a distance of a mile from the foundry, there would seem but little pretense for seeking to make the defendants suffer for the way in which

In one of the cases under this head, recovery was denied on the ground that a master could not be held liable for a wilful tort.² But the doctrine thus applied has been abandoned in the majority of jurisdictions. See §§ 2239 *et seq.*, *ante*.

As the liability of a defendant for injuries caused by a nuisance depends solely upon whether it was caused or continued by him, evidence that he exercised due care in regard to the selection of the servant appointed by him to warn third persons regarding its existence is wholly immaterial in an action to recover for such injuries.³

The liability of a corporation for a nuisance has frequently been affirmed.⁴

2397. Other wrongful acts.—Actions against the master of the tortfeasor have been held to be maintainable under the following cir-

he stored them, although they were perfectly aware of his negligence with respect to them. It is the double fact of the proximity and of the general employment that confuses the mind, and yet neither of these things really affects the principle involved. Elliott was the absolute owner of the ashes, as soon as they left the furnace, free to do with them as he pleased, subject in no respect to the control of the defendants, and alone responsible for his conduct with regard to them, whether stored on an adjoining lot procured for the purpose, or transported to one already owned by him a mile distant. In no point of view can we see how the defendants are to be made liable for the manner in which another has dealt with his own."

(f) *Obstruction of sewer pipe in a building.*—In *Marshall v. Cohen* (1871) 44 Ga. 489, 9 Am. Rep. 170, the landlord of a building was held to be liable for damage caused to the goods of his tenant by water which flowed from a water-closet in consequence of the negligence of his servants in allowing the out-flow pipe to become obstructed.

(g) *Use of explosives.*—*Hay v. Cohoes Co.* (1848) 2 N. Y. 159, 51 Am. Dec. 279, affirming (1848) 3 Barb. 42 (nonsuit erroneous where rocks were blasted so that fragments fell on plaintiff's premises); *Wright v. Compton* (1876) 53 Ind. 337, 2 Mor. Min. Rep. 189 (defendant liable for injuries caused to traveler on highway by rocks blasted in his quarry).

(h) *Invasion of ferry.*—In *Huzzey v. Field* (1835) 2 Crompt. M. & R. 432, 1

Gale, 166, 5 Tyrw. 855, 4 L. J. Exch. N. S. 239, 12 Eng. Rul. Cas. 139, where the owner of a boat which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master, it was held that as the servant was "acting at the time in the course of his master's service and for his master's benefit," the master was answerable for his act, and would have been liable for it, "although no express command or privity of his master was proved," if it had been distinctly proved to have amounted to an invasion of the ferry. But the conclusion of the court was that the facts were not such as to warrant it in entering a verdict for the plaintiff.

² *Douglass v. Stephens* (1853) 18 Mo. 362 (verdict for defendant affirmed, where rubbish thrown into a gutter when his store was cleaned out by his servants obstructed a sewer, and so caused the water therein to flow into plaintiff's cellar).

³ *South & North Ala. R. Co. v. Chapell* (1878) 61 Ala. 527 (plaintiff fell into ditch dug in highway by the employees of a railroad company).

⁴ *Chesnut Hill & S. H. Turnp. Co. v. Rutter* (1818) 4 Serg. & R. 16, 8 Am. Dec. 675; *First Baptist Church v. Schenectady & T. R. Co.* (1848) 5 Barb. 79; and some of the cases cited in note 1, *supra*.

cumstances: Where a servant who was ordered to cut trees on his master's land cut some outside his master's boundaries;¹ where laborers sent by the defendant to cut upon the plaintiff's land trees of not less than a certain diameter chopped down a number of smaller ones;² where employees removed stones from land that did not belong to their employer;³ where a servant employed in a mine took mineral from a mine belonging to a third person;⁴ where a servant engaged in constructing a telegraph or telephone line cut the trees of a third person to make a passage for it;⁵ or to render it secure;⁶ where construction crews camped on a railroad company's right of way, cut down the fences of neighboring landowners, and used them for fuel to cook their meals;⁷ where section men on

¹ *Carman v. New York* (1862) 14 Abb. Pr. 301; *Gerhardt v. Swaty* (1883) 57 Wis. 24, 14 N. W. 851; *Harris v. Brunette Saw Mill Co.* (1893) 3 B. C. 172, and cases cited in note 12, *infra*.

In *Luttrell v. Hazen* (1855) 3 Sneed, 20, it was held error to instruct jury that the plaintiff would or would not be entitled to recover, according as the trespass was committed by the agents of the defendant with his knowledge or by his direction, or the cutting of the timber was not procured or directed by him. The only prerequisite to recovery was that the servant should have been acting in the business of his master.

In *Avery v. White* (1907) 79 Conn. 705, 66 Atl. 517, evidence offered by the defendant as to the instructions given to the laborers concerning the size of the trees to be cut was held to have been properly excluded. The professed purpose of the evidence was to show that the smaller trees were cut without authority. The court observed that it would possibly have been "admissible upon the question of damages had it appeared, or been claimed in connection with the offer, that the cutting of the smaller stuff was not necessary to the cutting and removal of the larger timber from the tract in dispute."

³ In *Hawks v. Charlemont* (1871) 107 Mass. 414, a town in which the highways and bridges had been injured by a freshet voted that the selectmen be its agents to repair them. Acting in execution of the purpose of the vote, the selectmen, by their servants, entered a close without the consent of its owner, and took away stone from it to

repair a bridge, and by removing the stone exposed part of the close to be washed away by a river. Held, that the town was liable in tort to the owner of the close.

⁴ *Dean v. Thwaite* (1855) 21 Beav. 621, 1 Mor. Min. Rep. 77; *Joicey v. Dickinson* (1882) 45 L. T. N. S. 643; *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655.

⁵ *Postal Teleg. Cable Co. v. Brantley* (1894) 107 Ala. 683, 18 So. 321 (liability predicable, though trees were cut in disobedience to master's directions);

⁶ In *Western U. Teleg. Co. v. Satterfield* (1889) 34 Ill. App. 386, a telegraph company was held liable, where a lineman, authorized to remove trees which he regarded as dangerous to the line, cut some trees on the plaintiff's land.

In *Van Siclan v. Jamaica Electric Light Co.* (1899) 45 App. Div. 1, 61 N. Y. Supp. 210, affirmed in (1901) 168 N. Y. 650, 61 N. E. 1135 (memo.) an action was held to be maintainable against electric light company, where one of its servants, who had been instructed by the manager to cut such branches from trees as it might be necessary to take off in order to prevent contact with the wires, went onto plaintiff's land to cut off certain overhanging branches against which protection could have been secured by the insulation of the wires.

⁷ *Hord v. Holston River R. Co.* (1909) 122 Tenn. 399, 135 Am. St. Rep. 878, 123 S. W. 637, 19 Ann. Cas. 331. The *ratio decidendi* was that it was the

a railroad, while carrying out their instructions to fill in certain holes on the right of way, threw large quantities of earth into and on the plaintiff's house, which was built partly on the railroad company's land;⁸ where watchmen engaged to protect property, and authorized to search for it when it should be taken away, entered a house upon information that some articles had been removed there, and ransacked the premises in a brutal manner;⁹ where the servant of a gas company broke open the door of a cellar for the purpose of reaching a meter, which he had been ordered to remove if he should be unable to collect the money due for gas supplied by the company;¹⁰ where a servant in charge of sheep or cattle drove them onto a third person's land for the purpose of pasturing them;¹¹

company's duty to furnish firewood to enable the laborers to cook their meals. It is submitted, however, that this circumstance was not sufficient to bring the trespass within the scope of the laborers' employment. The ruling can apparently be supported only upon the hypothesis, for which it is believed no adequate authority can be produced, that the company was absolutely bound to see that the laborers did not interfere with the property adjacent to the right of way. The necessity for this extreme hypothesis is still more apparent with relation to the other point decided; viz., that the company was liable for the acts of the laborers in letting down fences, and so enabling animals to enter the field and destroy the crops.

⁸ *Ft. Worth & N. O. R. Co. v. Smith* (1894) — Tex. Civ. App. —, 25 S. W. 1032. The court said: "Where a master appoints a servant to discharge a particular work, the duty by virtue of an implied contract is thereby devolved upon the master to see that the servant in the discharge of the task allotted to him shall properly respect the persons and property of others; and if, in the performance of the appointed labor, the servant shall injure the person or property of third persons, the master is liable whether the trespass is due to the malice or the simple negligence of the servant. It becomes the duty of the master to protect such third persons from violence and insult on the part of the employee." For the purposes of the decision, there was manifestly no need to treat the circumstances as imposing upon the company the duty of an in-

surer in respect of the conduct of its servants. The broad principle formulated is clearly not good law, so far as the majority of jurisdictions are concerned. See § 2244, *ante*.

⁹ *Lesch v. Great Northern R. Co.* (1904) 93 Minn. 435, 101 N. W. 965.

¹⁰ *Reed v. New York & R. Gas Co.* (1904) 93 App. Div. 453, 87 N. Y. Supp. 810.

¹¹ *French v. Cresswell* (1886) 13 Or. 418, 11 Pac. 62. The court said: "The herder in this case had charge of the sheep. It was his duty to keep them off the respondent's land, and whether he negligently or wilfully violated it cannot, it seems to me, shield the appellant from liability for the damages done the respondent, so long as the act was within the course of the herder's employment. If he was the appellant's servant while doing the act, the latter is responsible; but if he were a principal in the transaction, were his own master, were doing the act upon his own responsibility, and to accomplish private ends, he alone is liable. . . . I distinguish between the wilfully doing of an act in such case and doing of it maliciously. The former may imply that it was done through stubbornness and obstinacy, but not necessarily for any ulterior purpose; while the latter implies that it was done with an intent to injure. The one exhibits a set purpose to do the thing itself; the other to do it in order to gratify hatred or ill feeling. It was the appellant's duty to keep his sheep off the respondent's land. He was notified to do so, and if he employed ineffectual means to do it, he should be responsi-

As the tortious acts in all cases of this description involve the infringement of an absolute right, the injured party is clearly entitled to recover, irrespective of whether the misconduct of the servant was the result of wilfulness or mere negligence.¹²

In some of the cases under this head in which the plaintiffs were unsuccessful, the liability of the master was denied simply on the ground that the facts were not such as to warrant the conclusion that the trespasses complained of were committed within the scope of the servant's employment.¹³ Other cases were determined with reference to the doctrine, now abandoned by nearly all the courts

ble unless he were prevented by means over which he had no control. The herder may have acted wilfully in the matter, but so long as he kept within the limit of his employment, the appellant was answerable for his acts. *Wharton, Neg.* § 171. Whether the herder was pursuing the course of his employment or not when he permitted the sheep to eat off the respondent's grass, was a question for the jury. Their finding that he acted wilfully in regard to the matter would not have been sufficient unless they should also find that he was acting to subserve a private end."

In *McAlary v. Stafford* (1902) 2 New So. Wales St. R. 386, 19 W. N. 294, it was held that the master was liable for an act of the same description, although it was done without his orders or consent.

In *Foreman v. McNamara* (1890) 23 Vict. L. R. 501, the *ratio decidendi* was that it is the function of a driver of cattle to feed as well as drive the cattle under his charge.

¹² The liability of a master for the value of trees cut by mistake upon the land of another person was affirmed in *Hill v. Morey* (1854) 26 Vt. 178; *Mishler Lumber Co. v. Craig* (1905) 112 Mo. App. 454, 87 S. W. 41.

In *Smith v. Webster* (1871) 23 Mich. 298, another case involving such a tort, the court made the following remarks: "There are many cases of wilful misconduct for which an employer will not be liable, because, in such cases, the wrongdoers may be regarded as having renounced his service to that extent. Yet even for wilful misconduct there are some instances of liability, where the employer has furnished peculiar means whereby the employee is enabled

to do the mischief. This doctrine has sometimes been applied to the misconduct of the servants of carriers and the deputies of officials. But where the act is not wilful, and is done in the regular course of the employment, there is quite generally a distinct liability resting on the grounds of an implied agency. The employer who leaves to his subordinates a discretion, which they abuse, is responsible as if he had approved their action. And when, as in this case, his agent or overseer sets or allows his men to work on other men's lands, the agency covers the trespass. There is no distinction in principle between an express and an implied direction to the men to work, where the overseer instructs or permits them. They are, to all intents and purposes, working under orders in either case, unless they act wilfully. Here they worked with the full knowledge of the overseer. If the offense of the men would be trespass, there is no sense in holding the master exempt from the same kind of responsibility. He is only liable because the law creates a practical identity with his men, so that he is held to have done what they have done. If the injury to the plaintiff is a direct one, and not an incidental or consequential one, the remedy should be trespass, and not case; and there is, we think, no real foundation for any other distinction. Cutting down a tree is an act, and not a consequence; and whether it is done by the servant of another or by one acting in his own behalf, the injury is precisely the same."

¹³ In *Stickney v. Munroe* (1857) 44 Me. 195, where the general manager of a water mill, authorized to keep it in repair, lease it, and collect the rents,

(see §§ 2238 *et seq.*, *ante*), that in the absence of prior authorization or subsequent adoption, a master could not be charged with the wilful torts of his servant.¹⁴ In other cases the *ratio decidendi* was a theory of which the present standing is somewhat doubtful, so far

made excavations in the bed of the stream for the purpose of obtaining additional water, the consequence being that water was wrongfully diverted from the plaintiff's mill wheel, the manager's employer was held not to be liable for the damage thus caused. The court observed that the evidence showed that the manager "was at least held out to the world as the defendant's general agent in the charge of the property aforesaid. But it is manifest that the scope of this agency was limited to the business of keeping the mills in a proper condition, leasing the same, and receiving the rents therefor. . . . From a full view of all the evidence in the case, there is nothing showing that these excavations were made for the use and benefit of the defendant, and that they were done by Lowell, . . . in the execution of his agency as he was held out by the defendant." It is apprehended that neither the conclusion arrived at in this case, nor the reasoning by which it was sustained, will meet with universal approbation. There seems to be no adequate authority for the theory that the doctrine as to "holding out" applies to actions in respect of a servant's torts. It is submitted that the only essential point to be determined is whether the given tort was, as a matter of fact, committed within the scope of the tort-feasor's employment, and that the question whether the injured party was or was not led to form a certain opinion regarding the extent of his powers is entirely irrelevant.

In *Boulard v. Calhoun* (1858) 13 La. Ann. 445, a planter's overseer, having been informed that a certain woman was illegally trafficking in articles stolen by slaves on the plantations in the neighborhood, took some of his master's slaves, and, with their assistance, turned her out of her house and burned it down. Held, that the wrongful act was not within the scope of the overseer's duties, but that the planter might properly be held liable on the ground that he knew what was contem-

plated, and failed to prohibit the taking of his slaves for such a purpose.

¹⁴ *Blackburn v. Baker* (1840) 1 Ala. 173 (master not liable in trespass for the act of his servant in cutting lumber on the land of a third person); *Eaum v. Brister* (1858) 35 Miss. 391 (same doctrine affirmed with regard to the same kind of tort, but liability was imputed on the ground of the master's having sanctioned it); *Ferguson v. Terry* (1840) 1 B. Mon. 96 (defendant not liable for the act of his servant in pulling down plaintiff's fence and letting hogs into his field); *Wesson v. Seaboard & R. R. Co.* (1857) 49 N. C. (4 Jones, L.) 379 (railway company not liable for wilful trespass upon land by its servants engaged in construction work, there being no evidence that it sanctioned or even knew of the trespass); *Church v. Mansfield* (1850) 20 Conn. 284 (roads made across plaintiff's land by a servant engaged in making charcoal); *Southwick v. Estes* (1851) 7 Cush. 385 (master not liable for act of servants in removing stones from an adjoining proprietor's land, if it was done "wilfully and with the intention of disregarding the directions of the master,"—instruction to this effect approved).

In *Young v. Colt* (1832) 10 Sc. Sess. Cas. 1st series, 666, a landlord reserved in a lease the right to work coal, etc., on payment of damages occasioned by his operations. Held, that the tenant was not entitled to damage for injury by unauthorized trespass by the colliers, who made paths over the land in going to and from their work. Lord Fraser pointed out (*Mast. & S.* p. 274) that this decision is inconsistent with an earlier one (*Hull v. Merricks* (1813) Hume (Sc.) 397), where a master was held responsible for the act of his overseer, whom he had employed to cut trees on his own property, in passing over the known fence of an adjoining proprietor and there cutting trees, although it was alleged he did so without authority. He also remarked that by the law of England, and probably by the law of Scotland also, a master is

as regards some jurisdictions (see § 2241, *ante*); *viz.*, that the authority of a servant to commit an illegal act cannot be implied, but must be established by specific testimony.¹⁵

not liable for a trespass committed by his servant, unless it can be shown to have been committed either by his express command, or to have been a necessary consequence of the orders given by him. At the time when the criticism was written, it was doubtless justified. But the earlier decision was in harmony with the doctrine now applied in England. See §§ 2238 *et seq.*, *ante*.

¹⁵ In *Bolingbroke v. Swindon New Town* (1874) L. R. 9 C. P. 575, a servant whom the defendant, a local authority, had placed in charge of its sewage farm, undertook to improve the drainage by paring away soil and cutting brushwood and trees on the plaintiff's side of a ditch. Held, that the defendant was not liable for the trespass. After referring to *Bayley v. Manchester S. & L. R. Co.* (1872) L. R. 7 C. P. 415, (1873) L. R. 8 C. P. 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, 25 Eng. Rul. Cas. 115, and *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309, as examples of two distinct classes of cases, Keating, J., said: "In applying the principles to be deduced from these authorities to the facts of the present case, it seems to me that the authority which was given to Buchan was confined to the defendant's farm and its management, and could not be extended so as to authorize him to commit a trespass on the land of a neighbor, even though he might think the act he did was for the benefit of the neighbor. The powers given to him with respect to the management of the defendant's farm were, no doubt, very wide, but I do not see how they could authorize a wrongful act on another person's land or render his employers liable for his wilful act of trespass. It was urged by Mr. Pinder that the defendants had derived benefit from the acts of Buchan. In some cases the consideration that the employer has elected to take the benefit of the wrongful act is important; but the argument loses its weight where, as in the present case, the defendants are obliged to take things as

they stand, and have no option in the matter. On the whole, admitting that the cases run rather closely on this subject, I am of opinion that this case is clearly on the side of the line on which my Brother Quain placed it, and this rule should be discharged." Grove, J., "I am of the same opinion. It is difficult, no doubt, to lay down an exact absolute line of demarcation between acts done within the scope of an authority and those beyond it. In one sense all wrongful or negligent acts are beyond the scope of the authority, but, to use an expression taken from another subject-matter, there are certain lines of deviation, and there are some things which may be so naturally expected to occur from the wrongful or negligent conduct of persons engaged in carrying out an authority given, that they may be fairly said to be within the scope of the employment. Though, in some cases, the distinction between acts done in the scope of an employment and wilful acts beyond the authority given runs very fine, in the present case I think there is not much difficulty. If Buchan, in ameliorating the condition of the farm, for which purpose he had the most ample authority, by anything he had done on the farm itself, caused injury to the plaintiff's land, he might possibly have rendered his employers liable, but here the act was done on the land of the plaintiff. There is no ground for supposing that Buchan thought what he was doing was within the scope of his authority, or that he did not know that he was committing a trespass; nor could it be said, irrespective of his knowledge, that the act was one which, in any reasonable sense, was within the authority given to him for ameliorating the farm. The authority so given him was to benefit the farm by dealing with it, and by acts done upon it, not upon other land. None of the cases cited by the plaintiff's counsel went the length necessary for his contention, *viz.*, to show that an agent intrusted with authority to be exercised over a particular piece of land has authority to commit a trespass on other land."

Where things wrongfully taken from a third person's land are mingled by the tort-feasor's master with similar things derived from his own land, he has the onus of showing how much of the whole mass belongs to him.¹⁶

In *Macdonald v. Chisholm* (1860) 22 Sc. Sess. Cas. 2d series, 1075, it was observed by Lord M'Neill, *arguendo*, that a landowner could not be held liable for the act of his factor (*i. e.*, manager) in illegally ejecting a tenant, unless there was some express proof of the factor's having been authorized to eject tenants.

In *Riddiford v. Norman* (1897) 15 New Zeal. L. R. 508, some of the defendant's cattle which had been taken to a sale were condemned as diseased by government inspector, under "the stock act 1893," and the person in charge of them, the defendant's manager, was told by the inspector that they must be destroyed at once. Thereupon he drove them onto the plaintiff's land, and, having killed them in the presence of the inspector, promised to bury them on the following morning. In taking them onto the land, the manager had committed a trespass, being misled by the statement of a certain person that he had authority to license the use of the land for the purpose contemplated. Before the cattle were buried, portions of the carcasses were devoured by the plaintiff's pigs, and, this fact having become known to the public, the plaintiff, who was a butcher, lost his business. In an action for the damages so caused, it was held, in the first place, that the acts of the defendant's manager were not acts of the inspector for which the inspector was responsible. The court took the position, that the effect of the evidence was that the manager did what he did, not as the agent of the inspector, but because he was in effect told that, if he did not kill the animals himself, then the inspector would, and that in order to escape the additional cost which would be incurred if the inspector destroyed them he made his own arrangements, and undertook to kill and bury them himself. It was furthermore held that the defendant, having put the cattle under the control of his servant, must be supposed to have given him authority to take all reasonable measures in an emergency arising under the

stock act; but that this authority did not give the servant implied authority to commit a pure trespass; he was only empowered to take all reasonable measures on behalf of his master for the destruction of the animals. The action was accordingly held not to be maintainable.

¹⁶ In *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.* (1888) 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760, 15 Mor. Min. Rep. 655, the court said: "No case can be found which holds that where the agent, upon his own motion, illegally takes the property of one, and gives it to his principal, the principal is not liable for such property or its value. If, then, the appellant is liable to appellee for the act of its superintendent in the premises, does the mere fact of its receiving and converting the ore, or its value, in ignorance of the true ownership thereof, change the rule of evidence on the facts of this case? I think not. . . . If the appellant, by its whole body of directors, had worked in its mine and ignorantly crossed into the Little Chief ground, and taken and appropriated the proceeds of this ore, it would be liable therefor to the owner thereof, and would be bound to show how much of it did not belong to appellee. The entry in such case would be wrongful, though done unwittingly; and appellant, being a wrongdoer, would be subject to the rule cited above, that what is one's duty to know the law holds him to know. Neither in legal nor natural reason can there be any difference between taking the ore ignorantly and taking the value thereof without knowledge of the place from which the ore was taken; and if, in the first instance, the burden of proof would be upon appellant, it would in the last. . . . Appellant is as much bound to know where the money it received came from, as it would have been to know from whose ground the ore producing the money came from, had it done the mining."

The liability of a corporation for a wilful trespass committed by an employee has been recognized in several cases.¹⁷ In this connection it is to be observed that a court which still adheres to the doctrine that such a trespass cannot be imputed to a corporation, unless it is shown to have been specifically authorized or ratified by the corporation itself, has taken the position that such proof is not a prerequisite to the maintenance of an action, where the trespass was committed by an employee of the rank of a vice principal.¹⁸ The doctrine thus applied is, however, contrary to that which was laid down in New York during the period when the view prevailed that master could not be held responsible for the wilful torts of his servant. (See § 2239a, *ante*).¹⁹ But in most jurisdictions both of

¹⁷ *Chesnut Hill & S. H. Turnp. Co. v. Rutter* (1818) 4 Serg. & R. 6, 8 Am. Dec. 675 (obstruction of water course); *Doyon v. St. Joseph* (1873) 17 Lower Can. Jur. 193 (municipal corporation liable for damages inflicted on plaintiff's premises by wrongful appropriation of land for a road); and several of the decisions cited in notes 1-11, *supra*.

¹⁸ In *Union Naval Stores Co. v. Pugh* (1908) 156 Ala. 369, 47 So. 48. it was held that the trial judge had properly refused to direct a verdict for the defendant upon evidence which tended to show that the defendant was engaged in the naval stores business, and as a part of its business boxed timber and gathered crude turpentine from the boxes, and that it intrusted the conduct of this business to a general manager, who was invested with full power to employ and discharge subordinate agents and servants, and generally to do whatever might be necessary to its performance of its corporate functions. The court said: "Such a person, with reference to the public, is more than a mere agent acting under orders of a superior. He is *pro hac vice* a principal. He stands for, and represents within the sphere of his authority, the corporate entity itself, and his acts are the direct acts of the corporation itself; and if, in his representative character, he commits a trespass or commands or authorizes its commission by a servant under his orders, the corporation is suable for the wrong in the action of trespass. . . . If it cannot be held that the evidence affords no reasonable inference in support of the contention,

then the affirmative charge was properly refused, so far as the theory under discussion is concerned," was "no evidence whatever of a direct participation by the defendant company in any trespass; in other words, that the acts of trespass, if any were committed, were those of an agent or employee."

¹⁹ *Vanderbilt v. Richmond Turnp. Co.* (1849) 2 N. Y. 479, 51 Am. Dec. 315. In that case (which apparently was not brought to the attention of the Alabama court), it was declared that "a general agent, when he commits or orders a wilful trespass to be committed, acts without the scope of his authority, as much as a special agent would in committing or ordering the same trespass to be committed." It was accordingly held error to charge the jury that, if the president and general agent of the defendant ratified the act of the captain of its steamboat in wilfully running down the plaintiff's steamboat, the defendant was liable. The court said: "Suppose that after the captain of the boat had committed the wilful trespass, the general agent had said, I approve of what the captain has done and wish he had sunk the steamboat Wave. This would have been a more distinct approval and assent than any which was proved, and yet would that have made the company liable? When the captain committed the wilful trespass, the company was not liable, and could it be made liable after the trespass was committed, by the declaration of its general agent that he approved of what the captain had done, and wished that the captain had sunk the boat? The general agent was appointed for no

the doctrines thus applied have now been repudiated. See §§ 2239, 2241, *ante*. Having regard to the extremely technical basis of the rule under which wilful torts are excepted from the operation of the principle, *respondeat superior*, it is not a matter for regret that a reasonably satisfactory ground has been found by one court for predicated a counter-exception in respect of one class of cases. But, as the master's liability for such torts, irrespective of the rank of the tort-feasor, is now recognized almost universally, there are very few jurisdictions in which the point is of any practical importance.

C. MISCELLANEOUS TORTS INJURIOUS TO PERSONAL PROPERTY.

2398. Damage resulting from an act done to protect the master's property.—On general principles it might seem that any damage which a servant whose specially appointed duty is the safeguarding of his master's property may inflict upon the property of a third person for the purpose of discharging his protective functions should, under all circumstances, be imputed to his master. Such a tort clearly pertains to the class of acts which are contemplated by the contract of hiring, and it is in this sense within the scope of the servant's employment. But in the only case which, so far as is known to the writer, the subject has been discussed, the court took the position that the master's liability was to be determined with reference to another criterion, *viz.*, whether the servant's implied authority extended to the commission of such an act as the particular one which caused the given injury.¹ If the reasoning of the court on this point

such purpose; he was appointed to manage all the business of the company in the most advantageous manner for the stockholders, and not to ruin them by his passionate and foolish declarations." Some decisions were then reviewed which proceeded upon the ground that an action may be maintained against a principal in trespass of his servant which he had himself ratified; but the court said that it could find "no case where the principal has been made liable for a wilful trespass committed by a servant, because approved by a general agent."

¹In *Thames S. B. Co. v. Housatonic R. Co.* (1855) 24 Conn. 40, 63 Am. Dec. 154, where the hawser of a steamer upon which a fire had broken out while it was moored to the wharf of the defendant company was cut by its watch-

man, in order to preserve the wharf from the flames, the actual ground upon which recovery was denied was that an action of trespass was not maintainable in respect of such a tort. But the court thus discussed the general question adverted to in the text: "The view which we have taken of the case renders it unnecessary for us to determine the extent of the watchman's discretionary power, and we therefore do not wish to be considered as expressing any opinion upon it, any farther than it is involved in the question, which we do not feel called upon to decide, in order to determine whether there was any error in the court's granting the nonsuit. To hold, however, that his discretion was unlimited as claimed by the plaintiffs; that he had power to do whatever he might

of view is to be accepted as correct, it will follow that the connotation of the phrases "scope of employment" and "scope of authority" is not identical. But at the present day such a theory would certainly not be approved in all jurisdictions. See § 2227, *ante*.

think best, even to the destruction of the property of third persons, and without any reference to its comparative value to the property he was set to watch, is such a startling proposition that we cannot for a moment sanction it. . . . The books tell us that general agents must exercise a sound discretion, but precisely what this consists in, they do not inform us. It appears to us that it is more correct to say that the law will imply, in favor of agents, whether the agency is limited to one or more objects, the usual and appropriate means to accomplish the object or objects of the agency. There must be some discretionary power in every agency, where the manner in which it is to be conducted is not specifically pointed out by precise and definite instructions, given before it commences, or has not become settled by known rules of law; and wherever there is any discretionary power, whether it is general or limited in its nature, it would seem that it ought to be exercised soundly. An unlimited discretion would give the watchman power to pull down or blow up, with any means at his command, any buildings contiguous to a fire, which he might think, to some extent, endangered the property he was set to watch. If such powers were in fact given to a watchman, we do not see why the master should not be liable for its exercise. But a power so liable to be abused, and when abused attended with such consequences, no prudent man would intrust to an agent of this description. And will the law, by implication, confer a power which no prudent man would intrust to his agent? All powers are to be construed with reference to the subject-matter, which, in this instance, was to keep watch. As incident to the discharge of this duty, the watchman might have power to extinguish fires, and, in some instances, to remove combustible materials from the vicinity of the property watched, when it could be done without injury to others. But, at best, the power to remove the boat from the

vicinity of the property watched was only incidental, and, on general principles, ought not to be so construed as to empower the watchman to ruin his employers, by destroying her, without reference to the comparative value of the property watched and the property destroyed. The law is rather jealous of the exercise of unlimited powers of discretion, in subordinate agents and servants. In some cases, where the master is not at hand to be consulted, as is sometimes the case of the master of a vessel, in a foreign port, it will give very enlarged powers to an agent, but this is from the necessity of the case. Here it does not appear, we are aware, that the principal officers of the defendant's company resided in Bridgeport; and that the company kept its office there; but the corporation is entirely within the state, and the principal terminus of the road is at Bridgeport, and it may fairly be presumed that there were officers there of a higher grade than that of night watchman to one of their sheds; and if there was no one there who could be consulted in such an emergency as this, we think, at least, it ought to be shown, before it is assumed, that it falls within the general powers of this subordinate agent, for a special purpose, to destroy a valuable vessel and cargo, in order to save property of very trifling importance, comparatively. The law will not presume that a principal, for any purpose, would authorize an agent to take and convert property to his own use, that did not belong to him; and if it will not confer this power on an agent, we see no more reason for its conferring on him a power to destroy, than to take, property; and we certainly should require some direct and controlling authority, before we should feel authorized to hold that where the principal's property is to some extent threatened by a contiguous fire, though, in this case, it does not appear to have even been threatened to any considerable extent, that the agent has power to remove the property which threatened it out of the way,

2399. Words or conduct injurious to business interests.—a. Slander of title.—In Kentucky it has been held that in respect of slander of title by the declarations of its president and secretary, a corporation is liable, or not liable, according as it appears that such declarations were made by them in their official capacity, and by direction of the corporation, or in the apparent scope of their authority.¹

b. Making false statements regarding plaintiff's business.—A master is liable for injuries occasioned to a plaintiff's business interests by false statements, made by the defendant's servant in the course of his employment.²

and, by such removal, destroy it. No such authority has been produced, and we presume, therefore, none such can be."

¹*Continental Realty Co. v. Little* (1909) 135 Ky. 618, 117 S. W. 310, where it was held that a demurrer to the petition should have been sustained because it did not allege any facts showing that the officers in question possessed the requisite authority. A comparison of this case with the one in which the same court has held that, in respect of a slander affecting personal character, a corporation cannot be held liable except upon the single ground that it authorized the utterance of the particular words complained of, discloses a manifest discrepancy between the doctrine applied with regard to the two different kinds of slander. Such a position seems quite illogical and untenable, and corporate responsibility will presumably be placed upon the same footing in both class of cases whenever the attention of the court is directed to the inconsistency.

As to slander of title, see generally *Odgers, Slander & Libel*, 5th ed. pp. 79 *et seq.*; *Newell, on Libel & Slander*, chap. 11.

²In *Sheppard Pub. Co. v. Press Pub. Co.* (1905) 10 Ont. L. Rep. 243, T., who had been a salesman in the service of the plaintiff company, the publishers of a Christmas annual, left their employment and entered that of the defendant company, who decided to issue a similar annual, and sent T. out as salesman. By untrue representations, amongst others that "the defendant company had taken over that part of the plaintiffs' business, and that the plaintiffs were going out of that branch of business," he sold annuals to the det-

riment of the plaintiffs' business and to the profit of the defendant company, who accepted and filled the orders and collected the price. Held: (1) That T. was acting within the scope of his employment in seeking to procure orders; (2) that the action was not one of slander, but an action on the case for false and malicious statements made in reference to the plaintiffs' business, and resulting in loss to the plaintiffs, and that the defendant company, although incorporated, was liable; and (3) that the true measure of the master's liability was the same as if the act had been committed by himself, and that the fact that the defendant company had made no profit out of the transaction made no difference as to the amount of the damages against it. Clute, J., said: "It cannot, of course, be disputed that Tibbs acted within the scope of his employment in seeking to obtain the orders, for he was sent out by the defendant company for that express purpose. He was acting, therefore, within the scope of his employment in seeking to procure the orders; but the mode or manner in which he sought to procure them—in other words, the argument that he used—was not authorized by the company. But can this make any difference? The defendant company had availed itself of his acts. It had adopted what he has done, by not only accepting the orders, but when they were repudiated on this very ground, by insisting upon their fulfilment. The company, having, therefore, deliberately adopted the acts of Tibbs, ought to be held responsible for his acts of which it has taken advantage."

In *Buffalo Lubricating Oil Co. v. Standard Oil Co.* (1886) 42 Hun, 153, affirmed in (1887) 106 N. Y. 669, 12

c. Deterring subordinate servants from dealing with plaintiff.—In a case where the foreman of a street railway company injured the business of a tradesman by threatening to discharge any laborer under his control who should deal at the tradesman's store, and by carrying his threats into effect, the nonliability of the company was affirmed on the ground that his words and acts were not within the scope of his functions.³

d. Systematic refusal of carrier's servant to deliver goods to drayman.—A licensed drayman had contracts with merchants to haul their freight from the depot of a railway company to their places of business. The depot agent of the railway company at the place in which the drayman was licensed to do business, knowing of the existence of such contracts, wilfully and maliciously refused to deliver to the drayman goods of such merchants, notwithstanding orders oral and written to that effect were communicated to the agent, and also attempted to induce the merchants to withdraw from their contracts.

It was held that the former of these wrongful acts was imputable to the railway company, but that it was not liable in respect of the latter.⁴

N. E. 825 (mem.) a complaint alleging damage caused to the plaintiff's business by false reports, statements, etc., made with regard to the quality of its products by the employees of the defendant, was held not to be demurrable.

³ *Graham v. St. Charles Street R. Co.* (1895) 47 La. Ann. 1656, 49 Am. St. Rep. 436, 18 So. 707. For previous appeal, see (1895) 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806, where the point decided was that the foreman's conduct constituted an actionable wrong.

⁴ *Southern R. Co. v. Chambers* (1906) 126 Ga. 404, 7 L.R.A. (N.S.) 926, 55 S. E. 37. The court said: "If this suit had been against Scarborough in his individual capacity there would be little question about the fact that a cause of action was set forth, not only as regards the refusal to deliver freight, but also as regards his conduct in persuading the merchants of Villa Rica to abandon their contracts with the plaintiff. But is the railway company responsible for the conduct of Scarborough? Is the malice of Scarborough the malice of the company? It is not alleged that the railway company expressly authorized that to be

done which is charged against Scarborough. It appointed Scarborough its agent. It placed him in a position where it was his duty to deliver freight to consignees or their authorized agents. Those things which were done in connection with this duty were within the scope of his agency. The railway company would be responsible for the wrongful conduct of Scarborough in dealing with the consignees or their authorized agents, in delivering freight to them. If he refused to deliver freight when he ought to have delivered it, his act was the act of the railway company. If he maliciously refused to deliver, and the consequence of this malice was damage to him who had a right to receive, the malice of Scarborough became the malice of the railway company. So far as the cause of action rests upon the malicious act of Scarborough in refusing to deliver freight to the plaintiff upon orders verbal and written from the consignees, the action is well laid. But was the action well laid so far as it relates to the conduct of Scarborough in going to the merchants of Villa Rica and procuring them to abandon their contracts with the plaintiff? It is alleged that he is the agent of the railway company.

e. Undue prolongation of work in premises occupied by plaintiff.—

In a case where an employee of a landlord entered upon a building used by the tenant as a bakery, in order that he might make certain changes required by a factory act, it was held that the landlord might properly be found liable upon evidence which tended to prove averments to the effect that the employee had, with malicious intent, prolonged the work unduly, so as to destroy the usefulness of the ovens, and had also, for the purpose of injuring the tenant's business, instituted summary proceedings to dispossess her, and posted upon the premises a notice which was calculated to mislead her customers.⁵

2400. Conspiracy.—In an English case where the servants operating the omnibuses of the defendants attempted to break up the business of a rival by habitually driving their omnibuses so close to his that passengers were unable to reach them without great difficulty, the liability of the defendants was denied on the ground that the acts complained of "were clearly wilful acts done by the men, contrary to the orders of their masters."¹ But this decision was rendered with ref-

It is alleged that as such he went to the merchants of the town of Villa Rica, and interfered with the plaintiff's business by begging and persuading his customers to allow other parties to haul their goods which came over the line of road represented by him. What he did in this respect was his individual act. It was beyond the scope and authority of his agency, and the company would not be responsible unless it appeared that it was done by its direction and authority, or that it ratified his acts in reference thereto. If the plaintiff seeks to hold the company responsible for the acts of the agent under such circumstances, it must distinctly appear from his petition that the company authorized the acts, or that they were within the scope of his employment, or, if beyond the scope of his employment, they were approved and ratified by the company after a full knowledge of his conduct. So far as that portion of the first count relates to the conduct of the agent in persuading the merchants to discontinue business with the plaintiff, nothing appears in the petition bringing the case within this rule. The count was to this extent defective."

⁵ *Levy v. Ely* (1900) 48 App. Div. 554, 62 N. Y. Supp. 855. The court

said: "It matters not that he [the employee] exceeded the powers conferred upon him by his principal, and that he did an act that the principal was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service. *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 86, 43 Am. Rep. 141."

¹ *Green v. Macnamara* (1859) 1 L. T. N. S. 9, per Crowder, J. Similar language was used by Erle, Ch. J., during the argument of counsel. The declaration charged the defendants with combining together by a variety of acts to injure the plaintiff's trade as an omnibus proprietor. A verdict was rendered against Price, one of the defendants, and for the other defendants. At the trial Price was shown to have actively interfered, and to have done many acts within the terms of the declaration. It was not shown that the other defendants interfered, and at the trial they denied that they knew of the acts complained of, and they said also that they gave orders that such acts should not be done. It was argued at the trial that the other defendants as well as Price was liable for the acts

erence to a doctrine which has now been rejected, both in England and in the great majority of the American states, *viz.*, that a master was not vicariously liable for the wilful trespasses of his servants. See § 2239, *ante*.

In an English case where the officers of a Trade Union Society, acting in combination, threatened to call out the men wherever the plaintiff should be employed, and so prevented him from getting work, the liability of the society was affirmed on the ground that the acts complained of were done in its service and for its benefit.² So far as England is concerned, the trade disputes act of 1906 has ren-

of their servants. Erle, Ch. J., who tried the case, directed the jury that, upon the facts proved, the defendants who knew nothing of the acts done, and gave orders that they should not be done, were not liable. This direction was held to be correct.

² *Giblan v. National Amalgamated Labourers' Union* [1903] 2 K. B. (C. A.) 600. Stirling, L. J., said: "Williams and Toomey were the servants and agents of the trade union; and the principle which governs the liability of the last-named defendants for the acts of their agents is expressed with great clearness by Willes, J., in delivering the judgment of the court of exchequer chamber in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, at p. 265, 12 Eng. Rul. Cas. 298. He says: 'The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved.' This principle was expressly held to be applicable to trade unions, in *Taff Vale R. Co. v. Amalgamated Soc.* [1901] A. C. 426, at p. 433, 70 L. J. K. B. N. S. 905, 65 J. P. 596, 50 Week. Rep. 44, 85 L. T. N. S. 147, 17 Times L. R. 698, 1 B. R. C. 832. It is, then, to be inquired whether Williams and Toomey committed the acts complained of in the course of the service of the trade union, and for the benefit of that body. Under the rules of the union it was part of the duties of the executive committee to protect its funds from misappropriation, with power to prosecute any officer of the union or member or other person who appropriated, misapplied, or withheld the funds of the union. The executive

committee clearly had power to direct the officers of the union to recover the funds misappropriated by the plaintiff. Further, in the absence of the executive committee, Williams, the general secretary, had full power to take any action for the executive committee that the rules allowed. It must be taken that Williams and Toomey, in doing what they did, were acting as officers of the union, charged with the duty of recovering the misappropriated fund from the plaintiff. What they did was a tort. Further, it was committed for the benefit of the union. It seems to me that all the conditions pointed out by Willes, J., were satisfied. It was said, however, that the acts of the defendants Williams and Toomey were beyond the powers of the executive committee as defined by rule 14. It may be that, if a member of the trade union had applied to the court to interfere by way of injunction to restrain those two defendants from committing the acts of which the plaintiff complains, the court would have seen its way to interfere, on the principles laid down in *Howden v. Yorkshire Miners' Asso.* [1903] 1 K. B. 308, 72 L. J. K. B. N. S. 176, 88 L. T. N. S. 134, 19 Times L. R., 193, but the question is a different one when the plaintiff complains of a wrong which has actually been committed by the agents of the trade union. The case of *Poulton v. London & S. W. Ry. Co.* (1867) L. R. 2 Q. B. 534, 8 Best. & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309, was relied on by counsel. It was there held that where the servant of a railway company committed a wrong which the company, under the acts incorporating it, had no power to do, the company was not liable. There, if all the share-

dered trade unions exempt from responsibility in respect of torts of this description. See the chapter in which Trade Unions are discussed. But the decision would doubtless be treated as authoritative in any jurisdictions in which the common law has not been modified by statute.

A corporation is liable for an injury caused to a third person's interests by a conspiracy between its servants, acting within the scope of their authority.³

2401. Unfair discrimination by the servant of a carrier.—An action was held to be maintainable against a railway company, where an employee whose duty it was to assign cars to shippers was induced, by bribery or motives of partiality or oppression, to assign them to persons who, by the usage of the company, were not rightfully entitled to them.¹

2402. Infringement of patents.—In a case where, in carrying out the process upon which they were engaged, the workmen employed in a factory owned by a company infringed a patent, it was held that the company, and also its directors and managers, were liable for the acts of the workmen, even though they might have been instructed not to infringe the patent.¹

holders of the railway company had met and purported to confer authority on the servant to do what he did, they could not have bound the company. In the present case the members of the trade union are under no such incapacity; if they all concurred they could have conferred authority on Williams and Toomey to do what they did. I think that the present case falls within the principles laid down in *Limpus v. London General Omnibus Co.* (1863) 1 Hurlst & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258, rather than within *Poulton v. London & S. W. R. Co. supra*, and consequently that the trade union is liable."

³ *Stewart v. Wright* (1906) 77 C. C. A. 499, 147 Fed. 321, affirming (1904) 130 Fed. 905; *Aberthaw Constr. Co. v. Cameron* (1907) 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478; *Caffall v. Bandera Teleph. Co.* (1911) — Tex. Civ. App. —, 136 S. W. 105; *American Freehold Land Mortg. Co. v. Brown* (1907) — Tex. Civ. App. —, 101 S. W. 856.

¹ *Galena & C. Union R. Co. v. Rae* (1857) 18 Ill. 488, 68 Am. Dec. 574.

¹ *Betts v. De Vitre* (1868) L. R. 3 Ch. 441, Lord Chelmsford said: "One cannot help observing that the general orders issued to avoid infringing Betts's patent show that the directors knew that they were running very near it in their ordinary operations, which rendered additional caution on their part necessary. Now, I will assume that the orders not to work in a particular manner were given, and that the disobedience to those orders was secret, although the evidence hardly warrants this conclusion. But granting all this to be the case, I should still hold that the directors would be liable. A master is responsible for all the acts of his servant which are done in the execution of his duty. If a coachman drives his master's carriage where he is ordered to go, and by negligent driving does an injury, the master is responsible; but if he takes a carriage without permission, and employs it for his own purpose, he alone is answerable for any injurious consequences which arise during his use of it. The alleged infringement of the plaintiff's patent took place

2403. Conversion.—For the conversion of personal property by a servant, his master is responsible or not responsible according as the servant was or was not acting within the scope of his employment in respect of taking possession of it and withholding it from its owner.¹

It has been suggested in an earlier section (2235) that the vicari-

in the company's works, and in the course of the performance of the proper duties in which the workmen were engaged. Those who have the control of the working are responsible for the act of their subordinates, and it is not sufficient for them to order that the work shall be so done that no injury shall be occasioned to any third person. That, of course, must be avoided, whether orders to that effect are given or not; but the directors were bound to take care that their orders were obeyed; and if there was a violation of them, whether openly or secretly, they are liable for the consequences."

¹ (a) *Liability of master affirmed*—In *Jones v. Hart* (1699) 2 Salk. 441, 1 Ld. Raym. 738, a pawnbroker's servant took a pawn, and the pawner came and tendered the money to the servant, who said the goods were lost or sold. Holt, Ch. J., held that trover would lie against the master.

In *Taylor v. —* (1702) 2 Ld. Raym. 792, it was ruled by Lord Holt at nisi prius that trover would not lie against a carrier for refusing to deliver goods given to his servant, unless he had been guilty of an actual conversion. The proper form of action was said to be case.

In *Armory v. Delamirie* (1722) 1 Strange, 505, 1 Smith, Lead. Cas. 11th ed. p. 356, 10 Mor. Min. Rep. 66, a nisi prius case, the plaintiff, a chimney sweeper's boy, found a jewel which he carried to the shop of the defendant, a goldsmith, in order to ascertain what it was. He delivered it into the hands of the defendant's apprentice, who, under a pretense of weighing it, took out the stones, and called to his master to let him know it came to 3 halfpence. The master offered the boy the money, but he refused to take it, and insisted upon having the thing back again; whereupon the apprentice delivered him back the socket without the stones. It was ruled by Pratt, Ch. J., that "an action of trover will lay against the

master who gives a credit to his apprentice, and is answerable for his neglect." The report does not show whether the apprentice misappropriated the stones for his own benefit or for that of his master; presumably the latter.

In *Mead v. Hamond* (1722) 1 Strange 505, it was ruled at nisi prius by Holt, Ch. J., that trover would lie against a master for an ingot of gold delivered to his servant to be assayed.

In *Eubank v. Nutting* (1849) 7 C. B. 797, where the cargo of a ship was sold by the master at an intermediate port, because the ship had become leaky, the owner was held liable for the conversion. Wilde, Ch. J., said: "I do not say that the owner is liable for every conversion of which the master may be guilty. I desire to be understood as confining my attention to the facts of this particular case. The captain, acting bona fide, the meaning to execute the duties of his employment of master, has been guilty of a mistake which in law amounts to a conversion. That which he did, he did as the servant or agent of the owner; and he was not less the agent of the owner because, meaning to act bona fide in that character, he has fallen into a mistake. I think an act amounting to a conversion is, under such circumstances, a joint conversion by master and owner; more particularly where, as here, the latter has done no act to repudiate or sever the relation. So far from having done so, he seems, as the jury have found, to have adopted the master's act. That question was left to the jury, and their finding upon it removes all doubt. I am clearly of opinion that this action is maintainable against both defendants." Coltman, J., said: "As to the conversion, it appears to me that, although the act of the master in disposing of the cargo at Bahia was at variance with the authority given him by the owner of the cargo, it was not without the general scope of the authority conferred upon him by the owner."

ous liability of a master in respect of conversion is susceptible of being explained as being a warrantable deduction from the doctrine

er of the ship. The master is to act, in a case of sudden emergency and difficulty, according to the best of his judgment. The owner appoints the captain, and he is bound to choose a man of sound judgment and discretion." Cresswell, J., said: "As to the master's discretion, I agree with my brother Colman, that the owner gives the master a general discretion to act, in cases of emergency, in such a way as to bind him. Here, the master has exercised that discretion bona fide, but erroneously. I think both owner and master are responsible for the consequences."

In *Rooke v. Midland R. Co.* (1852) 14 Eng. L. & Eq. Rep. (C. A.) 175, a conversion was held to be inferable where the consignee of goods forwarded to a certain railway station demanded them from the station master, and delivery was refused.

In *Giles v. Taff Vale R. Co.* (1853) 2 El. & Bl. (Exch. Ch.) 822, where the general superintendent of a railway refused to deliver up to the consignee some plants which the clerk at the station to which they were sent had permitted to be set in the ground until the consignee should be ready to receive them, the railway company was held to be liable for the conversion. Jervis, Ch. J., observed that the whole court was agreed that, if the goods were carried by the defendants, and left with them in the ordinary course of their business as carriers, the demand and refusal from the superintendent on the spot would be sufficient evidence in support of this action against the company. The contention put forward was that, because the goods were not in the custody of the company in the ordinary course, there was not sufficient evidence of the superintendent's authority. "I am of opinion that it is the duty of the company, carrying on a business, to leave upon the spot someone with authority to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand; and I think it was a question for the jury, whether Fisher in this case was a person having such authority. If he was I think he had authority, in the exigency of the traffic, to keep the quicks in the mode in

which they were kept, and that consequently they were in the custody of the company in the course of their ordinary business." Maule, J., said: "There ought to be someone with authority from the company to deliver up or refuse to deliver up goods. To whom was the plaintiff to apply, except to the station masters and superintendent? And who else was to have that authority?" Platt, B., said: "It is objected that we do not know what a general superintendent is. But might not the jury know? Might not they rightly infer that he was a person having authority generally to superintend the affairs of the company on the spot, and, in the course of such superintending, to deliver or refuse to deliver goods left with them as carriers? And then we have the conduct of the parties; the plaintiff, when he wants his goods, goes to the persons acting for the company; and they all refer him to Fisher as the superior authority. I think that is sufficient evidence to go to the jury."

In *Dench v. Walker* (1780) 14 Mass. 500, the defendant undertook to transport from B. to S. four hogshead of rum for the plaintiff. At the time of the delivery to him the rum was good; but on its arrival at S., it was much adulterated and greatly lessened in value. Whether it was thus adulterated by the defendant himself, or by his servant, the teamster, did not appear. The court held that trover would lie, because the alteration of the quality of the liquor undertaken to be transported, whether it was made by the defendant or his servant, was an unlawful conversion.

In *Storm v. Livingston* (1810) 6 Johns. 44, an action of trover for a horse, it was held that a demand for the horse from the defendant's wife or servant, and a refusal to deliver it, was no evidence of a conversion.

In *Mount v. Derick* (1843) 5 Hill, 455, where a servant refused to deliver, upon the demand of a stranger, certain goods which had been intrusted to him by his master, it was held that such demand and refusal were not sufficient evidence of conversion to charge the master, unless the servant refused under directions from the master. The

under which the possession of the servant is treated as being legally equivalent to the possession of the master. See § 241, *ante*.

court said: "If a man without my license or command commit a trespass for my use or benefit, subsequent assent will make the act my own, and I may be treated as a wrongdoer. 4 Inst. 317; Comyns' Dig. Trespass, C. 1. But if my servant properly refuse to do an act because he has no authority, and I afterwards approve of his conduct for that reason, it is no wrong, and an action cannot be based upon it. The demand of Jackson must go for nothing."

In *McCormick v. Pennsylvania C. R. Co.* (1872) 49 N. Y. 303, the defendant's baggage master, acting in accordance with one of its rules, declined to check plaintiff's baggage until he had procured his passage tickets. While he was getting his tickets, the baggage master caused his baggage to be placed in the baggage car, and on his return refused to give him the checks unless he paid extra compensation on account of excess weight. Plaintiff refused to pay this extra charge, and demanded his baggage; but the baggage master refused to deliver it, for the reason that it was covered with other baggage, and that, in order to reach it, it would be necessary to delay the train beyond the time fixed for starting. Plaintiff declined to take passage without his checks; his baggage was taken through to Chicago, and on the night after its arrival was destroyed by fire. The action was for the conversion of the baggage. Held, (1) that defendant did not occupy the position of common carrier in respect to the plaintiff, and could not avail itself of any of the rules which have been established as to the liabilities of common carriers of passengers and (2) that defendant was liable for the acts of the baggage master.

In *Taylor v. Brigham* (1876) 3 Woods. 377, Fed. Cas. No. 13,781, the captain of a steamer which was on its way up a river found, at one of the landings, several bales of plaintiff's cotton, which was to be sent down the river when an opportunity presented itself. In order to forestall other boats, the captain of the steamer, instead of waiting until he was on his return trip, took the cotton on board without the plaintiff's consent, and proceeded up

the river. While the steamer was in the upper part of the river, it was burned, and the cotton was destroyed. Held, that the owner of the steamer was liable in trover. The court referred to *Phillips v. Brigham* (1859) 26 Ga. 617, 71 Am. Dec. 227, a case arising out of the similar facts, in which it was held merely that there had been a conversion, and consequently that a nonsuit in an action of trover was improper.

In *Winston v. Foster* (1843) 5 Rob. (La.) 113, where a slave was concealed on board a vessel by a member of the crew, and carried away so as to be lost to his owner, the master and owners of the vessel were held liable. The fact that the slave was received on board contrary to the orders, and without the knowledge, of the master and owners thereof, was said not to be a valid defense.

In *Strawbridge v. Turner* (1836) 9 La. 213, where a slave employed by the captain of a steamer as a member of the crew, without the authority and consent of the slave's master, was accidentally drowned, the owner of the steamer was held liable. The condition precedent to recovery under the Louisiana Code, *viz.*, that the setamer might have prevented the illegal employment, was held to have been established by the evidence.

For other cases in which the owners of steamboats were held liable for the asportation of slaves, see *Pennsylvania, D. & M. Steam Nav. Co. v. Hungerford* (1834) 6 Gill & J. 291 (captain, when told that the slave was on board, failed to make search for him); *Price v. Thornton* (1846) 10 Mo. 135 (verdict for the defendant, rendered with reference to an instruction which represented the defendant's liability as being conditional upon his having participated in the trespass of the captain of the steamboat, was reversed, on the ground that there was no evidence whatever on this head, and it was entirely immaterial whether the owner was personally concerned in the illegal act or not).

In *Fishkill Sav. Inst. v. National Bank* (1880) 80 N. Y. 162, 36 Am. Rep. 595, affirming (1879) 19 Hun, 354, the

It may also be pointed out that in a large proportion of the instances in which that liability has been affirmed, the facts were such

plaintiff's bonds had been pledged while in the possession of B., the defendant's cashier, and sold by the pledgee. The complaint alleged a conversion of bonds by the defendant bank. In support of that averment, it was contended that the evidence showed a conversion by B., the cashier, committed by him in the course of his conduct of the bank's business, and that therefore the cause of action is made out. The referee had found in general words that on a certain date, the bank "took from the plaintiff without its knowledge or consent, and wrongfully converted to its own use, bonds" of a specified value. No other finding was made as to any fact relating to it, nor was any request made for further findings. The defendant moved for a nonsuit, and by that motion and an exception to the conclusion of the referee, the question was presented, whether the bank was answerable for the cashier's fraud. Referring to earlier New York decisions, the court said: "They establish that a corporation is liable for the consequences of its wrongful acts and omissions, and for the acts of its agents while engaged in the business of their agency, to the same extent and under the same circumstances as natural persons. They illustrate the familiar principle that, though a principle is not liable *criminaliter* for the conduct of his agent, he is responsible *civiliter* for all acts done by him in the course of his employment, and bound by his fraud whether he concurred in it or not. For acts wholly foreign to the business in which the agent is engaged, the principal is not bound. But that cannot be extrinsic to his employment which is adopted as a means of accomplishing the object of his agency. *New York & N. H. R. Co. v. Schuyler* (1865) 34 N. Y. 30; *Holden v. New York & E. Bank* (1878) 72 N. Y. 286. I do not think the case for the plaintiff would be any stronger if the actual concurrence of the directors in the cashier's fraud was established. If they were ignorant of it, it is because they omitted the performance of official duty, and so were not less bound than if the ignorance was intentional, that they or the bank they represent might profit by it.

This the law will not tolerate. . . . It is objected that the action should have been for money had and received, and not in tort. I am not sure that such an action would have laid; but, however that may be, I think this action was well brought. . . . The wrong in this case was committed for the benefit of the defendant. Its purpose was to put the bank in funds, and however Bartow may have brought about the necessity for resorting thereto, its proximate object was to relieve the bank. The bank had the entire avails of the property converted. Moreover it ratified and adopted the wrong when it secured its fruits. *Bennett v. Judson* (1860) 21 N. Y. 238. But if it had been otherwise, it would be unjust to the plaintiff to measure its damages by the sum actually received by the defendant, rather than by the value of the property."

In *Electric Power Co. v. Metropolitan Teleph. & Teleg. Co.* (1894) 75 Hun, 68, 27 N. Y. Supp. 93, affirmed in (1896) 148 N. Y. 796, 43 N. E. 986, a telegraph company which directed its employees to cut from fixtures belonging to it, wires belonging to another, without notice to the latter, and without affording it reasonable opportunity of collecting and claiming such property, was held to be liable for the acts of such employees in wrongfully removing and converting the wires. The *ratio decidendi* was that the conversion by the servants "was an act so closely and intimately connected with and related to their employment that it is but just that the employer should be held liable."

In *Buckingham v. Vincent* (1897) 23 App. Div. 238, 48 N. Y. Supp. 747, a person who instructed his servants to remove goods pointed out to them by a third party was held to be chargeable with their acts in removing, at the direction of that party, the property of his wife against her objection.

In *Arthur v. Balch* (1851) 23 N. H. 157, the record showed that the plaintiff's horse was being used by one G. upon railroad work for which his master, the defendant, had a contract. Upon the plaintiff's demanding the horse, G. referred him to the sheriff, from

that it might have been referred to the theory that, as the property in question or its proceeds had come under the control of the master

whom possession of the horse had been derived; but it did not appear that the sheriff had any legal authority to dispose of it. Held, that the defendant was liable. The court said: "Although the defendant must be connected with the transaction in order to be chargeable with a conversion, he need not have given his servant an express direction to commit the act in question. It is enough to charge him if the servant be in the performance of, and be intrusted with, the ordinary business of his master."

In *Burnett v. Oechsner* (1899) 92 Tex. 588, 71 Am. St. Rep. 880, 50 S. W. 562, the manager of defendant's farm, having trouble keeping plaintiff's hogs out of his inclosure, penned them and hauled them into an adjoining state, where he unloaded them at a ranch belonging to defendant. Held, that this act was within the scope of the manager's authority to keep the hogs out of the field, and that, as it was done in furtherance of the defendant's business, he was liable.

In *Moir v. Hopkins* (1855) 16 Ill. 313, 63 Am. Dec. 312, an employee was directed to get a pair of horses, his employer expecting he would do so with the owner's permission. The agent, misunderstanding the instruction, took the horses without leave, and in using them killed one. Held, that the principal was liable for the value of the horse.

In *Walker v. Johnson* (1881) 28 Minn. 147, 9 N. W. 632, the defendant's wagon broke down while it was being driven by a servant whom he had sent to haul certain supplies. In order to procure the means of reaching his destination, the servant took a part of the plaintiff's wagon. Held, that the defendant might properly be found liable. The *ratio decidendi* was thus stated in the syllabus of the court: "A master is liable for a trespass committed by a servant without his express authority, if the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose." It was suggested, but not decided, that the master is liable, "though it be not actually necessary to commit the trespass in order to accomplish the purpose of the employment, if the servant, in the exer-

cise in good faith of the judgment and discretion ordinarily expected of a servant in doing his master's business, deems it necessary, and so does the act in good faith, not for himself, but for his master, and in his business."

Compare *Potulni v. Saunders* (1887) 37 Minn. 517, 35 N. W. 379 (§ 2492, note 3, *post*), where a master was held liable for the theft of hay taken by a teamster to feed his master's team.

In *Guttner v. Pacific Steam Whaling Co.* (1899) 96 Fed. 617, the masters of two whaling ships, together with natives living on shore, took from an ice-bound vessel without the consent of those in charge, certain provisions, which were divided between the ships, and also whaling gear and other articles, which were kept by the natives. Held, that the owners of one of the ships could be held liable only for the value of that portion of the stores taken which was applied to the use and benefit of their vessel. The fact that the master consented to the taking of the other property by the natives could not render his principals liable therefor. The court said: "The defendant is only liable for the tort of the master of the Newport in so far as he was engaged in accomplishing a purpose within the general scope of his employment, and he was not clothed by the defendant with authority to secure whaling gear and other property for the natives, nor supplies for any other vessel than the one of which he was master. In *Cooley on Torts*, p. 536, in discussing the general questions as to when the master is responsible for the wrongful act of his servant, it is said: 'The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name.' Certainly, under this rule, the court would not be justified in finding as a fact that the master of the Newport was acting within the scope of his employment in so far as he acted jointly with the natives and with the master of the Fearless in taking from the Navarch supplies and other property not for the use of the Newport."

himself, his refusal to return the property or account for its value, according to circumstances, rendered him an actual participant in the conversion, and therefore chargeable as a principal tort-feasor.

In *Tyler Ice Co. v. Tyler Water Co.* (1906) 42 Tex. Civ. App. 210, 95 S. W. 649, an action against an ice company for water alleged to have been wrongfully taken from plaintiff's mains, plaintiff contended that the water was so taken by one of defendant's servants in the furtherance of its business and within the scope of his authority. Held, that a request for an instruction that defendant was not liable if the water was taken without its knowledge, and its use was not necessary in the operation of defendant's plant, was properly refused, for the reason that it ignored the question whether the determination of the amount of water necessary was left to such servant. The court said: "If the act of Morehead in procuring the water was in the line of his duty and in furtherance of the business of appellant, and it was left to him to determine how much of appellee's water should be used in the operation of the plant, appellant would be liable for the value of all the water taken by him."

In *The Florence* (1877) 2 Flipp. 56, Fed. Cas. No. 4,880, the court sustained a libel against a scow for the conversion and use of a lighter by the master of the scow.

b. *Liability of master denied.*—In *Everest v. Wood* (1824) 1 Car. & P. 75, to prove a conversion of a quantity of bricks, evidence was given that some men took them away in a cart; and that, on being asked by the witness why they did so, they said that they were ordered by their master, Mr. Wood. It was also shown that the name "James Wood" was painted on the cart. Gifford, Ch. J., ruled that on this evidence there was nothing to connect the defendant with the transaction. "The name or 'James Wood' on the cart might be the name of any other 'James Wood.'"

In *Barnard v. How* (1824) 1 Car & P. 366, a horse was kept at the defendant's stables, and one day, when he was from home, three or four of his servants being in charge of the premises, the horse was taken away. The defendant blamed his hostlers for letting it be taken, but when he was himself re-

monstrated with, replied that it was of no consequence, because he was indemnified. Abbott, Ch. J., said that the horse appeared, on the evidence, to have been taken away without the knowledge or assent of the defendant, and that he was not liable in trover, though he might have been in another form of action, *i. e.* one brought on the ground of negligence.

In *Brown v. Purviance* (1828) 2 Harr. & G. 316, A, the harbor master of B, having been directed by the board of health to remove the plaintiff's vessel from a wharf and moor it in the stream, employed C to perform this duty. After C and the men hired to assist him had finished the job, they returned to the shore in a boat belonging to the vessel. They then abandoned the boat, and it was lost to the plaintiff. The boat was demanded of A by the plaintiff, and, he having failed to return her, an action of trover was brought against him. Held, that from the time the vessel was moored in the stream, C ceased to be A's agent, and that his subsequent acts were not imputable to A. C was regarded as having abandoned his duty and having wilfully become a wrongdoer.

In *Vandeymark v. Corbett* (1909) 131 App. Div. 391, 115 N. Y. Supp. 911, a sheriff who had levied upon certain property left it temporarily in the custody of the defendant's servant. Held, that the defendant could not be held liable for conversion on the ground of the servant's having refused to deliver the property to a third person. The court said: "It was substantially undisputed that Lasure represented the sheriff in retaining possession of the cattle; that he was engaged in doing his work, and that the sheriff alone had the right to control or direct him in that particular employment."

In *Layman v. F. F. Slocomb & Co.* (1909) 7 Penn. (Del.) 403, 76 Atl. 1094, an action of trover for certificates of stock alleged to have been converted by the defendant corporation, the jury were instructed that it was a good defense to show that an officer of the corporation converted them individually.

It has already been pointed out that a similar alternative ground of responsibility is also available in many of the cases which have involved the commission of a fraud by the servant. See § 2382, *ante*.

The liability of a corporation for the conversion of property by its officers or servants has been affirmed in several cases.²

2404. Seizure of property for the satisfaction of debts.—In an English case where a servant who had been merely authorized to distrain cattle damage feasant drove the plaintiff's cattle from the highway into his master's close, and there distrained them, the right of recovery was denied on the broad ground that "a master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one."¹ Having regard to the facts, this decision may possibly be sustainable upon the hypothesis that the act which caused the injury was, beyond the scope of the tort-feasor's employment.² But at the present day, even in England, it would probably not be accounted a valid precedent in so far as it was based upon the illegal quality of the act. (See § 2241, *ante*). A similar remark is applicable to some other cases belonging to the same period, in which it was laid down that, in the absence of evidence showing a prior authorization or a subsequent ratification, a

In *The Dauntless* (1881) 7 Fed. 366, a cargo of mineral phosphate was taken from an island by the master of a vessel in violation of rights said to have been exclusively given to the libellant by the Brazilian government to gather the phosphate. It was intimated, but not decided, that the vessel would not be liable for the wrongful act of the master in taking the cargo, unless prior authority or subsequent ratification of his acts was shown.

² *Yarborough v. Bank of England* (1812) 16 East, 6, 14 Revised Rep. 272: See *Duncan v. Surrey Canal* (1821) 3 Starkie, 50; *Smith v. Birmingham & S. Gaslight Co.* (1834) 1 Ad. & El. 526, 3 Nev. & M. 771, 3 L. J. K. B. N. S. 165; *Beach v. Fulton Bank* (1827) 7 Cow. 485; and several of the cases cited in note 1, *supra*.

¹ *Lyons v. Martin* (1838) 8 Ad. & El. 512, per Patteson, J. The jury were held to have been properly directed that, as the act of seizure was not within the scope of a servant's ordinary authority, some direct authority from the master ought to be proved.

² During the argument of counsel in *Bayley v. Manchester, S. & L. R. Co.* (1872) L. R. 7 C. P. 415, Willes, J., referred to the case as being one in which "the act was a wilfully illegal act, wholly without the scope of the employment." It is not altogether clear from this statement, whether the position of the learned judge was that the act was "without the scope of the employment," simply because it was "illegal," or that it was not only "illegal," but also "outside the scope of the employment." In view of the date of the case, it seems not unlikely that the latter was his meaning. But it may be doubted whether the majority of the courts would now deem it warrantable to hold—at all events as a matter of law—that the act in question was beyond the scope of the employment. The author ventures to express the opinion that in most, if not all, jurisdictions, such an act would be deemed imputable to the master, as being merely an improper method of doing something which he was authorized to do.

landlord could not be held liable for the tortious act of an agent in distraining upon chattels which his warrant did not empower him to seize.³

The decisions and *dicta* of the American courts with regard to the liability of a master for similar torts are not consistent.⁴

It is not disputed that, where an agent deputed to make dis-

³ In *Lewis v. Read* (1845) 13 Mees. & W. 834, 14 L. J. Exch. N. S. 295, a landlord authorized his bailiff to 'distrain for rent due to him from his tenant. Special directions were given that nothing should be taken unless it was found on the demised premises. The bailiff distrained cattle of another person (supposing them to belong to the tenant) beyond the boundary of the farm, the cattle were sold, and the landlord received the proceeds of the sale. Held, that the landlord would not be liable for the value of the cattle, unless it was found by the jury that he ratified the bailiff's act with knowledge of the irregularity, or that he chose, without inquiry, to take all risk upon himself.

In *Freeman v. Rosher* (1849) 13 Q. B. 780, a broker to whom a warrant had been given to distrain upon the plaintiff's chattels for rent took away a fixture, and turned over the proceeds to his principal, the defendant, who received the money without inquiry and without actual notice that anything irregular had been done. Held, that the wrongful act was not imputable to the defendant. Patteson, J., thus laid down the law: "It is clear that a principal is not responsible for a trespass by an agent, unless he gave a prior authority or subsequent assent. Here, the warrant was the only prior authority, and clearly did not extend to destroying a building or removing a fixture."

The rule in the text was also recognized in *Haseler v. Lemoyne* (1858) 5 C. B. N. S. 530, 28 L. J. C. P. N. S. 103, 4 Jur. N. S. 1279, 7 Week. Rep. 14. See note 5, *infra*.

These rulings seem to be essentially inconsistent with two earlier decisions. In one of these, *Bates v. Pilling* (1826) 6 Barn. & C. 38, 9 Dowl. & R. 44, 5 L. J. K. B. N. S. 40, where the agent of an attorney, not knowing that a debt had been paid, entered up judgment and levied an exception to collect the debt, it was held that the creditor, who had employed the attorney to collect the debt,

and the attorney, who had set his agent in motion, were liable for the trespass.

In the other *Hurry v. Rickman* (1831) 1 Moody & R. 126, it was ruled at nisi prius that a landlord who had authorized his bailiff to distrain for rent was *prima facie* liable for the act of his bailiff in taking goods privileged from distress; but that he would not be liable if he disclaimed the act when the circumstances became known to him.

⁴ In *Cate v. Schaum* (1878) 51 Md. 299, the English cases (note 3. *supra*) were distinguished from the one before the court, on the ground that "the tortious acts of the servant or bailiff were not within the scope of the authority delegated by the principal." This remark betokens an approval of the conclusion actually arrived at; but it does not necessarily import an approval of the broad doctrine that a master is not vicariously responsible for the illegal acts of his master. As to the case, see further in note 5, *infra*.

In *Everson v. Syracuse* (1885) 100 N. Y. 577, 3 N. E. 784, it was held that the acts of a constable who had unlawfully seized and sold real property for city taxes, and paid the proceeds into the city treasury, without notice of the circumstances to the municipal authorities, could not be imputed to the city, unless it was shown that the municipal authorities authorized the sale or afterwards ratified it. This decision was in harmony with the English cases, but they were not referred to by the court.

In *Joyce v. Duplessis* (1860) 15 La. Ann. 242, 77 Am. Dec. 185, it was held that an employer was liable for the illegal act of an employee appointed to collect a debt, in seizing, upon execution, the property of a person other than the debtor. The *ratio decidendi* was that authority to collect a debt carried with it authority to sue for it and issue execution on judgment. The distinction taken in the English cases between illegality and mere irregularity was not referred to.

traint "takes the goods which it was meant he should take, the landlord is liable for any irregularity committed by him in the conduct of the distress."⁵

In an English case it was held that an action of trespass lay against a corporation for breaking and entering the locks in its canal, and seizing and carrying away barges and coal upon which tolls were due.⁶ The liability of a corporation for the act of an agent in suing out an attachment of property has been recognized in several American cases.⁷

2405. Other wrongful acts.—The liability of masters for wilful trespasses in respect of personal property has been affirmed under the following circumstances: Where an engineer wantonly or wilfully ran his locomotive over persons or animals trespassing upon the track;¹ where the driver of a street car drove it against a vehicle which was obstructing the track;² where a motorman wilfully ran

⁵ Williams, J., in *Haseler v. Lemoyne* (1858) 28 L. J. C. P. N. S. 103. Cockburn, Ch. J., as reported in the Law Journal, observed during the argument of counsel: "If you employ a person to do a certain act, you authorize him to do all that is requisite for completing such act. Where I send a man to distrain, and he distrains something else than I authorized him to distrain, I am not liable; but if he does distrain on the things I authorized him to distrain, it is then my business to see that he does what is requisite to make it a good distress of such things; and if I do not see to it myself, I am answerable for any irregularity he may commit." Crowder, J., referred to *Gauntlett v. King* (1857) 3 C. B. N. S. 59, where A authorized B, a broker, to distrain for rent due him from C. B, having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory. Held, that A was liable jointly with B, in trespass.

In *Cate v. Schaum* (1878) 51 Md. 299, the grounds upon which the decision proceeded were thus stated: "Here the distress warrant clothed the bailiff with authority to enter the premises to make the distress, and the wrong done was in the manner of executing the authority. And in such case, the general principle applies, that the master is responsible

for the wrongful acts of his servant, even though they be wilful or reckless, if the act done by the servant be within the scope of his employment and in furtherance of his master's business."

⁶ *Maund v. Monmouthshire Canal Co.* (1842) 4 Mann. & G. 452, 5 Scott, N. R. 457, Car & M. 606, 6 Jur. 932, 3 Eng. Ry. & C. Cas. 159.

⁷ *Jefferson County Sav. Bank v. Eborn* (1887) 84 Ala. 529, 4 So. 386; *Western News Co. v. Wilmarth* (1885) 33 Kan. 510, 6 Pac. 786; *Wheless v. Second Nat. Bank* (1872) 1 Baxt. 469, 25 Am. Rep. 783.

¹ *Chicago & M. R. Co. v. Patchin* (1854) 16 Ill. 203, 61 Am. Dec. 65; *Detroit, E. R. & I. R. Co. v. Barton* (1878) 61 Ind. 293; *Banister v. Pennsylvania Co.* (1884) 98 Ind. 220; *Cooke v. Illinois C. R. Co.* (1870) 30 Iowa, 202; *Vicksburg & J. R. Co. v. Patton* (1856) 31 Miss. 156, 198, 66 Am. Dec. 552; *Pritchard v. LaCrosse & M. R. Co.* (1858) 7 Wis. 232.

² *Cohen v. Dry Dock, E. B. & B. R. Co.* (1877) 69 N. Y. 170, affirming (1876) 8 Jones & S. 374.

The decision in *Wood v. Detroit City Street R. Co.* (1884) 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124, to the effect that a street car company was not liable for the wilful act of its driver in running against a vehicle which was obstructing the track, proceeded upon the doctrine that a master was not liable for the wilful trespasses of his serv-

his car against a vehicle at a street crossing;⁸ where the motorman of a street car so operated it as to run over a dog;⁴ where the crew of one vessel maliciously ran it against another;⁵ where a farm servant impounded another person's cattle while his master was absent;⁶ where a servant sent to a cattle range with some of his master's cattle, and instructed to impound on his arrival any strange cattle he found there, impounded some cattle which in point of fact were not on his master's land;⁷ where a farm servant, seeing that a mare belonging to his master had been pushed into a ditch and was being bitten in the neck by a stallion, struck the stallion so violently with a spade that it became necessary to destroy him;⁸ where a butcher's servant, having been instructed to go to a certain place and kill "a beef," went to the place, and, finding no animal there but the plaintiff's bull, killed and dressed that;⁹ where the defendant's minor son killed a negro who was stealing sugar cane.¹⁰

On the other hand, the action was held not to be maintainable in

ant. As to the present position of Michigan courts with regard to that doctrine, see § 2239a, *ante*.

³ *Baltimore Consol. R. Co. v. Pierce* (1899) 89 Md. 495, 45 L.R.A. 527, 43 Atl. 940. It was laid down that the master's liability in such a case is a question for the jury, "if there were any circumstances from which it could be fairly inferred that he was simply endeavoring to clear the track so he could proceed with his car, or do something in furtherance of his master's business."

⁴ *Columbus R. Co. v. Woolfolk* (1907) 128 Ga. 631, 10 L.R.A. (N.S.) 1136, 119 Am. St. Rep. 404, 58 S. E. 152. There, an allegation that the motorman suddenly increased the speed of his car, and "wilfully, wantonly, and maliciously" ran down plaintiff's dog which had come upon the track, was held good against a demurrer based on the ground that there was no averment that said act of wantonness and malice was done under the command or with the consent of the defendant.

⁵ *Wallace v. Merrimack River Nav. & Exp. Co.* (1883) 134 Mass. 95, 45 Am. Rep. 301; *Duggins v. Watson* (1854) 15 Ark. 118, 60 Am. Dec. 560.

⁶ *Spafford v. Hubble* (1837), an unreported case decided in Upper Canada, noted in 2 Ontario Case Law Dig. 4168. The *ratio decidendi* was that the servant was acting within the general scope of his authority. The point that the

act was illegal was apparently not taken, though it would, under the English doctrine which then prevailed, have been fatal to the right of recovery. See *Lynons v. Martin* (1838) 8 Ad. & El. 512, 3 Nev. & P. 509, 7 L. J. Q. B. N. S. 214, § 2404, *ante*.

⁷ *Jones v. Barton* (1883) 4 New So. Wales L. R. 271. The defendant's liability was affirmed on the ground that the servant had not acted wilfully, but by mistake, in the course of carrying out the orders given him by the defendant.

⁸ *Hunter v. McRae* (1897) 15 New Zealand L. R. 701. The servant's act amounted to a crime; but the court relied on *Dyer v. Munday* [1895] 1 Q. B. 742, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week. Rep. 440, 59 J. P. 276 (assault), as indicating an abandonment by the English courts of the earlier English doctrine which precluded recovery against the master in respect of an illegal act of the servant. See § 2483, *post*.

⁹ *Maier v. Randolph* (1855) 33 Kan. 340, 6 Pac. 625. The *ratio decidendi* was that the expression "beef" might connote either bull, cow, or ox, and that the servant was honestly attempting to obey the order given, and acting in the execution of his master's business.

¹⁰ *Priester v. Augley* (1851) 5 Rich. L. 44 (act "connected with the father's business").

cases where a chattel sold on the instalment plan was taken from a defaulting customer by employees whose implied authority did not extend to the retaking of chattel's under such circumstances;¹¹ where the master of a ship set on fire an abandoned scow which was drifting about in the track of vessels;¹² where an agent employed by a city marshal to carry into effect an ordinance which provided for the killing of unmuzzled dogs killed a dog which was not within the terms of the ordinance;¹³ where a servant laid hold of a horse that had strayed to his master's farm, and rode it to the farm of its owner with such violence and cruelty that it was severely injured;¹⁴ where the evidence failed to show whether the plaintiff's trespassing cattle had been injured while they were within the defendant's field or outside of it;¹⁵ and where the defendant's overseer and manager, acting, as he believed, in his employer's interests, but without any express authority from him, seized and detained certain cattle belonging to the plaintiff, because, as the jury specially found, he suspected that the plaintiff's servants had killed his employer's cow.¹⁶

¹¹ *Weinstein v. Singer Mfg. Co.* (1907) 121 App. Div. 708, 106 N. Y. Supp. 517. The duties of both employees were distinctly specified by written contracts. The authority of one of them was limited by his contract to selling and collecting for sewing machines, and the repossessing and delivering to the employer of such machines as it might direct. The employment of the other that of a managing salesman at the employer's store, with such other services as should be required of him; but he was not authorized to contract debts for the employer, or to bring suit without express authority.

¹² *North American Dredging & Improv. Co. v. The River Mersey* (1892) 48 Fed. 686. The court said: "The act was not done in the service of the ship, or for any benefit to the ship, or by any act of negligence in the navigation of the ship; nor was it done in the execution of any duty of the master to the ship, or to her owners; nor was the act within the scope of the master's duties or powers as the representative of the owners. Neither the owners therefore, nor their property, can be held legally answerable for it." It seems permissible to feel some doubt with regard to the correctness of this decision. Surely the defendant, in common with other shipowners, was interested in the re-

moval of a dangerous obstruction to navigation.

¹³ *Pritchard v. Keefer* (1870) 53 Ill. 117.

¹⁴ *Dalrymple v. M'Gill* (1804) Hume (Sc. Sess.) 387. The *ratio decidendi* was that the servant had done the act wilfully for his private ends, and that there was no evidence that his conduct was known to or countenanced by his master. It is, however, probable that in many jurisdictions a court could decline to hold, as a matter of law, that a farm servant acts outside the scope of his employment in taking back to the owner an animal which has intruded upon his master's premises. If such work is within the range of his duties, the further conclusion seems to be inevitable, that his master must be responsible for the improper manner in which it is performed.

¹⁵ *Lee v. Nelms* (1876) 57 Ga. 253. The mere element of locality would probably not be considered by all courts to have been decisive under the given circumstances. See § 2284, *ante*.

¹⁶ *Kearns v. Wilson* (1885) 19 So. Austr. Rep. 28. The *ratio decidendi* was that the act had no relation to the protection of the master's property, and that the servant was not authorized to make reprisals on another person's property for a suspected offense.

In one case recovery, the ground on which was denied, was that the injurious act was induced by personal spite on the servant's part.¹⁷ In other cases the remedial rights of the parties were discussed with reference to the doctrine that the authority of a servant to commit an illegal act could not be implied,¹⁸ and to the doctrine that a master could not be held liable for the wilful trespasses of his servant.¹⁹

¹⁷ In *The James Seddon* (1866) L. R. 1 Adm. & Eccl. p. 64, 35 L. J. Prob. N. S. 117, 12 Jur. N. S. 609, 14 Week. Rep. 973, Dr. Lushington referred to a decision, the name of which was not stated, in which the captain of a ship tried to run down another ship on which he had been refused employment.

¹⁸ In *Wardrope v. Hamilton* (1876) 3 Sc. Sess. Cas. 4th series, 876, 13 Scot. L. R. 568, the declaration in an action to recover the value of a dog shot by a gamekeeper was held bad, because it did not specifically aver that he was acting under the instructions of his master.

¹⁹ In *Cox v. Keahey* (1860) 36 Ala. 340, 76 Am. Dec. 325, the ground upon which the owner of a steamboat was held not to be liable for the damage resulting from a collision between it and another vessel was that the crew had acted wilfully.

In *Andrus v. Howard* (1863) 36 Vt. 248, 84 Am. Dec. 680, where a servant was sent by his master to bring cattle from a certain pasture where they were supposed to be, and when he did not find them there, he searched for them in the neighborhood, and by mistake

took an animal belonging to another person out of the adjoining field, the master was held liable. The court reasoned thus: "The master is not liable for the wilful wrong or trespass of the servant, though the act be done while employed in the business of his master. It is not claimed, and there was no evidence tending to show, that the act here complained of was the wilful act of the servant. The case shows that the servant supposed the heifer he tried to drive off was one of Cole's. It was a mistake likely to be made—for young cattle pastured through the season, by their growth, change so much in appearance that they are not readily identified, unless they are either frequently seen, or have some peculiar marks or looks by which they may be distinguished." The circumstances were deemed to bring the case within the rule that trespass lies "if the act was done by the servant in the business of the master which he was directed or expected to do, and he acts in good faith, in the exercise of ordinary care, and neither wilfully nor negligently, but by mistake, commits the trespass."

CHAPTER CIII.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER FOR INJURIES OCCASIONED BY THE WILFUL TORTS OF HIS SERVANTS TO THIRD PERSONS STANDING IN A CONTRACTUAL RELATIONSHIP TO HIM. LIABILITY OF CARRIERS.

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a. Generally.

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a. Generally.

b. Arrest.

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- 2456. Duty of carrier to protect passengers against injuries from the wilful torts of other passengers.
 - a. Doctrine prevailing in the United States.
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2406. Introductory.—In this chapter it is proposed to consider how far the liability of a master for the wilful torts of his servant is affected by the circumstance that the relation of carrier and passenger existed between him and the injured person at the time when the injury complained of was inflicted. The cases relating to the subject are so extremely conflicting, and their weight as precedents depends so largely upon the date at which they were decided, that it will be advisable in the first place to review them chronologically with reference to each jurisdiction. It should be mentioned, however, by way of caution, that the precise doctrinal standpoint of the courts is in many of the cases a matter of considerable uncertainty.

It is scarcely necessary to observe that in any view of the obligations of a carrier with regard to the indemnification of a passenger

for the wilful act of his servant, no action can be maintained against him unless it appears that the act was, in point of fact, tortious.¹

¹ In *Graville v. Manhattan R. Co.* (1887) 105 N. Y. 525, 59 Am. Rep. 516, 12 N. E. 51, reversing (1885) 13 Daly, 32, the nonliability of a railway company for the act of a brakeman in compelling the plaintiff to leave the platform of a moving train was predicated on the ground that it was his duty to go inside when directed to do so, and that the assault committed by the brakeman in enforcing compliance with the direction was consequently justifiable.

In *Rose v. Wilmington & W. R. Co.* (1890) 106 N. C. 168, 11 S. E. 526, 8 Am. Neg. Cas. 563, it was held that the defendant could not be held liable in damages because its conductor informed a husband, in a brusque manner, in the presence of his wife, whose head was resting on a pillow as though she was an invalid, that they must pay their fares or get off, and, after waiting until the train reached the next station, said, in a decided or rude tone, that they must get off.

In *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730, plaintiff, while a passenger with his son on a street car, in answer to a question from the conductor, said his son was nine years of age, whereupon the conductor answered: "You can't give me a stiff like that. He is fourteen years old"—thereby charging plaintiff with lying. Held, that, as mere words, unaccompanied by bodily injury, are not actionable unless they are defamatory in a legal sense, no recovery could be had against the company.

In *Spade v. Lynn & B. R. Co.* (1899) 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367, it was held that a railway passenger on whom a drunken man was thrown by being jostled while the conductor was removing another drunken man from the car, rightfully and without negligence, could not maintain an action against the carrier. Holmes, J., said: "When we . . . take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's

right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles; but if that care is shown, probably the injury must be regarded as an inevitable accident. We find some difficulty in seeking upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks she assumed when she took her passage." It was also laid down that a street car conductor's knowledge of the peculiar sensitiveness of a lady passenger does not increase the carrier's obligation toward her, although in case of a wrong toward her the carrier will be liable for the actual consequences, even if the effect would have been less upon a normal person.

In *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 51 S. E. 569, 18 Am. Neg. Rep. 355, a conductor of an electric car in putting on the brake struck a passenger who was standing on the platform of a "trailer." It was conceded that this was unintentional, but there was a dispute as to whether it was negligently done. The plaintiff demanded of the conductor what he meant by treating a gentleman that way; and the conductor responded that the passenger had no business to be standing there. Held, that the words of the conductor did not constitute such an insult or abusive treatment as would entitle the plaintiff to damages.

A. EFFECT OF DECISIONS IN EACH JURISDICTION.

2407. United Kingdom and the British Colonies.—In an early case, Lord Kenyon, Ch. J., observed, *arguendo*, that an assault committed upon a passenger by a member of the crew of a vessel was an act which “did not respect the shipowner’s duty to him.”¹ As the doctrine which then prevailed in England was that a master was not liable for the wilful torts of a servant, whether they were or were not within the scope of his employment (see § 2239, *ante*), it may be presumed that this remark was made with reference to that doctrine, rather than with reference to the idea that an assault was to be regarded as a tort which was in every instance outside the scope of a servant’s employment. Be this as it may, it is apparent from the later cases that, in that country as well as in other parts of the British Empire, the liability of a carrier for the wilful tort of his servants in respect of passengers is tested by precisely the same criterion as in cases where privity of contract is not involved. That is to say, such torts are treated as being imputable or not imputable to him, according as they were, or were not, within the scope of the employment of the tort-feasors. Such was the footing upon which recovery has been allowed in cases where the acts from which the plaintiff’s injuries resulted were these:—The seizure of a passenger’s person for the purpose of preventing him from entering a train;² the for-

¹ *Ellis v. Turner* (1800) 8 T. R. 531, 5 Revised Rep. 441.

² In *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 8 C. P. (Exch. Ch.) 148, 25 Eng. Rul. Cas. 115, affirming (1872) L. R. 7 C. P. 415, the porters were directed by rule 92 of the railway company to prevent passengers from leaving trains whilst in motion, and to do all in their power to promote the comfort of the passengers and interests of the company, and specially given powers of removal under certain specified circumstances not applicable to the particular case. By a case stated in an action for injury to a passenger in his removal from a carriage by a porter under the mistaken idea that he was in a wrong train, it was found that he was violently removed just as the train was moving; that it was the duty of the porters to prevent passengers going by wrong trains as far as possible; but if they were on such trains, to request them to alight, and, on refusal, report them, with a view to charging an excess

of fare, but not to remove them. Held, that there was evidence on which the jury might find that the act of the porter was done in the course of his employment as the defendants’ servant. In the judgment delivered by Willes, J., for the court of common pleas, he said: “If a porter roughly and negligently showing or helping a passenger into a carriage were to mislead or injure him, he would be acting in the course of his employment within the scope of rule 92, and the company would be liable; and why not for the passenger’s being by the same servant, acting in the supposed interest of the company, roughly and negligently put out of a carriage where he was entitled to be? The distinction would be a refinement for which the law as yet furnishes no precedent. There was evidence of an authority to remove a person in a wrong carriage, abused by a blundering servant of the company in pulling the plaintiff out of the right one, in the supposed ‘interest of the company,’ and the rule to enter a non-

suit ought to be discharged." In the exchequer chamber, Kelly, C. B., said: "Here it is unquestionably found that it was the duty of the porters to prevent persons from traveling in the wrong carriages as far as they were able to do so. The porter in this case sees the plaintiff in which he conceives to be the wrong carriage. Does he not act in what he may well suppose to be the performance of his duty when, having no other means of preventing the plaintiff from traveling in such carriage, he pulls him out? In the present case no doubt the porter acted blunderingly, and the results were unfortunate to the company, but one can well imagine a case in which the porter might rightly conceive it to be for the interests of the company and his imperative duty at any risk to remove a person from a carriage, even if force were necessary. A carriage might be so dangerously overcrowded as to expose the company to the risk of incurring serious responsibility as the consequence of such overcrowding. Various other grounds may be suggested on which it might be the porter's duty to remove a person from a carriage. The present case is distinguishable from the cases of isolated acts unconnected with other circumstances done by a servant in direct disobedience to the orders of a master. Here, among many precepts and directions to the porters, we find it distinctly provided that they are, as far as they are able, to prevent persons from traveling in the wrong carriage. We do find it, no doubt, also stated that it was not the duty of the porters to remove a person from the wrong carriage; but where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them,—for instance, where, as in the present case, there is a general order to prevent persons from traveling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage,—it is obviously very likely that the servant may, while acting in the performance of the general duty so cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment. Again, the rules expressly provide that the porters shall do all in

their power to promote the interests of the company, and if a porter, intending to act in the performance of the duty so cast upon him, and doing something with a view to the interests of the company, happens to disobey another direction really to some extent inconsistent with the general orders given to him, it is very difficult to say that in so doing he is not acting within the scope of his employment. On the whole, I think the porter here was so acting; he was interfering in a case in which it was obviously his duty to interfere, and to act to the best of his ability for the protection of the interests of the company; under these circumstances, if in so doing he acted wrongfully or negligently, I think the company must be liable." Martin, B., said: "I am of the same opinion. I am disposed to think that we must be governed in deciding this case by the general principles of the law of master and servant, and that it is really quite immaterial what the rules and by-laws of the company were. The question appears to me to be principally one of fact. And if in fact the porter thought that this man was in the wrong carriage, and, acting as the servant of the company, pulled him out of a carriage of the company where he thought he had no right to be, the company are responsible for his wrongful act in so doing." Blackburn, J., said: "The question here, therefore, is whether there was evidence that the porter, in what he did, was acting within the scope of his employment. If he were so acting, then, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable. It seems to me that the judgment of the court below puts the case upon its fair footing. It is stated, in the third paragraph of the case, that it was the duty of the porters, as far as possible, to prevent persons from going in the wrong carriages. Even without the statement it would be tolerably obvious that such is their duty. It is, likewise, expressly provided by the rules that the porters are to promote the comfort of passengers and the interests of the company. In this particular case the porter, in a stupid, blundering manner, did what, certainly in the result, did not promote the comfort of the passengers nor the interests of the company; but he was given

cible removal of a passenger by a porter from one carriage to another in the same train;³ the wrongful ejection of a passenger from the vehicle on which he was being transported;⁴ the wrongful arrest by, or at the instance of, an employee whose functions are connected

authority, as far as he could, to prevent passengers from traveling in the wrong carriage, and general directions to promote the interests of the company to the utmost of his power, and if, thinking that the plaintiff was really in the wrong carriage, and that he could get him out without hurting him before the train had got into motion, he acted as he did, it seems to me impossible to say that in so acting he was acting beyond the scope of his authority."

In *Hanlon v. Glasgow & S. W. R. Co.* (1899) 1 Sc. Sess. Cas. 5th Series, 559, it was held that a prima facie cause of action was shown by allegations to the effect that A., having observed that one of two companions with whom he intended to travel on one of the defenders' trains was not allowed to enter it because it was just starting, did not attempt to enter, but remained on the platform; and that thereupon one of the defenders' servants seized A. by the collar of his coat, and pushed him violently, so that he fell between the train and the platform. Lord Young said: "With regard to the relevancy of the action I think that it is clearly essential to the pursuer's case to prove that the defenders' servant erroneously thought that the deceased was going to get into a moving train, and that it was his duty to do what he could to prevent him, and that, following up that mistake, he proceeded to act in such a clumsy manner that the pursuer's son was hustled over the platform, run over by the moving train, and killed. The idea that this ticket collector committed a wanton assault upon a man whom he did not know and had never seen before is, I think, absolutely ridiculous. The case is one within the region of those authorities and the rule of law which they illustrate, in which a servant, while discharging what it was within the scope of his duty to discharge, acted under a mistaken notion of his own in such an unjustifiable or careless manner as to render his employer responsible. . . . If it is proved here that one of the defenders' servants mistook his duty and proceed-

ed to discharge it in a blameworthy manner, then the pursuer will be entitled to a verdict, but if otherwise, not."

³ In *Lowe v. Great Northern R. Co.* (1893) 9 Times L. R. 516, where a collier holding an ordinary third class ticket was forcibly removed by porters to a carriage set apart for pitmen, on the ground that his clothes were dirty, a nonsuit was held to have been improperly granted. Mathew, J. (as reported in the Times L. R.), said: "The porters, under the authority of the station master, must have power to remove passengers improperly traveling in certain carriages. In the present case they supposed they were acting in pursuance of this authority, and they made a mistake, for which the company are liable." It is to be observed, however, that during the argument of counsel this judge, as well as Wright, J., made remarks which seem to import that, even apart from the consent of a station master, porters are authorized to remove passengers from one carriage to another.

⁴ *Seymour v. Greenwood* (1861) 7 Hurlst. & N. (Exch. Ch.) 355, affirming (1861) 6 Hurlst. & N. 359 (pretext of ejection was that the passenger was drunk). Williams, J., who delivered the judgment of the court, said: "We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion; or, in other words, misconducted himself in the course of his master's employment, and therefore the master is responsible. . . . It is said that, although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the

with the operation of trains;⁵ an assault committed by the servants of a ferry company in attempting to enforce a regulation;⁶ an assault made by the purser of a steamboat upon a passenger with whom he had had a dispute regarding the payment of the fare.⁷ It may be

guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible.⁵

In *Butler v. Manchester, S. & L. R. Co.* (1888) L. R. 21 Q. B. Div. (C. A.) 207, 57 L. J. Q. B. N. S. 564, 60 L. T. N. S. 89, 36 Week. Rep. 726, 52 J. P. 611, the authority of a ticket inspector to remove from a train a passenger who had lost his ticket was not questioned. The only question discussed was the justifiability of the removal under the given circumstances.

In *Adams v. National Electric Tramway & Lighting Co.* (1893) 3 B. C. 199, where the plaintiff recovered for an assault committed by the conductor of a tram car in ejecting him therefrom, it was unsuccessfully contended that the act of ejection was *ultra vires* for the reason that the only power which the statute incorporating the defendant company had conferred upon it in respect of dealings with a passenger who refused to pay the fare was to summon him and have him fined.

⁵In *Moore v. Metropolitan R. Co.* (1872) 42 L. J. Q. B. N. S. 23, L. R. 8 Q. B. 36, 27 L. T. N. S. 579, 21 Week. Rep. 145, the plaintiff traveled with a ticket which entitled him to leave the train at N. station. Before the train arrived there it stopped at E. station, whereupon he got out of the carriage, and, upon being asked for his ticket, handed it to the collector. He was told by the collector that it was not available, and that he must pay the sum of two pence excess fare. He refused to do so unless a receipt was given to him, and was given into custody by the inspector of the station at F. station, and charged with having, on arriving at that station, refused to deliver up his ticket or pay his legal fare, and thereby defrauding the company of two pence. The charge was preferred before a magistrate and dismissed. Held, that

in an action against the company for false imprisonment the question whether the inspector was authorized, expressly or impliedly, to give the plaintiff in charge should have been submitted to the jury.

In *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297, the railway company was held not to be liable for the arrest of the plaintiff by a ticket collector in its service. As was pointed out by Blackburn, J., in *Goff v. Great Northern R. Co.* (1861) 3 El. & El. 672, this decision is apparently inconsistent with a later one rendered by the same court. *Giles v. Taff Vale R. Co.* (1853) 2 El. & Bl. 822. Its validity as a precedent is therefore very questionable, so far as it turns upon the authority of the inspector to make the arrest under the given circumstances. But no question was raised regarding the quality of the given act as being done by him in the capacity of a servant.

⁶*Robertson v. Balmain New Ferry Co.* (1906) 6 New South Wales, St. Rep. 195, 23 W. N. 70. The plaintiff was a person who, after having missed a boat, was leaving the wharf with the intention of taking passage at another ferry. The regulation which he refused to comply with was one which prescribed that everyone should pay a certain sum before leaving the wharf, whether he had used the ferry boat or not. Held, that the action was maintainable.

⁷*Emerson v. Niagara Nav. Co.* (1883) 2 Ont. Rep. 528. There the plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return on the same day by a steamer of the defendants, which had been taken up by the purser on that day, claimed the right to return by it on the following day under an alleged agreement with the purser, which the latter denied. On the purser's demanding the fare, and the plaintiff's refusing to pay it, the porter, by the purser's direction, laid hold of a valise which the plaintiff was carrying, and attempted to take it and hold it for the fare, whereupon a scuffle ensued, and the plaintiff

pointed out, however, that in all the cases cited, the right of the plaintiff to recover was affirmed, and that the act complained of was of such a character that the employer would have been liable for an injury caused by it, even if the injured person had been a stranger. So far as the present writer is aware, no English or colonial court has yet been called upon to express an opinion regarding the extent of a carrier's responsibility in respect of torts which have no connection with the ordinary functions of his servants. By referring to § 2456, *b, post*, the reader will see that it has been held in England that a carrier is not under any absolute duty in respect of protecting a passenger against the wilful misconduct of other passengers. The definite acceptance of that doctrine would probably be held to involve by analogy the rejection of the doctrine that such a duty is incumbent upon carriers with relation to the wilful misconduct of his servants. But the cases cited in the section just mentioned indicate that the status of the former doctrine is still quite doubtful. If upon reconsideration it should be disapproved, and the existence of a duty to safeguard passengers against maltreatment by other passengers

was injured. Held (Osler, J., dissenting), that the purser was not acting within the scope of his duty in thus forcibly attempting to take possession of the valise, and the defendants were not liable for his act. Wilson, Ch. J., said: "It appears to me that, although the purser was acting in the interest and for the benefit of his employers, he was not acting in the due course of his employment and within the line of his authority. He was committing an assault, and he might as well have seized the watch from the person of the plaintiff, or put his hand into the plaintiff's pocket and held the watch, or paid himself by force from the plaintiff's money, as wrest the valise from the plaintiff's hands. The company, and the purser for them, had the right, if in possession of the valise, to keep it for the unpaid fare, assuming it to have been unpaid, but neither the company nor the purser had the right to commit an assault for the purpose of acquiring a lien, and in my opinion the company are not liable for the unauthorized act of the purser." Galt, J., said: "It is not disputed that the defendants have a lien on the luggage of a passenger to secure payment of his fare, and consequently that any person appointed by them as their officer to collect such fare

has an authority derived from them to exercise such right, and that in so doing he must and should be considered as acting under such authority, and they are responsible for his acts. If, therefore, the person whose duty it is to collect the fares of the passengers should, under a mistaken belief that a passenger had not paid his fare, insist on detaining the luggage of a passenger until his fare was paid, the defendants would be responsible for his act, as he was engaged in discharging a duty specially delegated to him, and exercising a right which they possessed. But the defendants have no right or authority to exercise the power of forcibly taking possession of the passenger's luggage which is in his actual personal possession, by way of asserting a lien, and consequently they can confer none on their servants. If, therefore, their officer does act in that manner, he cannot be said to be acting under their authority, and they are not responsible." This, it is submitted, was a case in which recovery should have been allowed on the ground that the servant had resorted to an improper method of doing something which was within the scope of his authority,—*viz.*, enforcing the payment of the fare.

should be affirmed, consistency would seem to demand that a similar duty should be predicated with regard to the misconduct of servants. It is not impossible, therefore, that the theory of the English courts may ultimately be assimilated to that which, as is shown by the decisions reviewed in the following sections, is now sustained by an overwhelming preponderance of authority in the American states.

2408. Federal courts of the United States.—In a case where the master of a ship was held to be personally liable in damages for continued and wanton cruelty to passengers, Justice Story, sitting as a circuit judge, based his conclusion upon the broad ground that the defendant had violated a duty which his contract imposed upon him with regard to the proper treatment of the aggrieved parties.¹ As the reason thus assigned would obviously have been equally controlling if the action had been brought against the defendant's employer, the decision may be regarded as having involved by implication the doctrine that the liability of a carrier to a passenger is predicable in respect of any acts of a servant which constitute a breach of the contract of carriage, and not merely in respect of acts done by the servant with relation to the actual work of transportation. About fifty years after the decision was rendered, it was cited as authority for that doctrine in a case where an action for an assault was held to be maintainable against the carrier.² The same theory as to the respon-

¹ *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575. "In respect to passengers," said the learned judge, "the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet farther, it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds: What can be more disreputable, and at the same time more distressing, M. & S. Vol. VI.—458.

than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief, in cases of seasickness and ill health? It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings in the most tyrannical manner, and yet if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity."

² *Pendleton v. Kinsley* (1871) 3 Cliff.

sibility of the carrier was subsequently adopted by the Supreme

416, Fed. Cas. No. 10,922 (passenger on a steamer who had had an altercation with the clerk about the fare was seized by him and pushed down to another deck). Clifford, J., said: "Unjustifiable as the conduct of the clerk was, the case must be viewed as between these parties just as it would be if no dispute had arisen as to the fare, and the questions to be decided are whether the defendant is liable for the injuries inflicted upon the plaintiff by the clerk, and, if so, upon what ground does that liability rest. Sufficient has already been remarked to show that the owner of the steamer is liable to the plaintiff for the injuries inflicted upon him by the agent of the owner, but it is quite important, in case of a new trial, to ascertain upon what ground that liability arises,—whether merely as a principal answering for the acts of his agent in the course of his employment, or as a carrier of passengers answering as such for a breach of the obligation which he assumed as such carrier, that the plaintiff as his passenger should not be ill treated by himself or his employees, and that he and they should use all due care and proper exertion to protect him as such passenger from any degree of violence or any kind of abuse or ill treatment from other passengers, or other persons coming on board during the trip. . . . He may have his remedy against the carrier, it is said, if he can prove that the carrier was negligent, or that the active person was the agent of the carrier and was in the course of his employment, but, if not, he must be content with his remedy against the assailant of his person. Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply. Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance; and for the fulfilment of those obligations

the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation. . . . Conductors and employees of a railroad company represent the company in the discharge of their functions, and, being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission; and the same rule must be applied in a suit against the owner of a steamer as the carrier of passengers for the misconduct of the master, as the owners of a vessel carrying passengers for hire are liable for breaches of duty of the master to the passengers equally as they are in case of merchandise committed to their care."

In addition to *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575, Clifford, J., cited *Nieto v. Clark* (1858) 1 Cliff. 145, Fed. Cas. No. 10,262, where the doctrine laid down in that case was invoked as a ground for a decision to the effect that a steward of a ship who had attempted to ravish a female passenger had been justifiably discharged at a foreign port, the passenger having refused to stay on board unless he should be discharged. Other cases cited were *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474; *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197, and *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316. But the New York case, properly speaking, is not an authority for imputing to a carrier misconduct of the description which the learned judge was considering. See § 2433, *post*.

Two cases decided before *Pendleton v. Kinsley*, *supra*, in which the liability of a ship and her owners for the torts of the crew was regarded as being determinable with reference to the test of the scope of the tort-feasor's employment, may be referred to here. *The Aberfoyle* (1848) Abb. Adm. 242, Fed. Cas. No. 16; *McGuire v. The Golden Gate* (1856) McAll. 104, Fed. Cas. No. 8,815. The opinions expressed are now merely of historical interest.

Court of the United States.³ It has also been applied in several cases decided by inferior tribunals both before and since that court expressed its views.⁴

³ In *New Jersey S. B. Co. v. Brockett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, where the plaintiff recovered damages for being ejected with unnecessary violence from a part of a steamer where he had no right to be, it was contended that, as the plaintiff was in the forbidden part of the steamer, no case was made that would sustain an action upon the contract of transportation, and that a request to instruct the jury to find for the defendant should have been granted. But the court said: "This argument assumes that the plaintiff could not claim protection under the contract for safe transportation in respect to an injury done him by the company's servants while he was upon a part of the boat other than that to which he was restricted by the rule or regulation printed on his ticket. This position cannot be sustained. We shall not stop to inquire whether the regulation in question is shown to be a part of the contract for transportation; and we assume, for the purpose of this case, that the plaintiff stipulated that, during the voyage, he would remain upon the part of the boat to which deck passengers were assigned; still, it would not follow that his violation of that stipulation deprived him of the benefit of his contract. Such violation only gave the carrier the right to compel him to conform to its regulation, or, upon his refusing to do so, to require him to leave the boat, using, in either case, only such force as the circumstances reasonably justified. If the injuries necessarily arose from his violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were not the necessary result of his being, at the time, on a part of the boat where he had no right to be, and were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, he is not precluded from claiming the benefit of the contract for safe transportation. . . . What will be misconduct on the part of its servant towards a

passenger cannot be defined by a general rule applicable to every case, but must depend upon the particular circumstances in which they are required to act. In the enforcement of reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force. But the law will not protect the carrier if the servant uses excessive or unnecessary force. This doctrine is well illustrated in *Sanford v. 8th Ave. R. Co.* (1861) 23 N. Y. 343, 345, 80 Am. Dec. 286." An instruction that, as a matter of law, more force was used than was necessary where a deck passenger out of his proper place on a steamer was awakened from sleep by a blow with a cane, and, without any violence on his part, was caught, after being struck several times, by the collar of his coat and pulled headlong against a barrel standing near, seriously injuring his shoulder, was held not to be erroneous. In the headnote the effect of this case is thus stated: "A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants employed in executing the contract of transportation, and acting within the general scope of their employment." This statement was adopted as correct in *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, where the question chiefly discussed was whether the plea of self-defense was made out. See § 2453, note 2, *post*.

In *Pullman's Palace Car Co. v. Campbell* (1894) 154 U. S. 513, 38 L. ed. 1069, 14 Sup. Ct. Rep. 1151, affirming (the court being equally divided) (1890) 42 Fed. 484, the right of a female passenger to recover damages for an indecent assault made upon her by the porter of a sleeping car was declared by Shiras, J., on the ground that the tortious act was "unquestionably a violation of duty owing from defendant."

⁴ In *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116, the conductor of a train refused to honor a return ticket on the ground that certain formalities had not been

satisfied, and afterwards the jury were thus charged by Caldwell, J.: "The law requires railroad companies to carry their passengers safely and treat them respectfully. They are under obligations to use proper precautions and exertions to protect passengers while in the cars from the violence and insults of strangers and copassengers, and they are bound, of course, to protect them from the assaults, insults, and violence of their own conductors and servants."

On the ground that it is the duty of a railroad company to protect its passengers from insult and injury so far as it can, it was held in *Murphy v. Western & A. R. Co.* (1885) 23 Fed. 637, that if the conductor and brakeman on a train conspire with passengers thereon to remove another passenger who has a right to be on such train, or see such passengers eject their fellow passenger, and make no effort to prevent it, or make no attempt to repair the mischief by restoring him to his seat, the company will be liable.

In *Mann-Boudoir Car Co. v. Dupre* (1893) 21 L.R.A. 289, 4 C. C. A. 540, 13 U. S. App. 183, 54 Fed. 646, a passenger who had been unlawfully ejected from a berth in a sleeping car was held to be entitled to recover. Nothing, however, was said regarding the characteristic duty of a carrier.

In *Texas & P. R. Co. v. Williams* (1894) 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440, the facts and law of the case were thus discussed by the court: "The testimony here shows that he approached Williams for his fare, but was informed that he was being passed by the road master, but, upon being told by the party that he had not given Williams permission to ride, he went back to Williams, and again demanded his fare, and in doing this he admits that he may have used strong language, may have sworn, and said that he was a 'damned lie.' How far this was proven by the testimony of the plaintiff, which was before the court, the record does not disclose, and we can only determine what preceded the assault by the admission of Nicely himself. He was at that time acting within the scope of his employment, and when his abuse was answered by something which implied the same insult he had been heaping upon Williams, and which had naturally been drawn out by his own language and conduct, we do

not consider that it can be properly claimed that he immediately abandoned his employment as conductor, and commenced an attack solely in his personal capacity. If, as is claimed, he was resenting a fancied insult as a man, it plainly appears from his own testimony that it was one which he had provoked as conductor, and we consider such character should reasonably be held to cover the whole transaction, and that the entire evidence, when properly considered, cannot reasonably raise a question whether he was not acting beyond the scope of his employment, which should have been submitted to the jury." Having regard to the plainly expressed opinion of the Supreme Court with regard to the absolute quality of a carrier's liability (see note 3, *supra*), it is not easy to understand why so much pains should have been taken in this case to refute the contention that the conductor was not acting as such when he made the assault complained of.

In *Rohrback v. Pullman's Palace Car Co.* (1909) 166 Fed. 797, the court laid it down that "the carrier is liable absolutely as an insurer for the protection of the passengers against assaults and insults at the hands of its own servants; but none of the cases include passengers who are alone the cause of the trouble." The court cited *Hutchinson, Carr.* § 1145; 3 *Thomp. Neg.* § 3184. But the decisions of the Supreme Court do not warrant the attribution of this absolute liability to carriers,—unless, that is to say, the court understood the word "insurer" in a qualified sense as being applicable to those classes of servants who are "acting in the line of their duty, etc." (See *Pendleton v. Kinsley*, note 2, *supra*, where they have personal dealings with passengers.)

In *Goodwin v. Cincinnati Traction Co.* (1910) 99 C. C. A. 661, 175 Fed. 61, where a passenger in a street car, after having had a dispute about a transfer, was assaulted by B., one of the company's inspectors, after he had left the car and was awaiting the arrival of another car for which he held a transfer ticket, the defense offered was that, at the moment of the assault made by B., he was not acting within the scope of his employment as an inspector, because he had directed the passengers where to go to make the transfer, and had put them in the care of H., another inspector, and was then en-

2409. Alabama.—The doctrine that a carrier impliedly stipulates that his passengers shall be properly treated, and that he must answer for any tort of his servants which amounts to a breach of his stipulation in this regard, and which is committed by them while engaged in the discharge of their duties, was adopted in the two earliest cases decided in this state.¹ A subsequent decision seems to be scarcely reconcilable, upon the facts, with the doctrine applied in those cases, or only reconcilable with it by ascribing to it an unwarrantably nar-

gaged in switching the car from which the plaintiff had alighted. The evidence being conflicting as to whether the plaintiff was in point of fact under the direction of B. or of H. at the time when the assault was committed, it was held that the trial judge had improperly nonsuited the plaintiff. It was distinctly laid down by the court that the liability of a carrier for an assault committed upon a passenger depends upon whether the servant was at the time of the assault acting "within the scope of his employment,"—a phrase which here means "engaged in the performance of duties in respect of the particular passenger whose remedial rights are in question."

¹ In *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328, 8 Am. Neg. Cas. 9, the clearly established doctrine was declared to be this,—that railroad corporations are liable for all acts of wantonness, rudeness, or force done by their employees in and about the duties assigned to them; but that the liability does not extend to any tort, wantonness, or wrongful act which an employee might commit in a matter not connected with his service to the carrier. The action in the case was brought by a person who had purchased a ticket, but, having got on the wrong train, was ejected from it while it was in rapid motion. Such an ejection would clearly have been within the scope of the duty of the servants in charge of the train, so that the above statement was an *obiter dictum* in so far as it may be supposed to embody the doctrine of a carrier's absolute liability. The phraseology of the above statement, moreover, is somewhat ambiguous with relation to that doctrine. But the actual position of the court is indicated by the fact that the case of *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am.

Rep. 39, 8 Am. Neg. Cas. 316, which is a clear authority for that doctrine, was cited as a valid precedent.

In *Lampkin v. Louisville & N. R. Co.* (1894) 106 Ala. 287, 17 So. 448, the settled rule was said to be that a carrier's obligation requires him to protect his passengers against the violence and assaults of its servants. It was held that a complaint which alleged that one, "who was a brakeman or flagman on defendant's train, and an employee of defendant," insulted and threatened plaintiff, who had paid full fare for a first-class ticket and was traveling on defendant's train, and "did assault and beat plaintiff while he was getting off the train at his destination," sufficiently charged that the acts complained of were committed, while plaintiff was a passenger, by a brakeman in the employ of defendant, while in the discharge of his duty as brakeman. The court cited the *Goddard Case*, *supra*, and also *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665, which is one of the leading decisions regarding the absolute duties of a carrier. Yet it also adverted to several cases in which "the line has also been carefully and distinctly drawn between such acts as are here complained of, when committed by an agent of the railroad while acting in the line and discharge of his duty, and when committed by him as an individual, and not connected with his service to his company." Most of the cases cited had relation to the claims of mere strangers. The circumstance that two entirely distinct lines of authorities were thus relied upon is calculated to raise a suspicion that the court did not clearly apprehend the fundamental difference between the theories to which they are referable.

row sphere of operation.² But this apparent departure—if departure it was—from the original position was merely temporary. The theory of the carrier's absolute liability has once more been reaffirmed in emphatic language of an extremely wide connotation.³

² *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166. There a trainman, while engaged in a friendly scuffle with a coservant, accidentally pushed the plaintiff off the platform of a car. The grounds upon which the act was held not to be imputable to the company were thus stated: "What these parties did to cause plaintiff's injury was not in the line of their respective engagements, or that of either of them, to their employer; it was not fairly incidental to their employment; it was not done in pursuance of an express or implied authority from the master to do it; it was the result of the conduct of these employees, who, in the commission of the injurious act, however innocently done, had stepped aside from the purposes of the agency committed to them, and inflicted an independent wrong on the plaintiff; and they, if anybody, and not the defendant company, are liable for it." From the language, as well as from the actual decision, it is, to say the least, not an unreasonable inference that the carrier's duty to protect passengers was not regarded as extending beyond acts done by servants with relation to the actual work of transportation. That this was the doctrinal standpoint of the court is also indicated by its citation of *Gilliam v. South & North Ala. R. Co.* (1881) 70 Ala. 268, a case which involved an injury to a person not standing in any contractual relation to the carrier, and which was necessarily decided with reference to the ordinary rule that a master is not liable for acts done by a servant outside the scope of his employment. On the other hand one of the precedents relied upon is the *Lampkin Case*, note 1, *supra*, which is clearly inconsistent with any such narrow conception of the carrier's liability.

³ In *Birmingham R. & Electric Co. v. Baird* (1901) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, the conductor of a street car seized the bell rope to prevent its being pulled again by a passenger who had already rung the bell twice, and immediately came

toward the passenger and assaulted him. "But as between the carrier and its passengers an entirely different rule prevails. As to them the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort and from insult, from indignities and from personal violence. It is not material whence the disturbance of the passenger's peace and comfort and personal security or safety comes or is threatened. It may be from another passenger, or from a trespasser or other stranger, or from another servant of the carrier, or, *a fortiori*, from the particular servant upon whom the duty of protection peculiarly rests. In all such cases the carrier is liable in damages to the injured passenger. And it is of no consequence, when the wrong is committed by the carrier's own servant,—even that servant particularly charged with the duty of conserving the passenger's well being *en route*,—that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty, but is utterly violative of all duty, and apart and away from the scope of employment as that term is understood in the class of cases first above referred to. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment, and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice towards the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily

2410. Arkansas.—*a. Generally.*—This is one of the jurisdictions in which the doctrine as to the absolute liability of a carrier has been adopted with respect to assaults by servants.¹

b. Arrest.—In one case the nonliability of a street railway company for the arrest of a passenger at the instance of a servant was affirmed on the ground that his act was beyond the scope of his authority.² But more recently the doctrine that a carrier is an insurer against all acts of violence on the part of his employees was held to be applicable to wrongful arrests.³

understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine on principle, and while, as indicated above, there are adjudications against it, the great weight of authority supports it." The court, after referring to the general rule which precludes recovery against the master unless the tortious act was within the scope of the servant's employment, proceeded thus: It was held that the court had erred in instructing the jury with respect to "scope of employment," but that the error was nonprejudicial as regards the defendant. It is somewhat strange that the *Goodloe Case supra*, was not referred to. The difficulty, if not impossibility, of reconciling it with the language of the above extract would seem to have been a point demanding some notice by the court.

In *Birmingham, R. Light & P. Co. v. Parker* (1909) 161 Ala. 248, 50 So. 55, the court relied upon the above case, and quoted with approval the following statements in *Hutchinson on Carriers*, §§ 982, 1101: "The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct, or wanton approach. . . . The duty which a carrier owes to a female passenger to protect her from indecent assaults by its servants cannot be frittered away by questions of whether the servants were acting within the scope of their authority."

See also *Birmingham R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701 (where the actual point upon which the decision turned was the justifiability of an assault); *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169

Ala. 372, 52 So. 142 (absolute duty recognized in a case which turned on the question whether the aggrieved party had ceased to be a passenger at the time when he was assaulted).

In *Louisville & N. R. Co. v. Perkins* (1905) 144 Ala. 325, 39 So. 305, it was held that a good cause of action was stated by a complaint which alleged the wrongful, wilful, wanton, and intentional ejection of a passenger from a train by a conductor, and that it was not necessary to aver that the defendant's employees knew of the plaintiff's peril when he was ejected. The motive which prompted the ejection is not stated. The case is therefore one of indecisive import in the present connection.

¹ *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412 (defendant liable for a wrongful and unprovoked assault). The court cited with approval 2 *Hutchinson, Carr.* §§ 1093, 1094; 4 *Elliott, Railroads*, § 1638; *Thomp. Neg.* § 3186; 2 *Fetter, Carr. Pass.* §§ 365, 366.

² *Little Rock Traction & Electric Co. v. Walker* (1898) 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57, where it was held that a conductor, who was merely empowered by the company's rule to remove from the car passengers who did not pay their fare, had no authority to make an arrest for this cause.

³ In *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168, the court made the following remarks with reference to a hypothetical situation, the existence of which was in point of fact negatived by the evidence: "A railroad company as a common carrier of passengers is bound to use extraordinary care not only to carry its passengers safely, but also to protect them during the carriage from assault or injury from

2411. California.—*a. Assaults.*—One decision proceeded upon the ground that the assault in question was committed within the scope of the tort-feasor's authority.¹ But more recently the doctrine as to a carrier's absolute liability has been referred to, *arguendo*, in language which indicates with reasonable certainty that it will be applied whenever a definite opinion with regard to it is demanded by the facts under review.²

b. Arrests.—In two cases involving torts of this description, the criterion with reference to which the carrier's liability was tested was the scope of his employment.³ It will be observed that, in one of the

its agents in charge of the train, and from others. By its contract the railroad company assumes the obligation to protect the passenger against any negligent or wilful misconduct of its servants while performing the carriage. It also assumes the obligation to exercise diligence and care in protecting its passengers while in transit from violence or wrongful misconduct of others on the train. The conductor has control not only over the movements of the train, but over persons on it, and has authority to compel the observance of the rules of the company by all persons on the train. He has therefore the power, under ordinary circumstances, to protect them from violence or wrongful injury from others, and the law makes the company liable for an injury to a passenger resulting from a negligent failure to exercise such power. It is therefore liable for any wrongful arrest of a passenger, made or procured by its servants in charge of the train; and it is also liable for an illegal arrest of the passenger, made by others, which in the exercise of due diligence it could have prevented."

In *Moore v. Louisiana & A. R. Co.* (1911) 99 Ark. 233, 34 L.R.A. (N.S.) 299, 137 S. W. 826, a demurrer was held to have been erroneously sustained to a complaint which alleged that the auditor of a railroad company, while he was in charge of a train, falsely accused a passenger of stealing a watch fob, and had him illegally arrested, but did not state that the auditor in doing this was acting within the scope of his authority. The case cited in note 2, *supra*, was relied on by counsel for defendant, but not referred to by the court.

¹ In *Turner v. North Beach & M. R.*

Co. (1868) 34 Cal. 594, 8 Am. Neg. Cas. 49, it was held that a colored passenger whom the conductor of a street car had wrongfully ejected was entitled to recover actual damages, even though the misfeasance constituted a violation of the carrier's express orders, and was prompted by malicious motives. The *ratio decidendi* was simply that the conductor had acted within the scope of his agency.

² "The law seems to be pretty well settled that a common carrier of passengers, whether a shipowner or a railway company, owes to a passenger while in transit the duty of protection, absolute as against its servants in charge of ship or train, and equally as against fellow passengers when on account of intoxication or acts of violence they should not have been admitted, or when they have been allowed to remain after such misbehavior as justifies their expulsion." *Rahmel v. Lehndorff* (1904) 142 Cal. 681, 684, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 659.

³ In *Trabing v. California Nav. & Improv. Co.* (1898) 121 Cal. 137, 33 Pac. 644, a motion for a nonsuit was held to have been properly denied because the evidence tended to support a complaint which alleged that the defendant's servants and agents in charge of the steamer wrongfully placed handcuffs on the plaintiff, took him to the lower deck of the defendant's steamer, chained him to a post in such a way as to cause him great bodily pain, kept him chained thereto until the steamer reached a place short of the destination to which he had paid his fare, and there wrongfully ejected him from the steamer. The sufficiency of the complaint as against a special demurrer was affirmed on the grounds thus explained:

cases cited, the court expressly declined to consider whether the tort in question could be imputed to the defendant on the ground of his being bound to protect the plaintiff from maltreatment.

2412. Colorado.—The theory of an absolute obligation on the carrier's part has been adopted in this state.¹

2413. District of Columbia.—In one case a street car company was held to be liable for injuries caused to a passenger whom a conductor had wilfully ejected from a moving car.¹ It would seem that the court intended merely to adopt the restricted doctrine that the existence of the contract of carriage operates to render the carrier liable for the wilful as well as the negligent acts of his servant, in so far as they are done in the course of the employment.²

2414. Florida.—In this state the doctrine of the absolute liability of a carrier for the torts of his servants has been adopted.¹

"The wrongs and injuries complained of are alleged to have been committed by the defendant's servants and agents 'who were at said time in charge of said steamer.' This allegation sufficiently distinguishes between those who were authorized to represent the defendant in the management and control of the boat and its business, and those who, through employees and servants, were merely laborers and under the immediate control of those 'in charge of said steamer.' Whether, if these alleged wrongs and injuries had been perpetrated by the deck hands of their own motion, and without the direction of anyone in control of the steamer and its business, the defendant would not be liable upon the ground that it was its duty to prevent it, need not be considered. . . . The answer of defendant, as well as the evidence given on behalf of the plaintiff, shows that all the acts of the captain constituting the alleged wrongs and injuries were done and performed upon defendant's boat, in its operation as a common carrier, by the captain in charge thereof, in the line of his employment. That he was authorized by the defendant to see that persons being transported upon the said steamer paid their fare, and to collect the same, and to remove from the steamer those who, not having paid their fare, refused to pay it when demanded, cannot be questioned. That was not only 'in the line of his employment,' but one of the very purposes for which he was employed."

In *Elser v. Southern P. Co.* (1908) 7

Cal. App. 493, 94 Pac. 852, where the arrest of the passenger was incidental to his expulsion for refusing to pay his fare, the liability of the company was affirmed on the ground that "the testimony warrants the conclusion that in ordering the arrest of respondent the conductor was acting for the company and within his authority. It was the method adopted by the conductor to effect the ejection of plaintiff."

¹ *Bleeker v. Colorado & S. R. Co.* (1911) 50 Colo. 140, 33 L.R.A.(N.S.) 386, 114 Pac. 481 (fact that a railroad conductor was not instructed by the company to use insulting language toward a passenger, and it did not ratify his act in using it, would not relieve it from liability for the mental anguish caused to the passenger); *Denver Tramway Co. v. Reed* (1894) 4 Colo. App. 500, 36 Pac. 557, 8 Am. Neg. Cas. 95 (wrongful ejection of passenger from street car by conductor).

¹ *Converse v. Washington & G. R. Co.* (1876) 2 MacArth. 504, 8 Am. Neg. Cas. 110.

² The authority mainly relied on was *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, which goes no further than this. See § 2433, *post*.

¹ *Pelot v. Atlantic Coast Line R. Co.* (1910) 60 Fla. 159, 53 So. 937. The syllabus written by the court runs as follows: Passengers do not contract with carriers merely for ship room and transportation from one place to another, but for good treatment and against personal rudeness and wanton

2415. Georgia.—The provisions of the Civil Code which are material in the present connection are the following:

Code 1895, § 3817; Code 1910, § 4413, declares that “every person shall be liable for torts committed by his . . . servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary.”

Code 1895, § 2321; Code 1910, § 2780. “A railroad company shall be liable for any damage done . . . by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.”

Code 1895, § 2266; Code 1910, § 2714. “A carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agent to protect the lives and persons of his passengers. But he is not liable for injuries to the person after having used such diligence.”¹

It has been held that under these provisions the liability of a railway company to a passenger for the wilful torts of its servants is determinable upon the same footing as at common law.² The doctrine applied in the cases decided from this standpoint is thus stated in the headnote written for one of them by the court itself. “Railroad companies are responsible to passengers for the torts of conductors and other servants employed in running trains, where such torts are committed in connection with the business intrusted to such servants, and

interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance; and whatever may be the motive which incites a carrier's servant to commit an unlawful or improper act towards a passenger during the existence of the relation of carrier and passenger, and regardless of whether the wrong is committed in the execution of the servant's employment, the carrier is liable for the act and its natural and legitimate consequences.

¹It has been held that where a railway company is sued for a wilful and unjustifiable assault made upon a passenger by one of its servants, but no negligence on the part of that or any other servant is alleged, the law relating to the extraordinary care which a carrier owes to passengers under the provision is not involved, and consequently that a charge upon the subject of such care is improper. *Atlanta Consol. Street R. Co. v. Keeny* (1896) 99 Ga. 266, 33 L.R.A. 824, 25 S. E. 629;

Seaboard Air-Line R. Co. v. O'Quin (1905) 124 Ga. 357, 359, 2 L.R.A. (N.S.) 472, 52 S. E. 427; *Savannah Electric Co. v. Pritchard* (1909) 133 Ga. 747, 66 S. E. 952. In the last-mentioned case the court also disapproved of a charge that the carrier must furnish safe appliances to passengers while traveling, which must be in good condition and inspected with reasonable care, and that the carrier must use ordinary care in the selection of proper officials upon their cars, having in view the business they are to perform.

In *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, it was held that, having regard to the phraseology of the Code provision, it was error to instruct the jury that “carriers must treat their passengers respectfully, and protect them, so far as they reasonably can, from injury or insult on the part of their employees.”

²*Peeples v. Brunswick & A. R. Co.* (1878) 60 Ga. 281.

spring from, or grow immediately out of, such business.”³ Taken literally, this statement might seem to import a responsibility extending only to torts which should be directly related to the actual work of transportation. But the circumstances involved in the case with reference to which it was made show that it is to be construed as applying also to breaches of an assumed duty on the carrier’s part to see that his passengers are properly treated. This view of its meaning is amply confirmed by the later decisions of the court.⁴ But as

³ *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216. There recovery was sought under a complaint containing two counts, one of which was to the effect that the baggage master beat and maltreated the plaintiff wrongfully while engaged in having the baggage of his wife checked; the second to the effect that, when he was riding on the cars with his wife afterwards, the conductor awoke him from sleep, and, recognizing him, threatened to shoot him, and made him jump off the cars while they were running. The court, after showing that under other provisions of the Code the word “person” must be construed as including corporations, observed: “On the whole we think that the true principles deducible from our own Code and the general law, and the reason and spirit thereof, are these: First, if the conductor or other officer on a railroad train, in the exercise of a general power intrusted to him by the company, in respect to passengers, clothed with authority to exact pay from them, to receive their tickets, to receive, check, and deliver their baggage, to supervise their conduct, to put them off the train if disorderly, to care for their reasonable comfort and protection; if in the scope and range of such business the agent act in a manner to trespass upon the rights of passengers, to insult or maltreat them, to assault or wound or beat them, to frighten them so as to force them off the cars without justifiable excuse or reason,—we think that the company is responsible for such tortious conduct of its agents and servants acting where it put them to use discretion and judgment, and within the business it intrusted especially to them. . . . It is a duty that these carriers of passengers owe to the public to employ reliable and gentlemanly agents to conduct and manage their trains; and if they do not employ

such, they should be made responsible for torts committed by those whom they have employed and to whom they have given the power to violate their duty, imposed by law, safely to transport the passenger and decently to treat him on his journey so long as he properly demeans himself.”

⁴ In *Peeples v. Brunswick & A. R. Co.* (1878) 60 Ga. 281, the declaration alleged that plaintiff was a passenger on defendant’s road; that he was in the usual passenger coach; that while thus situated and entitled to the care and protection of defendant, at an intermediate station he was called out of the train by the conductor in charge thereof, who was defendant’s agent, and was beaten, bruised, etc. Held, that the failure to allege in express terms that the agent acted “in the prosecution and within the scope of his business” was not a vital defect, and that the court erred in dismissing the case on general demurrer. *Aliter*, had the injury been inflicted after the delivery of the plaintiff at his destination.

In *Atlanta & W. P. R. Co. v. Condor* (1885) 75 Ga. 51, 8 Am. Neg. Cas. 129, where a brakeman refused to allow a passenger to pass out of one car into the next while the train was in motion, there being no rule of the company forbidding such passing, the company was held liable for opprobrious language and an assault by the brakeman during an altercation arising out of the refusal.

In *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842, a person desiring to become a passenger upon a freight train entered the caboose. The conductor insolently refused to carry him, and struck him with his lantern. The liability of the railway company was affirmed on the ground that the aggrieved party was a passenger “within the reason and spirit of the *Gasway Case*,” *supra*. The court

the consensus of judicial opinion is now overwhelmingly in favor of imputing to masters, even where the aggrieved parties are strangers, liability for the wilful torts of their servants (see §§ 2238 *et seq.*, and chapters CL, CII., CV.), it is obvious that a doctrine of which the

said: "The duty of the conductor was twofold: First, if he refused the plaintiff passage, to do so in a polite manner, and give him a reasonable opportunity to quit the cab of his own motion. Secondly, if, after having done this, the plaintiff still refused to leave the cab, then to use such reasonable force as was necessary to eject him therefrom. Whatever the conductor did in relation to either of these matters was, under the facts of this case, clearly done in the prosecution and within the scope of his business, and the company was liable for his conduct, even though it was voluntary. He had no right to insult the plaintiff by the use of vulgar and profane language and abusive epithets, and then, without provocation, to beat him over the head, in his face and mouth, and knock him out of his cab door with his lantern."

In *Savannah, F. & W. R. Co. v. Quo* (1897) 103 Ga. 125, 40 L.R.A. 483, 68 Am. St. Rep. 85, 29 S. E. 607, 3 Am. Neg. Rep. 777, a railway company was held to be liable for an assault made by a baggage master upon a female passenger, with intent to commit rape.

In *Wolfe v. Georgia R. & Electric Co.* (1907) 2 Ga. App. 499, 58 S. E. 899, the court, proceeding upon the ground that a common carrier is bound to protect a passenger from insult as well as from physical injury, and especially from insult offered by its servants, held that an action was maintainable against a railway company for the insult implied in the fact that its conductor in enforcing Penal Code 1895, § 527, which requires conductors to separate white and colored passengers, called the plaintiff, a white man, a negro, or intimated that he was of African descent.

In *Georgia R. & Electric Co. v. Baker* (1904) 120 Ga. 991, 48 S. E. 355, it was held that the trial judge had improperly sustained a demurrer to a petition which alleged that a conductor maliciously made all manner of ungentlemanly remarks calculated to annoy a female passenger. On the review of this case after the trial consequent upon the overruling of the demurrer had taken

place, the court of appeals held that, in order to warrant a recovery in an action by a passenger to recover for an insult given by the conductor of a street car, his acts must have been such as not only humiliated and insulted plaintiff, but such as would reasonably tend to humiliate any person in similar circumstances. (1907) 1 Ga. App. 832, 58 S. E. 88.

For other cases in which the liability of railway companies in respect of assaults and insults by servants was treated as being absolute, see *Peavy v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70 (question chiefly discussed was whether provoking words of passengers excused defendant); *Savannah Street R. Co. v. Bryan* (1890) 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307; *East Tennessee, V. & G. R. Co. v. Fleetwood* (1892) 90 Ga. 23, 15 S. E. 778 (passenger insulted and assaulted by a conductor on account of personal animosity); *Columbus & R. R. Co. v. Christian* (1895) 97 Ga. 56, 25 S. E. 411 (court laid it down, *arguendo*, that a railroad company is liable if its freight agent takes advantage of the opportunity afforded by the presence of a patron at his place of business to bring about a difficulty with the patron upon the occasion of some previous private quarrel); *Georgia R. & Bkg. Co. v. Richmond* (1896) 98 Ga. 495, 25 S. E. 565; *Brunswick & W. R. Co. v. Moore* (1897) 101 Ga. 684, 28 S. E. 1000, 3 Am. Neg. Rep. 779 (main question involved was whether plaintiff was entitled to a passenger's rights at the time when he was assaulted); *Cole v. Atlanta & W. P. R. Co.* (1897) 102 Ga. 474, 31 S. E. 107 (passenger insulted); *Georgia R. & Bkg. Co. v. Hopkins* (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965 (passenger assaulted); *Central of Georgia R. Co. v. Brown* (1901) 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989 (passenger assaulted); *Dannenberg v. Berkner* (1903) 118 Ga. 885, 899, 45 S. E. 682 (first appeal) [1903] 116 Ga. 955, 60 L.R.A. 559, 43 S. E. 463; *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 51 S. E.

essence is merely that the contract of carriage serves to create, in respect of such torts, a liability which would not otherwise be predicable, no longer possesses much practicable importance.

2416. Idaho.—In this state the doctrine that a carrier is subject to an absolute duty to protect passengers against the misfeasance of his employees has been applied in a case where the plaintiff was wrongfully ejected from a train.¹

2417. Illinois.—*a. Generally.*—In the earliest relevant case in this state the scope of the servant's authority was explicitly treated by the supreme court as the gauge of the carrier's liability.¹ Subsequently

569, 18 Am. Neg. Rep. 355; *Savannah Electric Co. v. Pritchard* (1910) 133 Ga. 747, 66 S. E. 952.

In *Central of Georgia R. Co. v. Motes* (1903) 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, 14 Am. Neg. Rep. 13, the violent act alleged had a direct relation to the enforcement of a regulation, so that the company would have been liable, in any view of its obligations, if the act had been wrongful.

In *Mason v. Nashville, C. & St. L. R. Co.* (1911) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, the following remarks were made: "At the outset it is well to remember that in dealing with the general question of whether a master is liable for a wilful tort of his servant, the doctrine of *respondeat superior* furnishes the basis for decision, if there are no statutory provisions on the subject, but that in certain instances there is a relation between the master and the injured person, out of which arises a duty of protection; and this duty is to be considered in addition to the general doctrine mentioned above. This is true as to a carrier and its passengers. The carrier owes to its passenger a duty of protection even against outsiders. *A fortiori* it must protect its passengers against its own employees engaged in the performance of its contract of carriage, and for whose acts in so doing it is responsible."

In *Savannah Electric Co. v. Wheeler* (1907) 128 Ga. 550, 10 L.R.A. (N.S.) 1176, 58 S. E. 38, where a drunken street-car conductor, during an altercation with a passenger about the fare, fired several shots, one of which hit him, while another struck and killed the plaintiff's decedent, a foot pas-

senger in the street, it was laid down, *arguendo*, that the railway company was liable for the injury received by the passenger, because the conductor, in dealing with the passenger and shooting at him, was "acting in the prosecution and scope of the business intrusted to him," within the meaning of the law. Having regard to the other cases cited in this note, it is clear that the phrase within the quotation marked must be understood in the broad sense of "performing as the representative of his master absolute contractual duties."

¹ *Lindsay v. Oregon Short Line R. Co.* (1907) 13 Idaho, 477, 12 L.R.A. (N.S.) 184, 90 Pac. 984 (not necessary to allege or prove that the tortfeasor, a brakeman, was acting within the scope of his employment).

¹ In *Chicago, B. & Q. R. Co. v. Bryan* (1878) 90 Ill. 126, 8 Am. Neg. Cas. 175, the ground assigned for holding the railway company liable in an action for assault committed upon a passenger who was conducting himself in an orderly and decent manner, and had offered to pay the proper fare, was that his expulsion from the car in a forcible manner by the conductor was unjustifiable, and that the company was liable for acts performed by its conductor within the scope of his authority.

In *Chicago & N. W. R. Co. v. Williams* (1870) 55 Ill. 185, 8 Am. Rep. 641, where it was held that the defendant was liable if a colored woman was denied the privilege of the ladies' car, owing to "mere wantonness on the part of the brakeman," the only point discussed was the propriety of the exclusion. That the brakeman was acting within the scope of his authority was taken for granted.

the court applied the doctrine that a carrier impliedly guarantees that his passengers shall be protected against violent acts or insulting language on the part of the servants whom he places in charge of the vehicle by which the passengers are conveyed.² If the language of

² In *Chicago & E. R. Co. v. Flexman* (1882) 103 Ill. 546, 42 Am. Rep. 33, affirming (1881) 9 Ill. App. 250, a passenger on arriving at the place to which he had paid his fare, missed his watch, and, supposing it to have been stolen while he was asleep, he refused to leave the train until he should recover it. The conductor consented that he should remain on the train until it reached another station. After the train had been started and a partial search had been made, another passenger asked who he thought had his watch. He replied, "That fellow," pointing at a brakeman, who immediately struck the man in the face with a lantern. Held, that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. Referring to the contention that the case was controlled by the doctrine that a master is not liable for the wilful torts of his servants, the court said: "The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should wilfully or maliciously assault a stranger,—a person to whom the railroad company owed no obligation whatever,—the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented,—one which rests entirely upon a different principle. . . . The appellant was a common carrier of passengers. As such it was not an insurer against any possible injury that a passenger might receive while on the train, but the company was bound to furnish a safe track, cars, and machinery of the most approved quality, and place the trains in the hands of skilful engineers and competent managers; the agents and servants were bound to be qualified and competent for their several employments. . . . So, too, the

contract which existed between appellant as a common carrier and appellee as a passenger was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employee a railroad company might see fit to employ." In the affirmed judgment of the court of appeal we find the following statement: "In every contract for carriage, the carrier undertakes not only that the utmost vigilance, care, and skill shall be exercised to safely transport a passenger to his destination, but that during the passenger's transit, he shall be treated humanely, and protected from all dangers from whatever source arising, so far as the efforts of the carrier or his servants can be made available for the protection of such passengers."

In *McMahon v. Chicago City R. Co.* (1909) 239 Ill. 334, 88 N. E. 223, affirming (1908) 143 Ill. App. 608, the plaintiff and her husband, passengers on a street car, held transfers from another line of the same company entitling them to ride. A dispute arose between the husband and the conductor of the car concerning further transfers, which lasted for some time. The testimony showed that the conductor renewed the controversy several times as he passed by them in the car; that he addressed vituperative, profane, obscene language to them; that the altercation finally culminated in a scuffle between the conductor and the husband: that the conductor started the scuffle by attempting to strike the husband; that while he was struggling in the grasp of some of the passengers who were trying to prevent him from making a physical assault on the husband, his arm or elbow struck the wife and knocked her against the corner of a seat; and that after-

the supreme court should be construed literally, and treated as having both an exclusive and an inclusive connotation, the carrier would not be chargeable with the torts of every servant whose appointed functions have some relation to the performance of the contract of

wards in the *melee* she was thrown over and seriously injured. At the time the conductor attempted to strike the husband, his wife was sitting on the other side of the aisle. The liability of the defendant for the injuries thus inflicted was affirmed on the authority of the *Fleaman Case*, *supra*. An instruction that the jury should not find for the plaintiff if they believed she could have avoided the injury by the use of ordinary care was held to have been properly refused as misleading, where its only basis was the argument that if she had kept to her seat during the scuffle she would not have been hurt.

In *Pullman Palace Car Co. v. Lawrence* (1897) 74 Miss. 782, 22 So. 53, 2 Am. Neg. Rep. 586, the porter of a sleeping car, having been asked by a passenger at a somewhat late hour to bring him a sandwich, made an uncivil reply. The passenger threatened to report him, and was thereupon assaulted by him. The assault occurred while the train was in Illinois. The Mississippi court, treating the action as being *ex delicto* and determining the right of recovery with reference to what it regarded as the law of that state, held that the passenger was entitled to punitive damages, for reasons thus explained: "The porter who made the assault upon appellee was at that time engaged in the company's business, and was acting within the scope of his employment. And if he was not, it is difficult to imagine a case where a servant committing a wanton and wilful wrong could ever be said to be acting within the scope of his employment. He was the waiter, charged with the duty of attending the calls of passengers and of serving food; he did go into the smoking compartment in answer to repeated calls for his attendance; and he did make his brutal assault in the course of the interview had with him by appellee and his traveling companion, Henderson, in their effort to have food supplied appellee." This decision does not actually go any further than to hold a carrier to be liable for punitive damages in respect of torts committed by a

servant within the scope of his employment. But it appears to have reasoned on the assumption that in Illinois only torts of that description are imputable to the carrier. If this was really its position, it clearly conflicted with the doctrine already established by the former of the above cases.

In *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17, an action for the ejection of a passenger with undue violence, the court observed that in every contract of carriage "there is a stipulation, implied by the law, that the passenger shall be humanely treated, and a guaranty that the servants of the carrier, engaged in the performance of their master's contract, shall not unjustifiably assault or beat him, or otherwise maltreat him, while the master sustains such contract relations to him;" and the master is liable for any breach of this contract, regardless of the motive of the servant in committing the act which constitutes the breach.

The duty of a railway company to protect passengers against the assault of trainmen was the *rationale* of the decision in *Illinois C. R. Co. v. Sheehan* (1888) 29 Ill. App. 90 (unnecessary force used in removing an intoxicated man from a car).

In *Hanson v. Orban & C. Electric Street R. Co.* (1897) 75 Ill. App. 474, the conception of a guaranty on the carrier's part was the *rationale* of the recovery allowed in a case where a motorman on a street car had quarreled with a passenger about a personal matter, and struck him without any justifying provocation.

In *Coal Belt Electric R. Co. v. Young* (1906) 126 Ill. App. 651, an employee of a street railway company, in attempting to reach a person whom the superintendent had ordered him to arrest, dragged the complainant off a car which he was entering. The liability of the defendant was affirmed on the ground that "any act or order which might directly affect the comfort or safety of a passenger could be within the apparent scope of his employment." The phrase "scope of employment" is

carriage. But his liability for the misfeasance of servants whose duties are merely accessory to the actual work of transportation would probably be affirmed if a case involving the point should be presented. In two of the cases decided after the doctrine of absolute liability was recognized, the precise standpoint of the court is not shown by the opinions.³ The facts involved were, in both instances, such that the right of recovery might appropriately have been predicated with reference either to the test of scope of employment, or to the conception of an absolute contractual obligation. In another recent case the concept explicitly relied upon was that the action in question was within the scope of the tort-feasor's authority.⁴

b. Arrest.—In a case where a street car conductor gave a passenger into custody on a charge of having given him a counterfeit coin in payment of the fare, the liability of the railway company was affirmed on the ground that the conductor's act was within the scope of his authority.⁵ The effect of the carrier's obligation in respect of protecting passengers was not adverted to.

2418. Indiana.—The doctrine applied in all the earlier cases which bear upon the subject was that the wilful torts of a carrier's servant were or were not imputable to his employer, according as they were or were not committed within the scope of his employment; that

evidently used here in a more extended sense than it bears in cases where the remedial right of third persons are in question.

In *Chicago City R. Co. v. Cooper* (1906) 128 Ill. App. 528, where a motorman threw off a street car a newsboy who was getting on, not to sell newspapers, but to become a passenger, recovery was denied for the reason that there was "no averment or proof that the alleged wrongful act was within the scope of the motorman's employment." This decision, it is submitted, is essentially inconsistent with the theory of the supreme court as to an absolute duty on the carrier's part.

³In *Wabash St. L. & P. R. Co. v. Rector* (1882) 104 Ill. 296, 2 Am. Neg. Cas. 648, the liability of a railway company for the act of a conductor who used force in order to prevent a passenger from mounting the rear car of a train at the same time as himself was conceded, but the verdict was set aside on the ground of errors in the instructions. This decision might clearly have been rendered under any of the

theories as to the extent of a carrier's responsibility.

In *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 266, the company was held liable, where a brakeman acting under orders of the conductor ejected from a moving train a person whom they both believed to be a trespasser but who was really entitled to the rights of a passenger.

⁴In *Chicago Union Traction Co. v. McClevey* (1906) 126 Ill. App. 21, the ground upon which the court proceeded was that a conductor in charge of a street car is the agent of the company, and the power inherent in the company to expel from its cars persons who refuse to pay the customary fare is vested in him, and that if by an error in judgment he expels one who is entitled to the rights of a passenger, the company is responsible for such error, for in legal contemplation the company is present and is acting in the person of its conductor.

⁵*West Chicago Street R. Co. v. Lu-
leich* (1899) 85 Ill. App. 643.

phrase being used in its narrower sense, as one connoting merely such functions as were directly connected with the actual work of transportation.¹ The original position taken in this state, therefore, was the same as that of the English courts. But the theory of an ab-

¹In *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70, 8 Am. Neg. Cas. 201, the complaint alleged that the plaintiff had paid his fare and was seated in the car, when he was violently assaulted and beaten and ejected from the car by a servant of the company; that the duty and employment of said servant was to provide seats for passengers and exercise care for their comfort, and that he then had charge of said car and committed said trespass in the course of his business as such servant. Held, that the expulsion of the plaintiff from the car, where he lawfully was, if done without unnecessary violence, would give a right of action against the company, and that, as this state of facts might have been proved under the allegations of the complaint, a demurrer to the complaint was correctly overruled. The court said: "The first paragraph of the complaint presents a question of more difficulty. We think that it shows that the employee, Wilson, had general charge and control of the car in which the plaintiff was seated, and that it does not appear by the averments that his duties were confined to providing seats for passengers and caring for their comfort. The violence committed by him was not, therefore, as is insisted for the appellant, wholly disconnected with the business which he was employed to do, assuming, as we must on demurrer, that the paragraph is true. The case made, then, is one where the servant needlessly does an act under color of his employment, in a brutal and inhuman manner, wilfully and violently, without express authority from the master to use such brutality; and a question presented and discussed is whether, in such a case, the maxim *respondet superior* applies.

. . . If the act of the servant complained of was necessary to be done to accomplish the purpose of the servant's employment,—if it was essential as a means to attain the end directed by the master, and was intended for that purpose,—then it was implied in the employment; and the master is liable, though the servant may have executed it

wilfully and maliciously. But when it is unnecessary to the performance of the master's service, and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under pretense of executing his employment, it is not done to serve the master, and is not in fact within the scope of the employment; and the master is therefor not liable." The verdict against the company was, however, set aside on the ground that the servant who committed the assault had not general charge of the car. The doctrinal standpoint of the court is clearly indicated by the fact that several of the precedents cited related to the claims of third persons. Neither in this case nor in any of the others mentioned in this note was the case of *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, referred to.

In *Jeffersonville R. Co. v. Rogers* (1871) 38 Ind. 116, 10 Am. Rep. 103, where the defendant was held liable for exemplary damages in respect of the act of a conductor who had wrongfully ejected a passenger from a train, "in a spirit of oppressive malice or wantonness," the *ratio decidendi* was "that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized nor subsequently ratified by the corporation."

In *Indianapolis, P. & C. R. Co. v. Anthony* (1873) 43 Ind. 183, the liability of a railway company for the acts of a conductor who had ejected a passenger on the ground of his having been guilty of improper conduct in regard to a woman, the court thus discusses the law of the case: "The conductor of a railroad train has the right to eject a passenger for a refusal to pay his fare, or for indecent and disorderly conduct. The act of the conductor in ejecting a passenger for either of the above causes would come within the general scope of his employment, and the master would be liable, if the act was

solute obligation on the carrier's part with regard to the protection of his passengers against all the tortious acts of his servants, while they are engaged in performing the contract of carriage in his behalf, was subsequently adopted.² In some cases decided since its

wrongful, without reference to the question of whether the purpose of the conductor was to serve his master or to gratify his private malice. The intent of the conductor should not have any influence upon the question of the liability of the master, where the act performed comes within the general scope of his employment. If, in the case supposed, the passenger refuses to pay his fare, or is guilty of indecent conduct, the conductor for such cause ejects him from the train, the act would come within the general scope of his employment, and the master would not be liable, although the agent was actuated by private malice, because the conduct of the passenger justified the act. If, on the other hand, the conductor should be misinformed as to the conduct of a passenger, and in reliance upon such information should eject him, the master would be liable, although the agent had no private malice, but was actuated solely by the earnest desire to serve his master. The act of the agent within the general scope of his employment is the act of the master, and whether the act was necessary to be done will depend upon the facts surrounding it. If the act done is within the general scope of employment, and is wrongful, the master is liable, although the act was unnecessary to the performance of the master's service, and was not intended for that purpose. We therefore think that the liability of the master does not depend upon the necessity for the act, or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent."

See also *Terre Haute & I. R. Co. v. Fitzgerald* (1874) 47 Ind. 79 (right of a passenger to recover for the act of a conductor in wrongfully ejecting him was put upon the ground that such an act is within the scope of the conductor's agency); *Pittsburgh, C. & St. L. R. Co. v. Theobald* (1875) 51 Ind. 246 (a complaint not demurrable which alleged that the plaintiff, while he stood upon the platform of a car, waiting for the train to stop, had been "wantonly,

forcibly, and maliciously" thrown off by the conductor while train was in motion).

² In *Terre Haute & I. R. Co. v. Jackson* (1881) 81 Ind. 19, the liability of a railway company for the act of a brakeman in dashing a jet of water upon a passenger who had refused to pay him for watering certain cattle belonging to the passenger was affirmed on grounds thus stated: "It is immaterial whether the conductor or brakeman had been required or authorized to wash out the cars of the company for any purpose. The appellant had undertaken to carry the plaintiff as a passenger upon its train, and was bound to do it safely. For this purpose the appellant was represented by its agents in charge of the train, and if they did anything inconsistent with the safe carriage and delivery of the plaintiff, at his destination, unharmed, the appellant, upon the plainest principles of law, as well as good policy, is liable for the injury. The drenching of a passenger with water, either negligently or wilfully, is a clear and direct breach of the duty to carry safely, and it is immaterial upon the question of the company's liability, whether it resulted from the fault of the brakeman alone, or of the conductor, or of both of them. They were each agents of the company for the running of the train, and the company therefore responsible for the acts of either or both, in so far as such acts affected the passenger. It follows that if the conductor was faultless in raising the valve and in throwing the water into the caboose, which could hardly be, when he knew there was a passenger there liable to be injured, and the brakeman designedly procured the plaintiff to go to the door of the caboose in order that the water might strike him, the company is clearly liable for the injury. That the evidence tends to show this state of facts is not disputed."

In *Louisville & N. R. Co. v. Kelly* (1883) 92 Ind. 371, 47 Am. Rep. 149, 8 Am. Neg. Cas. 213, where a passenger who was either carelessly or purposely

jostled by a brakeman while he was obeying the direction of the conductor to go to another car, it was contended that an instruction to the following effect was erroneous: "The defendant's obligation was to carry the plaintiff safely and properly; and if the defendant intrusted this duty to servants, the law holds the defendant responsible for the manner in which they executed it. The carrier is obliged to protect the passenger from violence from its own servants, and from every source whatsoever." The court, however, said: "It is established law that carriers are responsible for the negligent and wilful wrongs of their servants suffered or done in the line of their employment. It is also true, as a general rule, that carriers are under a duty to protect their passengers from violence from all sources. . . . There rests on carriers this obligation to protect passengers from violence, and an instruction which asserts in general terms this obligation cannot, in such case as the present, be deemed erroneous. It is no doubt true that if the violence could not have been foreseen or prevented by the highest degree of care, the carrier would be absolved from liability. *Thomp. Carr. Pass.* 364, 365; *Hutchinson, Carr.* § 552; *Grand Rapids & I. R. Co. v. Boyd* (1879) 65 Ind. 526. This, however, does not prove that the statement of the general rule is incorrect, for the duty of protecting passengers from violence does rest on all carriers, although this duty is not an absolute one. If the care which the law requires is exercised by the carrier, then the duty is discharged and there is no liability. A carrier is responsible for injuries wilfully or carelessly inflicted upon passengers by servants engaged in the performance of duties within the general scope of their employment, whether the particular act was or was not authorized by the master. The question in such cases is whether the servant was, when he inflicted the injury, acting within the line of his duties, and not whether the particular act was authorized."

In *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85, where a brakeman wantonly inflicted an injury upon a passenger whom he was ejecting from a wrong train, the railway company was held to be liable, although, in the absence of express orders, the brakeman

was not authorized to eject passengers. This liability was declared to be "based upon the doctrine that a passenger, while traveling on a train, is under the care and control of the railway company, and is hence entitled to be protected against the wilful misconduct of the company's agents and servants in charge of the train, and to whose authority he is required for the time being to yield a greater or less obedience." This language is broad enough to import an adoption of the theory as to the absolute liability of a carrier with respect to all the torts committed by servants belonging to the specified class. Yet it was also laid down that an averment that the injury was inflicted by the "defendant, acting through its agents and servants," was equivalent to an averment that the defendant acted through its duly authorized agents and servants, and was sufficient to present the question whether the persons who performed the acts charged were the agents and servants of the defendant, and acting at the time within the line of duty. This ruling, it would seem, cannot be reconciled with the statement just referred to, except upon the supposition that the court intended to distinguish cases in which a trainman is on duty from those in which they are traveling on a train, but have no functions to discharge with relation to it.

In *Memphis & C. Packet Co. v. Pikey* (1895) 142 Ind. 304, 40 N. E. 327, where an action for the death of a passenger who was shot by the second mate of a river steamer was held to be maintainable, it was held that the defendant could not escape liability by showing that a quarrelsome and violent class of men are usually employed on such vessels. The report does not show how the altercation arose.

In *Citizens' Street R. Co. v. Clark* (1904) 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53 (on demurrer), where a passenger was ejected with unnecessary violence from a street car, his right to recover was put upon the ground that the assault was a breach of the railway company's duty to protect him, and that its liability for a breach of this duty did not depend upon whether the tort was committed by a servant acting within the scope of his employment.

In *Baltimore & O. S. W. R. Co. v. Davis* (1909) 44 Ind. App. 375, 89 N. E.

adoption, the right of recovery has been discussed with reference to the test of "scope of employment."³ But it may be that this phrase

403, where the plaintiff was assaulted by a conductor in the course of a dispute about the amount of the fare, the court laid it down that the duty of a railroad company "to carry passengers safely and expeditiously, and to conserve, by every reasonable means, the convenience, comfort, and peace of the passengers," rests on its agents, who must "protect each passenger from bodily discomfort, insult, indignities, and personal violence from whatever source," and that though the act of an agent violating such duty is one which "bears no relation to the duty of the carrier, and is not connected as an incident to the discharge of any duty," the company is liable for the reason that its duty has been violated. In this case it was also held not to be error to instruct the jury that a carrier is liable for all damages to passengers from the act of an agent in the course of his employment, though the act was not ordered or ratified by the carrier.

In *Indianapolis Union R. Co. v. Cooper* (1892) 6 Ind. App. 202, 33 N. E. 219, an action for an assault committed by a gate keeper at a station, an averment that it was committed by the defendant railway company through its employees was held to be sufficient. The prima facie liability of the company was affirmed, on the ground that it was within the general scope of the duty of that employee "to lay hands upon and use force, if necessary in proper cases, to prevent persons from going through the gate, or to compel their return if they improperly passed it," and also on the ground that the company owed to plaintiff the affirmative duty to protect him from the violence and insults of its own servants, and that for a breach of this duty it was liable, irrespective of the fact whether or not the servant, in the performance of the act, was within the scope of his employment."

³ In *Citizens' Street R. Co. v. Willoby* (1893) 134 Ind. 563, 33 N. E. 627, the court thus stated the grounds upon which a complaint alleging that the conductor in the employ of a street railway company jerked from a moving car a boy who was getting on with the intention of paying his fare was deemed to be sufficient to withstand an attack

made for the first time by an assignment of error: "It is somewhat difficult to determine the theory upon which this complaint proceeds, but whether it is to be regarded as proceeding upon the theory that the appellant was guilty of a violation of its contract duty as a common carrier of passengers, or upon the theory that one of its servants, acting within the scope of his employment, was guilty of inflicting a wilful and wanton injury upon the appellee, it is certainly sufficient to bar another action against the appellant, on account of the wrongs set forth therein. . . . It is true that every complaint must proceed upon some single, definite theory; but such theory is to be gathered from the general scope of the pleading, and not from detached allegations. *Louisville, N. A. & C. R. Co. v. Schmidt* (1885) 106 Ind. 73, 5 N. E. 684; *Rollet v. Heiman* (1889) 120 Ind. 511, 16 Am. St. Rep. 240, 22 N. E. 666. When the complaint now before us is thus construed, we think it appears that it does not proceed upon the theory that the appellant has been guilty of a breach of its contract, as a common carrier of passengers, to safely carry the appellee to the end of his journey, but that it proceeds upon the theory that the servant of the appellant, while acting within the scope of his employment, inflicted upon the appellee a wilful injury. That the master would be liable for such injury is too well settled in this state to be open to controversy.

In *Louisville, N. A. & C. R. Co. v. Wood* (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, 3 Am. Neg. Cas. 197, where a passenger on a train which had been stopped at a station, and started again before he had time to carry out his intention of alighting, was seized and thrown off by the conductor, the railway company was held liable in the ground that the conductor "was guilty of a tort while engaged in the line of his duty."

On the same ground a railway company was held liable in *Baltimore & O. R. Co. v. Norris* (1897) 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554, 1 Am. Neg. Rep. 579, where a conductor expelled with unnecessary violence a passenger who offered to pay his fare to

is to be understood in its broader sense, that is, as embracing all the duties which are owed to passengers under the contract of carriage, and not merely those which have an immediate connection with the work of transportation. See § 2451, *post*.

2419. Iowa.—In one case the right of the plaintiff to recover for an assault was determined with reference to the question whether the injurious act was or was not within the scope of the tort-feasor's employment.¹ A few years afterwards, in a case where the judgment of the trial court was reversed for errors in the instructions to the jury, it was taken for granted that the defendant railway company might be held liable for abusive words used by a conductor to a female passenger.² As the report does not show what was the precise doctrinal standpoint of the court, this decision is of ambiguous import for the purposes of the present discussion. But the theory that a carrier is bound to afford protection to passengers against the misconduct of the servants to whom he delegates the performance of the contract of carriage has now been categorically adopted.³

2420. Kansas.—*a. Generally.*—This is one of the states in which the theory of an absolute duty on the part of a carrier to protect passengers against the misconduct of his servants has been recognized.¹

a certain station where the train did not stop, and in whose behalf a companion offered to pay his fare to the next regular stopping place.

¹ In *McKinley v. Chicago & N. W. R. Co.* (1876) 44 Iowa, 314, 24 Am. Rep. 748, where the misconduct of a brakeman in wilfully assaulting a gentleman who had attempted to enter a car in which gentlemen unaccompanied by ladies were not permitted to travel was held to be imputable to the railway company, the *ratio decidendi* was the general principle that a master is liable for the wilful and criminal acts of a servant done in the course of his employment or in executing what he supposed to be the orders of his master.

² *Bryan v. Chicago, R. I. & P. R. Co.* (1884) 63 Iowa, 464, 19 N. W. 295.

³ *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327, where a female passenger was held to be entitled to recover damages for a rape committed by a brakeman. (On the first appeal [1904] 124 Iowa, 691, 100 N. W. 498, a verdict for the defendant was set aside for errors in procedure.) The court treated the tort as a "breach of implied

duty," and cited with approval 3 Thomp. Neg. § 3184.

¹ In *Missouri, K. & T. R. Co. v. Weaver* (1876) 16 Kan. 456, where the plaintiff had been wrongfully expelled from a train after a sharp scuffle in which he received some blows, the opinion was mainly devoted to a discussion of the question whether excessive damages had been awarded; but the doctrinal position of the court is shown by its citation of *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316 (see § 2423, *post*), and its statement that a carrier is bound to protect his passengers not only "against the violence and insults of strangers and copassengers, but against the violence and insults of his own servants."

In *Southern Kansas R. Co. v. Rice* (1888) 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817, 8 Am. Neg. Cas. 274, the carrier's duty was relied upon as the reason for holding a passenger who had been wrongfully ejected from a train to be entitled to maintain an action.

In *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A.

b. Arrests.—In one case the court seems to have intended to proceed upon the ground that the theory regarding the absolute duty to

465, 41 Pac. 952, 8 Am. Neg. Cas. 280, the plaintiff, being unable to produce his pass when asked for it, was obliged to pay the fare. Afterwards the pass was found, and upon the conductor's refusing to return the money paid a dispute arose, during which the plaintiff was struck by a brakeman. When the train reached the next station he was given into the custody of a policeman by the conductor acting upon the advice of the superintendent. The court said that the assault was "a gross violation of the duty of the railroad company toward a passenger. . . . If, through the negligence of the company in affording him the care and protection to which he was entitled, the passenger had suffered an injury, the company would be liable, and certainly the liability is no less where the injury is intentionally inflicted by an employee of the company who was required to exercise care and protection toward the passenger." It was also observed that the motive which actuated the tortfeasor was immaterial so far as the carrier's liability was concerned.

In *Missouri P. R. Co. v. Divinney* (1903) 66 Kan. 776, 71 Pac. 855, 13 Am. Neg. Rep. 523, where a railway company was held liable for an assault by a station agent the *ratio decidendi* was that the company is under an absolute duty to protect its passengers against maltreatment by its employees, irrespective of whether at the time in question such employees are or are not engaged in the discharge of their duties. On the first hearing ([1902] 69 Pac. 351) the right of recovery was denied on the ground that, under the evidence as presented, the plaintiff had not the status of a passenger at the time when he was assaulted. On the second hearing the court changed its opinion as to this aspect of the case.

With the above decisions it is not altogether easy to reconcile the language of the court in *Sachrowitz v. Archison, T. & S. F. R. Co.* (1887) 37 Kan. 212, 15 Pac. 242, 8 Am. Neg. Cas. 269. There it was proved that the plaintiff, while standing upon the platform of one of the cars of a train, which he was about to enter as a passenger, was knocked off and robbed, just as the

train started, by a person holding a lantern in one hand and a club in the other. The only specific evidence that the tortfeasor was an employee of the railroad company was that he carried a lantern with letters on it, and wore a cap with a badge upon it. It was not shown that the assault was made in ejecting, or attempting to eject, the plaintiff from the cars, by anyone connected with the operation of the train, or having any charge of the depot, its grounds, or the road. It appeared further, that the alleged assault was wholly disconnected from any service in which any employee of the railroad company was engaged. Held, that the plaintiff could not recover under a petition charging that plaintiff was assaulted and injured by the servant and employees operating and controlling the train. The court said: "The evidence of the plaintiff is insufficient in not showing that the person who assaulted him was in the employ of the defendant. Even if we concede he has shown that much, yet his evidence is fatally defective in not showing that the wrongful acts alleged were done by the servant or agent of the defendant in the course or within the scope of his employment. *Hudson v. Missouri, K. & T. R. Co.* (1876) 16 Kan. 470. This action was not brought against the defendant for its negligence in not protecting the plaintiff while a passenger on its train from the assault of some third party; and it nowhere appears in the evidence that he was thrown from the train by any person connected in any way with its operation." As the plaintiff in the case cited was a third person, not a passenger, the most obvious inference would seem to be that in the view of the court, the carrier's liability was to be determined upon the same footing as if the element of privity of contract had not been involved. But under the circumstances as proved, the denial of the right of action may be justified upon the ground that the tortfeasor, even supposing him to have been a servant, was not shown to have been intrusted with any functions which had reference to the performance of the contract.

a carrier to protect passengers is applicable as a criterion of responsibility in actions for wrongful arrest.² But its precise doctrinal standpoint is not entirely clear. In a late case the doctrine that the carrier cannot be held liable, unless the arrest complained of was made or procured within the scope of the tort-feasor's employment was laid down.³

2421. Kentucky.—a. Generally.—The doctrine laid down in the earliest decision which bears upon the subject was that the contract of carriage “guarantees to the passenger immunity from violence at the hands of those whose duty it is to afford him that protection” against insult and injury to which he is entitled in consideration of the payment of the fare.¹ The theory indicated by the language of the court seems to be that which treats the liability of the carrier as being absolute only in respect of the acts of servants who are engaged in carrying out his contract with the aggrieved party. With this conception of a carrier's liability, none of the later cases are incon-

² In *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280, the facts of which are stated in note 1, *supra*, the liability of the company in respect of the plaintiff's arrest was put upon the ground “that the conductor procured the false arrest to be made while in the line of his employment, and at a time when the relation of passenger and carrier existed between the company and Henry. It is well settled that when one in charge of a train, and engaged in the business which has been intrusted to him by the company, causes the arrest of a passenger, the company for which he is acting cannot escape liability. . . . The action of the conductor, who must be held to have been acting for the company, was clearly a breach of the contract between the carrier and the passenger, which required that Henry should be carried in safety to his destination, and protected from interference by strangers or against the misconduct of the company's servants. When the relation of carrier and passenger exists, it is held that no matter what the motive is which causes a servant of the carrier to commit an unlawful act, or to wrongfully inflict an injury upon a passenger, the carrier is responsible for the act and its natural and legitimate consequences.”

³ *Whitman v. Atchison, T. & S. F. R. Co.* (1911) 85 Kan. 150, 34 L.R.A. (N.S.) 1029, 116 Pac. 234, Ann. Cas. 1912 D. 722.

¹ *Sherley v. Billings* (1871) 8 Bush, 147, 8 Am. Rep. 451. There the third clerk of a steamboat, while he was engaged in the performance of his duty of collecting the passage money due from the deck passengers, approached the plaintiff and demanded his fare, which was promptly paid. The clerk immediately charged him with having hidden under the boilers, and, when the charge was denied, instantly assaulted him. Held, that the defendant was liable. “In this case,” said the court, “Williams, the clerk, at the time of the assault, was engaged in collecting from the deck passengers the passage money due from them. The amount due from Billings had actually been handed him; but before they separated, and almost simultaneously with the payment, the charge upon the passenger of having hidden under the boilers was made, and immediately thereafter the injuries inflicted. The entire affair was substantially one transaction. An appreciable interval of time may have intervened between the reception of the money and the assault, but it cannot be said that the officer was not at the time engaged in the discharge of a prescribed duty. He was charged with the collection of the passage money from Billings; and whether he had or not the right to inquire as to his conduct in

sistent.² An intention to adopt it is apparently indicated by the explicit phraseology used in one of those cases.³ But the statement referred to is affirmative merely as regards the class of servants mentioned, and does not necessarily import an exclusion of other classes.

b. Arrest.—The duty of the carrier to protect passengers against the misconduct of his servants was the *ratio decidendi* in a case where the plaintiff had been assaulted and thrust off a street car by the conductor, and given into the custody of a policeman after the altercation had been prolonged for some time upon the street.⁴

2422. Louisiana.—*a. Generally.*—The views of Story, J., as set forth in a case already cited,¹ were approved in the two earliest cases in which the supreme court of this state had occasion to determine the extent of a carrier's liability for the maltreatment of passengers by

reference to the alleged hiding under the boilers, he was at the time discharging 'a supposed or pretended duty.'" The precedent relied upon was *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316.

² *Winnegar v. Central Pass R. Co.* (1887) 85 Ky. 547, 4 S. W. 237 (held that an action would be either in contract or tort against a street railway company for the act of its conductor in wantonly assaulting a passenger and throwing him off a car); *Louisville & N. R. Co. v. Ballard* (1887) 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530 (contractual obligations of carrier recognized in general terms in a case where a female passenger who had been put off at a place between two stations was held not to be entitled, under the circumstances shown, to exemplary damages); *Wise v. Covington & C. Street R. Co.* (1891) 91 Ky. 537, 16 S. W. 351 (street railway company liable for insulting language used by a driver); *Louisville & N. R. Co. v. Donaldson* (1897) 19 Ky. L. Rep. 1384, 43 S. W. 439 (liability of the defendant for the abusive language used by a conductor to a passenger from whom he had demanded the payment of fare, on the ground that his ticket was not good, was affirmed for the reason that the insulting words were spoken in the course of his official duties); *Lewington R. Co. v. Cozine* (1901) 111 Ky. 799, 98 Am. St. Rep. 430, 64 S. W. 848 (liability of the defendant for a malicious assault made by a conductor upon a passenger was taken for grant-

ed, the only controverted point being the propriety of awarding exemplary damages); *Illinois C. R. Co. v. Gunterman* (1909) 135 Ky. 438, 122 S. W. 514 (contractual obligation of carrier to protect passengers was recognized *arguendo*).

In *Southern R. Co. v. Thurman* (1906) 121 Ky. 716, 2 L.R.A.(N.S.) 1108, 90 S. W. 240, it was held that the railroad company would be liable if the brakeman in question, when requiring a female passenger to remove to the car reserved, in pursuance of statute, for colored persons, did not in good faith believe that she was a colored person, or in the exercise of reasonable care, did not have a right to believe that she was such a person, or used insulting language.

³ *Louisville R. Co. v. Kupper* (1909) — Ky. —, 118 S. W. 266, where the court said: "It is also well settled that an act which amounts to a breach of duty on the part of a carrier towards a passenger, whether an assault, false arrest, insult, or abusive language, etc., makes the carrier liable for the acts performed by the servant who is placed in charge of or has control over the passengers. The law makes no distinction in the kind or character of the wrong done, if such wrong amounts to a breach of the undertaking to transport the passenger safely."

⁴ *Louisville R. Co. v. Kupper* (1909) — Ky. —, 118 S. W. 266.

¹ *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575. See § 2408, note 1, *ante*.

his servants.² The adoption of those views imported an acceptance of the theory that a passenger who sustains injury from the wilful tort of a servant whose duties are connected with the performance of the contract of carriage is entitled, irrespective of the quality of the tort, to hold the carrier liable. With that theory the more recent decisions are consistent.³

² In *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197, it was held that a good cause of action was shown by a petition which stated that the officer in command of the vessel treated the petitioner and his wife inhumanely and indecently, that he did not extend to them that protection and care which is usual, that he stimulated his crew to commit outrages on them, and that during the space of fourteen days they were, in consequence of his conduct, in constant danger of their lives. The court said: "The exposition just given of the duties of the master in relation to the passengers [i.e., in *Chamberlain v. Mason*, note 1, *supra*], renders it easy to ascertain the extent of the responsibility of the owners for a breach of those duties. The law is clear and perfectly well settled that owners of vessels are responsible for all acts of the master, while acting within the scope of his duties, even for his torts. When the proprietors of vessels use them for the purpose of carrying passengers for money, they subject themselves to the same responsibility for a breach of duty in their officers to those passengers as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases." On the subsequent appeal of this case ([1834] 6 La. 315, 26 Am. Dec. 478), the court used the following language: "A contract of passage is broken if a cabin passenger be not allowed the use of the cabin, or compelled to share it with every hand on board. If he be not furnished with proper food if he stipulated for it. If his situation be rendered uncomfortable by every hand on board being allowed to molest him. Female passengers stipulate further, completely for an exemption from rude, indecent, or brutal behavior towards them. The master is guilty of a negative breach of the contract of passage, if the passengers do not enjoy on board that ease and com-

fort for which the passage money is the consideration. If the master forcibly drives the passengers out of the cabin; if he compels them to lodge with the common hands; if by his rudeness, indecency, or brutality he shock the modesty of a female passenger, so as to oblige her to quit the cabin, or as to render the passage comfortless by a continued series of vexation, misery, and torment, shall he, as those who are bound for the faithful performance of his contract, escape a liability and damages on the score of his conduct being tortious? If without being guilty of any of these acts, he stimulates the mate and crew to commit them, will not the consequence be the same? If without such stimulation, he suffers them to commit those acts and neglects, to prevent them, as the result to the party injured will be the same, his right to remunerate in damages cannot be different."

In *Block v. Bannerman* (1855) 10 La. Ann. 1, where the master of a ship had, without any reasonable excuse, broken open the portmanteau of a passenger and suffered him to be assaulted, the shipowner was held liable.

In *Fellows v. High* (1852) 7 La. Ann. 451, the liability of a shipowner for indignities offered by the captain of a ship to young girls placed in his charge as passengers was recognized; but the case was dismissed on the ground that the shipowners, being residents in England, could not be brought into court by the service of a citation on their captain or their consignee.

³ In *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, 8 Am. Neg. Cas. 302, the plaintiff, a passenger traveling in an ordinary first-class car, being unable to procure any water to wash with, went back to a sleeping car in pursuance of a brakeman's direction. Having met the porter as he entered it, he made a jesting remark about being charged for the privilege of washing, and was-

b. Arrest.—In two cases the liability of the carrier for the arrest of a passenger was determined with reference to the question whether the servant was acting within the scope of his authority when he gave the complainant into custody.⁴ The supreme court of this state, therefore, is one of those which have adopted the scarcely logical doctrine that a carrier's liability for the wrongful use of criminal process by his servants is less extensive than it is in respect of other descriptions of wilful torts.

2423. Maine.—The unqualified language used by the supreme court in a leading case would, if taken literally, justify the conclusion that a carrier was regarded as being absolutely liable to his passengers for the wilful torts of his servants, irrespective of the character of their duties.¹ But having regard to the early date of the decision, and also to the authorities relied upon, it was probably intended merely

immediately assaulted. Held, that the railroad company was liable for the injuries caused by the assault. In the opinion first delivered, the court adverted to "the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to have the privilege, and that in addressing the porter he was dealing with him as a servant of the company." In the second opinion the conclusions of the court were thus stated: "The preponderance of the evidence on that point, although very conflicting, shows to our entire satisfaction that plaintiff did ask permission of the porter to wash his hands, and that after an exchange of a few unpleasant words, the porter struck him on the head with a blunt instrument, while plaintiff was standing at the threshold of the door of the Pullman car. He was stunned by the blow, which felled him to the platform, whence he was picked up and brought to the forward car by one of his friends. . . . Hence we conclude that the attack was unprovoked, unjustifiable, and wilful on the part of the porter, for whose conduct the defendant company must be held liable in damages. As the Pullman Car Company, the immediate and direct employer or master of the wrongdoer, has been shielded from responsibility by our previous decree [(1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; See § 2449, note 1, *post*], the case may be a hard one on the defendant, but under

the authorities by which we have been guided, the hardship appears inevitable."

In *Conolly v. Crescent City R. Co.* (1889) 41 La. Ann. 57, 3 L.R.A. 133, 17 Am. St. Rep. 389, 5 So. 259, 6 So. 526, a street car company was held to be liable for the act of a driver of one of its cars in ejecting a sick passenger, under the unwarrantably erroneous impression that he was drunk.

In *Lafitte v. New Orleans City & Lake R. Co.* (1890) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701, a street car company was held to be liable for abuse and defamation of a passenger by the driver of a street car, who had charged him with having given counterfeit money for the fare, and threatened to have him arrested. For the other point decided in this case, see note 4, *infra*.

⁴ *Lafitte v. New Orleans City & Lake R. Co.* (1890) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L.R.A. (N.S.) 162, 40 So. 714.

¹ In *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316, shortly after the plaintiff had, on request, surrendered his ticket to a brakeman authorized to demand and receive it, the brakeman, without provocation, approached him, and, accosting him in a loud voice, denied, in the presence of the other passengers, that he had seen or received the plaintiff's ticket, and, in language coarse, profane, and grossly insulting, called the plaintiff a liar, charged him

to assert the carrier's liability for the misconduct of servants engaged in performing the contract in respect of the passenger in question.²

2424. Maryland.—*a. Generally.*—The two earliest relevant decisions in this state proceeded upon the ground that the acts complained of were incidental to the duties of the servants in question. Nothing was said regarding the operation of the contract of carriage.¹ But the supreme court has now definitely adopted the doctrine that the effect of the contract is to impose upon the carrier the obli-

with then attempting to evade the payment of his fare and with having done so before; and leaning over the plaintiff, then in feeble health and partially reclining in his seat, and bringing his fist down close to his face, violently shook it there, and threatened to split the plaintiff's head open, and to spill his brains right there. Discussing the contention of the defendants that they were not liable, because the brakeman's assault upon the plaintiff was wilful and malicious, and was not directly or impliedly authorized by them, the court said: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that, if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of his duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and copassengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this

protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible."

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, the defendant was held liable for an assault made upon a passenger by a brakeman after they had had an altercation about the proposal of the latter to put the plaintiff's dog off the train while it was in motion. The court said: "It is the duty of the conductor, and other employees upon a train of cars, to treat the passengers with civility, and to abstain from all unnecessary violence toward them."

² Among the cases cited were *Weed v. Panama R. Co.* (1858) 17 N. Y. 362; *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575, and *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922, none of which extend the carrier's liability beyond the limits indicated in the text.

¹ In *Baltimore & O. R. Co. v. Blocher* (1867) 27 Md. 277, 8 Am. Neg. Cas. 341, the plaintiff, who had been compelled, under threat of expulsion, to pay his fare after he had given up his ticket, was held entitled to maintain an action. The defendant's prayers for instructions confining its liability to such tortious acts as it had authorized or approved were held to have been properly refused, for the reason that "the conductors and employees of the corporation, . . . being in the line of their duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of their authority, whether of omission or commission."

In *Philadelphia, W. & B. R. Co. v. Larkin* (1877) 47 Md. 155, 28 Am. Rep. 442, where a passenger was removed from a train for using bad language

gation of protecting his passengers against all torts committed by his servants while they are "engaged in and about the performance of their prescribed duties."²

b. Arrest.—In one case the liability of a carrier for the wrongful arrest of a passenger was determined solely with reference to the question whether the tort-feasor was authorized to make the arrest.³ But the doctrine that a carrier is under an implied obligation to protect a passenger from a tort of this description has more recently been adopted.⁴

when he was asked for his ticket, the essential point involved was merely whether the removal had been effected in such a manner as to entitle him to exemplary damages.

² In *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986, the court laid down the law as follows: "The plaintiff was required to show, as a condition precedent to his right to recover, first, that the wrongs sued for were done by an agent or employee of the defendant; secondly, that the employee was acting at the time within the scope of his employment. Without legally sufficient evidence tending to establish these two facts, no case of this nature should be submitted to the jury, and, when submitted, no verdict against the defendant should be rendered unless the jury are satisfied of the existence of these essential facts." It was held that a declaration which merely alleged that the plaintiff was assaulted, arrested, and imprisoned by a servant of the defendant, but which contained no words showing that the servant was acting within the scope of his employment, was demurrable; but that a count averring that the plaintiff, while in the defendant's waiting room, was assaulted by a servant in charge of the room, showed sufficiently that the wrong was done by a servant of the defendant in the course of his duties.

In the earlier case of *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709, the plaintiff, before he alighted from a street car, had threatened to report the driver, and was followed by him to the sidewalk, and there assaulted. Under these circumstances the contract of carriage had ceased, and the right of recovery was manifestly conditional upon the ability of the plaintiff to show that the assault

was within the scope of the driver's employment. Having been prompted by personal resentment, it clearly was not of that character. But the doctrinal position of the court is indicated by the following passage in the opinion: "The Supreme Court of the United States, in *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 645, 30 L. ed. 1050, 7 Sup. Ct. Rep. 1039, decided unequivocally that the carrier of passengers must protect his passengers from the violence of the carrier's employees, as also from that of other passengers; but there is nothing in the decision in conflict with the doctrine that to render [the carrier] liable the employee must be at the time acting in the employment of the railroad and within the line of his duty, and the decision assumes that the party injured is a passenger when injured; for that was the fact in the case." This statement was quoted with approval in *Tolchester Beach Improv. Co. v. Scharnagl* (1907) 105 Md. 199, 65 Atl. 916.

³ In *Central R. Co. v. Brewer* (1894) 78 Md. 401, 27 L.R.A. 63, 28 Atl. 615, the liability of a street railway for an arrest procured by its superintendent was denied on the ground that no express antecedent authorization by the company had been proved, and that no such authorization could be implied from the character of his position as superintendent.

⁴ In *Baltimore & O. R. Co. v. Cain* (1895) 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801, the court, in discussing the propriety of denying a prayer for the withdrawal of the case from the jury, said: "We find no error in this. If the plaintiff had been guilty of no breach of the peace, his arrest at the instance of the conductor was unlawful, and having been made in the defendant's depot whilst the plaintiff, a passenger,

2425. Massachusetts.—In the earliest cases which bear upon the extent of a carrier's liability, the right of the plaintiff to recover for an assault by a servant of a carrier was treated as being dependent upon whether the wrongful act was or was not within the scope of the general authority vested in him with respect to the functions which he was discharging when the act was done.¹ The doctrinal standpoint from which the remedial rights of the passengers were determined seems to have been the same as that of the English courts,—the contract of carriage being apparently regarded as an entirely negligible factor, except in so far as it served to show the duties and powers of the employee in question.² But in the same year that the second case was decided, an assault actuated by the personal resentment of the

was still entitled to be protected by the defendant against assaults and injuries by the defendant's own employees if wrongfully made by or at the request of the defendant's own servants whilst they were in and about the performance of their prescribed duties, the master would be liable. There was some evidence before the jury that the arrest had been made without a warrant, and therefore the second prayer was properly rejected."

In *Tolchester Beach Improv. Co. v. Scharnagl* (1907) 105 Md. 199, 65 Atl. 916, the doctrinal position of the court was stated thus: "The relation of passenger and carrier being shown to exist between the appellant company and Joseph Scharnagl, the law imposed upon the carrier a primary duty to protect him during the existence of that relation; and if he were unjustifiably assaulted or arrested or imprisoned, whilst that relation continued, by the servants or agents of the carrier while acting within the scope of their duty, the carrier would be liable. This proposition is so firmly settled in this state and elsewhere that it seems needless to quote authorities to support it."

See also *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986, cited in note 2, *supra*.

¹ In *Moore v. Fitchburg R. Corp.* (1855) 4 Gray, 465, 64 Am. Dec. 83, where the court sustained a verdict in favor of a passenger who had been forcibly put out of the cars by a conductor for not paying his fare, which he had in fact paid, it was held to be no ground for exception by the company that the jury were instructed that, if

the conductor removed the plaintiff in the wrongful exercise of a discretionary power conferred upon him by the corporation, they were liable; but that the conductor would have a right to remove a passenger who refused to pay his fare, if there was a rule or regulation of the corporation to that effect.

In *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200, 8 Am. Neg. Cas. 372, the court said: "The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger, or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured. The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger for not paying fare."

² In the second of the above cases the court cited several decisions with regard to claims by third persons, and made no reference to *Weed v. Panama R. Co.*

servant was held to be imputable to the carrier, on the ground that it constituted a breach of the contract of carriage in respect of the manner in which passengers were to be treated.^{2a} As the exception thus relied upon would have sufficed as a foundation for the preceding decisions, and so rendered quite superfluous all inquiry regarding the extent of the tort-feasor's authority, it seems impossible to avoid the conclusion that this ruling must be taken as indicating a new departure in doctrine,—an abandonment of the court's original position as to the extent of a carrier's responsibility, and an adoption of the theory that he is chargeable with the misfeasances of a servant, even though they may be outside the scope of the servant's authority.³ Considering its date, the decision was probably not intended to em-

(1858) 17 N. Y. 362, 72 Am. Dec. 474, and its restricted doctrine regarding the operation of the contract of carriage. See § 2433, *post*. In neither of the cases did the court advert to the earlier Louisiana decision, which proceeded upon the ground of a contractual duty.

^{2a} In *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, 8 Am. Neg. Cas. 392, where the owners of a steamboat were held to be liable for an assault and battery committed by their steward and table waiters on a passenger, from resentment at his having interfered by a proper remark with their rude treatment of his relative, a fellow passenger, in reference to a meal which he had taken on the boat, the court explained its position as follows: "The case thus presented differs in one respect from that of *Howe v. Newmarch* (1866) 12 Allen, 49, for in that case the plaintiff was a stranger both to the master and the servant. But here the plaintiff is entitled to all the rights which he derived from the contract of the defendants as carriers. The implied contract differs in some respects from that of carriers of goods. So far as this case is concerned, we have only to consider what it is in respect to the conduct of their servants. Nor do we deem it necessary to consider what it is in regard to selecting suitable persons as servants, or in regard to retaining incompetent servants after notice of their incompetency; for there is nothing in the bill of exceptions tending to show that they were in fault in this respect. We shall consider the matter on the assumption that they had not been

negligent in selecting or retaining their servants. . . . In this case the servants who committed the wrong, being the steward and table waiters, were those who were engaged in providing meals, waiting on the tables, and collecting the pay for meals. They were treating the plaintiff's relative with gross rudeness in connection with this business, and the plaintiff interfered only by a remark that was proper, whereupon the assault was committed. It was not as if a quarrel had occurred on shore and disconnected with the duties of these persons on shipboard. It violated the contract of the defendants as to how the plaintiff should be treated by their servants who were employed on board the ship and during the passage. For a violation of such a contract, either by force or negligence, the plaintiff may bring an action of tort, or an action of contract." The court quoted with approval the statements made by Story, J., and Clifford J., regarding the terms of the contract for carriage by water, in *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575, and *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922. The case of *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316, was also relied upon.

³ Having regard to the change of standpoint which this case manifestly imports, when compared with those which are cited in note 1, *supra*, the fact that all three are cited together in *Jackson v. Old Colony Street R. Co.* note 4, *infra*, as authorities which sustain the theory of a carrier's absolute liability, is a noteworthy illustration of

body any wider doctrine than that which treats the carrier as answerable for any tort committed by servants who represent him in the performance of the contract of carriage as regards the particular passenger who complains of the injury. But the notion of an absolute liability, comprehending, as it would seem, all descriptions of servants, has now been adopted.⁴

2426. Michigan.—In the earliest relevant case decided in this state, the liability of the carrier for the tort complained of was predicated upon the broad ground that it was committed “in the line of his employment.”¹ Having regard to the date of this case, it is perhaps a

the manner in which so many courts have, either from a confusion of thought, or from the desire of showing, at all costs, an apparent continuity of doctrine, advanced to the adoption of that theory without formally overruling precedents which essentially conflict with it.

⁴In *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, 19 Am. Neg. Rep. 281, the conductor of one of defendant's cars in sport threw a dead hen at the motorman of another car on which plaintiff was riding. The hen missed the motorman, struck the window of the car near where plaintiff was sitting, and injured her. Held, that the defendant was liable in spite of the fact that the conductor was not a member of the crew of the car in which plaintiff was riding. The general language used by the court with respect to the extent of a carrier's obligation was as follows: “A common carrier of passengers impliedly agrees to exercise the utmost care and diligence consistent with the proper management of his business, to protect his passengers from injury through the misconduct of other persons, while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passengers on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not

guarantee perfection in these particulars, he is under an obligation of implied contract, and consequent legal duty, to use a very high degree of care to prevent injuries that might be caused by the negligence or wilful misconduct of others.” The grounds upon which it was held that the capacity in which the tortfeasor was at work was no obstacle to the maintenance of the action are stated in 2450, note 1, *post*.

In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, where most of the discussion was devoted to the availability of the defenses raised by the carrier. (See § 2454, note 11, *post*), the court observed, *arguendó*: “By the plaintiff's contract, the duty rested upon the defendant of affording him full protection from unlawful violence at the hands of the conductor, to whom, as its representative, the management of the car had been intrusted.” This statement embodies only the more restricted doctrine of *Bryant v. Rich*, note 2, *supra*; but its form was evidently determined by the character of the facts under consideration. The broader principle established by the *Hayne Case*, *supra*, was not criticized or doubted.

¹*Great Western R. Co. v. Miller* (1869) 19 Mich. 305, 8 Am. Neg. Cas. 421 (ejection of passenger from train). The court made the following remarks with regard to the right of the plaintiff to recover for the act of a conductor wrongfully removing him from a train: “It was urged on the hearing that the railroad company could not be held liable for any wrongful expulsion under this statute, because it would be the personal wrong of the conductor in violation of law, for which he must be held

permissible inference that the phrase thus used should be understood as having reference to a conception of responsibility similar to that which is indicated by the English rulings. But the doctrine has since been enunciated, that it is the duty of a railroad to protect passengers from the wilful misconduct of its servants while performing the contract to carry, even if the injuries are inflicted by the servant when not "acting within the scope of his authority."²

2427. Minnesota.—The doctrinal situation in this state is not altogether clear. But the decisions and the reasoning by which they are supported indicate that the supreme court considers a carrier to be absolutely responsible to a passenger for the tort of every servant whose functions are directly connected with the performance of the contract of carriage.¹

2428. Mississippi.—In this state the conception of an absolute duty on the part of the carrier's servants to protect passengers from injury has been explicitly adopted.¹

to have exceeded his known agency. And the same exemption was claimed for them from liability for any expulsion, unless under circumstances where they may be supposed to have authorized it by their instructions, general or special. There is, however, so far as we have seen, no authority which would exempt them from some amount of responsibility for any wrongful expulsion of a passenger by a conductor. He represents them in the whole management of his train, and the power to do any serious mischief is chiefly derived from their investing him with the control of this large agency. He occupies the same position as the master of a ship, and his action in the case supposed must be regarded as done in the line of his employment."

In *Hufford v. Grand Rapids & I. R. Co.* (1887) 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544, the case turned upon the question whether the ejection of a passenger from a train for refusing to pay fare was, under the given circumstances, wrongful. Nothing was said which bears upon the subject now under discussion.

²*Johnson v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 453, 90 N. W. 274 (passenger struck by conductor during an altercation regarding the passenger's right to travel on a certain ticket).

¹In *Cain v. Minneapolis & St. L. R. Co.* (1888) 39 Minn. 297, 39 N. W. 635,

where the defendant was held liable for the act of its brakeman in violently pushing a passenger from the rear of a car when the train was going at a speed that rendered it dangerous, the decision was put upon the ground that the "acts of these servants in and about the management of the train, and in receiving, excluding, or putting off passengers, were the acts of defendant."

In *Conger v. St. Paul, M. & M. R. Co.* (1891) 45 Minn. 207, 47 N. W. 788, a verdict against a railroad company for an assault committed upon a passenger was held to be sustained by evidence that the assailant was at the time acting as brakeman under the authority of the defendant, though not on his regular train, and suddenly struck the plaintiff without any warning. The nature of the preceding dispute is not mentioned. The court said: "There is very little doubt that at the time of the assault he was in fact acting as a brakeman on the car upon which plaintiff was a passenger; and, from the evidence, the jury might fairly infer that he was so acting by the authority, expressed or to be implied from acquiescence of defendant's agent or agents, whose authority to place him on duty as brakeman on that car was not disputed, so that the jury might find that he was in the line of his duty as one of the crew in charge of the train."

¹*St. Louis & S. F. R. Co. v. Sander-*

2429. Missouri.—*a. Generally.*—The effect of the earliest relevant decision in this state was that a carrier was not liable for the wilful and malicious misconduct of a servant in respect of a passenger, but only for his negligence, incapacity, or unskilfulness.¹ From the form given to this decision it is apparent that the enforceability of a passenger's claim was treated as being determinable with reference to the rule under which, at the date of the decision, third persons were still precluded in many jurisdictions from maintaining actions against masters for injuries caused by the wilful torts of their servants.² A few years afterward, however, the conception of an impliedly stipulated duty in respect of the proper treatment of passengers was explicitly recognized.³ Except in one instance, where the right to maintain an action was predicated with reference to the extent of the tort-feasor's powers,⁴ that conception has served as the criterion of liability in all the cases subsequently decided.⁵ An examination of the actual circumstances involved will show that none of

son (1911) — Miss. —, 54 So. 885. In that case, where a conductor fired a pistol while the plaintiff's intestate was alighting from a train, the rule that a master is not responsible for torts committed by a servant outside the line of his duty, and not in the service of his master, was declared not to be applicable in actions brought by passengers against carriers.

In the earlier case of *Louisville, N. O. & T. R. Co. v. Patterson* (1891) 69 Miss. 421, 22 L.R.A. 259, 13 So. 697, where a conductor refused the plaintiff's request for a seat, and accompanied his refusal with insulting language, and the railway company was held liable, the precise *ratio decidendi* is not shown by the report. But the decision seems to require for its support the doctrine of an absolute duty.

¹ *McKeon v. Citizens' R. Co.* (1867) 42 Mo. 83, 4 Am. Neg. Cas. 471.

² The case of *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474, in which that rule had been declared, nine years previously, not to be applicable in actions by passengers against carriers, was evidently not brought to the attention of the court.

³ *Malecek v. Tower Grove & L. R. Co.* (1874) 57 Mo. 17. There a street railway company was held liable for an assault committed by a driver upon a passenger for the purpose of constraining him to pay a fare which he declared

to have been already paid. The authority relied upon was *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575. The *McKeon Case*, note 1, *supra*, was not ever referred to for the purpose of overruling it.

⁴ In *Travers v. Kansas P. R. Co.* (1876) 63 Mo. 421, where the conductor snatched from the plaintiff a check given in place of a ticket, charged him with having stolen it, and then ejected him, a verdict against the company was sustained. The position of the court is indicated by its statement that, in an action for such an injury it was not necessary to allege or prove that specific authority was conferred on the conductor by the company to perform such acts, because it appeared from the testimony that he was intrusted with "all authority which concerned the reception or rejection of passengers," and that he was acting within the scope of the general authority devolved on him by his position.

⁵ In *Spohn v. Missouri P. R. Co.* (1894) 122 Mo. 1, 26 S. W. 663, 4 Am. Neg. Cas. 763, it was held that an action might be maintained against the defendant by a passenger on a train, who had been so alarmed by threats made in sport by a conductor and some of the other passengers that he jumped off. This case was tried and appealed four times. On the first appeal ([1885] 87 Mo. 74, 4 Am. Neg. Cas.

these cases require for their support the hypothesis of a guaranty against the misconduct of servants outside the category of those who,

564) a verdict for the plaintiff was set aside as being against the weight of evidence. The court, however, recognized the general rule that a carrier is bound to use the utmost care to protect passengers from violence and insults. At the second trial the verdict was again in favor of the plaintiff (1890) 101 Mo. 417, 14 S. W. 880, 4 Am. Neg. Cas. 629. But a new trial was ordered on the ground that the following instruction was erroneous: "Reasonable cause to jump from the train," as used in the instructions given in this case, means a cause sufficient to have induced plaintiff, having regard to his intelligence, experience in life, situation, and surroundings at the time of his injury, to have jumped from the train while the same was in motion, and under the circumstances in evidence in this case." The court said: "The defendant is not necessarily responsible for any act a passenger may do in consequence of some breach of duty on the part of its employees. It is liable only for such results as are natural and probable consequences of such breach of duty. The agents of defendant are not chargeable with knowledge of a passenger's 'intelligence and experience in life.' They are authorized to act upon the appearance before them, where they have no notice of the facts. They may have in charge an insane passenger, but unless that condition is obvious or is made known to the carrier, the latter would be justified in assuming him to be as he appeared." On the third appeal a similar verdict was set aside for errors in the instructions and admission of evidence, and also because the court was of opinion that it was not supported by the evidence. (1893) 116 Mo. 617, 22 S. W. 690, 4 Am. Neg. Cas. 718. The verdict obtained by the plaintiff in the fourth trial was allowed to stand, although the evidence was substantially the same as on the second and third trials,—having been merely strengthened slightly by some additional testimony corroborating the plaintiff's story. The *ratio decidendi* was simply that there was evidence to support the conclusion of the jury.

In *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep.

592, 84 S. W. 939, the court quoted with approval the statement in Thompson, *Negligence*, §§ 3185, 3186, that "the carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely, and to give him decent treatment *en route*."

In *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669, the absolute liability of the defendant for acts of a conductor was affirmed by the court in commenting on the correctness of certain instructions.

For other cases in which the actions were held to be maintainable, see *Randolph v. Hannibal & St. J. R. Co.* (1885) 18 Mo. App. 609 (passenger was wrongfully accused of attempting to evade the payment of his fare, and afterwards insulted and struck a conductor); *McGinnis v. Missouri P. R. Co.* (1886) 21 Mo. App. 399 (plaintiff ejected on the ground that his ticket did not authorize him to travel on the train; also accused of fraud by the conductor); *Eads v. Metropolitan R. Co.* (1891) 43 Mo. App. 536 (conductor of a street car ejected the plaintiff after a dispute with him as to whether the money offered for his fare was good); *Tanger v. Southwest Missouri Electric R. Co.* (1900) 85 Mo. App. 28 (court rejected contention that defendant was not liable to a passenger who had been assaulted and ejected from a street car, because the wrongful act was wanton and outside the scope of the servant's employment); *Shaefer v. Missouri P. R. Co.* (1903) 98 Mo. App. 445, 72 S. W. 154 (aggravated assault by conductor); *Strauss v. St. Louis Transit Co.* (1903) 102 Mo. App. 644, 77 S. W. 156 (conductor without any provocation assaulted plaintiff while attempting to get on a street car); *O'Donnel v. St. Louis Transit Co.* (1904) 107 Mo. App. 34, 80 S. W. 315 (unprovoked assault upon a passenger by conductor of street car); *Flynn v. St. Louis Transit Co.* (1905) 113 Mo. App. 185, 87 S. W. 560 (street car company liable for act of conductor in committing an unprovoked assault upon an old man by pushing and kicking him while he was

in the ordinary course of their duties, are commonly brought into personal contact with passengers. In one instance it was apparently assumed that the guaranty was applicable only as regards servants of that description.⁶

b. Arrest.—In three cases the liability of a street railway company for a wrongful arrest or malicious prosecution of a passenger by a conductor has been affirmed on the ground that the act complained of was within the scope of his authority.⁷

2430. Nebraska.—In this state a carrier has been held liable for an assault made by a servant in the course of a personal altercation.¹ Such a decision necessarily imports an adoption of the theory of a duty incumbent on the carrier to protect his passengers. But the report does not show the precise ground upon which the court proceeded.

2431. Nevada.—The contractual duty of a carrier to protect his passengers against the misconduct of his servants has been recognized in this state.¹

attempting to alight from a car); *Keen v. St. Louis, I. M. & S. R. Co.* (1908) 129 Mo. App. 301, 108 S. W. 1125 (brakeman assaulted passenger on a mixed train, whom he found in a freight car, instead of the passenger coach, where he should have been); *Shelby v. Metropolitan Street R. Co.* (1910) 141 Mo. App. 514, 125 S. W. 1189 (plaintiff, who sought to put a stop to a fight which then was in progress between his brother and the conductor and motorman, in consequence of a dispute about the payment of fare, was struck by the motorman).

In *Murphy v. St. Louis Transit Co.* (1902) 96 Mo. App. 272, 70 S. W. 159, where the conductor of a street car wantonly pushed the plaintiff as he was about to light, an instruction to the effect that it was defendant's duty to treat its passengers with respect, and not subject them to insult or violence by its servants, was approved.

⁶In *Ephland v. Missouri P. R. Co.* (1896) 71 Mo. App. 597, where the plaintiff was injured as a result of having followed a direction wantonly and maliciously given by a brakeman, to jump from a train on account of threatened danger, the ground upon which the railway company was held to be liable was that the direction was within the scope of his duty. An instruction which omitted all reference to

the question whether he was acting in the line of his employment was held to be erroneous. But this ruling may possibly be merely an example of the improper use of the phrase "in the line of his employment."

⁷*Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730; *Ruth v. St. Louis Transit Co.* (1903) 98 Mo. App. 1, 71 S. W. 1055; *Dwyer v. St. Louis Transit Co.* (1904) 108 Mo. App. 152, 83 S. W. 303.

¹*Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830, where a man acting as driver and conductor of a horse car struck a passenger during an altercation which ensued when the passenger, after his fare had been paid by a companion, was requested to pay it again.

¹In *Quigley v. Central P. R. Co.* (1876) 11 Nev. 350, 21 Am. Rep. 757, the court remarked with reference to an instruction: "It is admitted by counsel for appellant that the act of the conductor in ejecting plaintiff from the cars was within the scope of his authority, in the prosecution of the business intrusted to him by defendant, and that if the act was unwarranted and unlawful, the defendant was liable in damages therefor, notwithstanding the fact that the conductor acted in good faith, in the honest belief that the plaintiff had no right to a passage. . . .

2432. New Jersey.—In this state the carrier's liability is determined with reference to the theory that he impliedly stipulates to protect his passengers against maltreatment by his servants.¹

2433. New York.—*a. Generally.*—The language used in the earliest case in which the liability of a carrier for the wilful torts of his servants was considered in this state shows that the court of appeals did not intend to go any further than to except actions by passengers against carriers from the scope of the doctrine which then prevailed (see § 2239, note 2, *ante*), that the wilful torts of a servant, even though committed within the scope of his employment, were not imputable to his master.¹ The *rationale* of the position thus taken was that an obligation to convey a passenger in accordance with the pro-

While there is some conflict in the decided cases, we are of opinion that the weight of reason and authority is decidedly in favor of the rule that a corporation is liable for the wanton and malicious acts of its agents. If the agent or servant of a corporation assaults a stranger, the corporation is not in any way liable; but the rule is different where the assault is made upon a passenger of the corporation. It is the duty of every railroad corporation to carry its passengers safely, and to treat them respectfully. They should protect their passengers from violence and insult, and are bound to use such reasonable precautions as human judgment and ordinary foresight are capable of, in order to make the journey safe and comfortable. In the language of the authorities, they are bound to protect their passengers not only against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of their own conductors, agents, and servants; and if this duty is not performed, they should, of course, be held responsible."

¹ In *Haver v. Central R. Co.* (1898; Err. & App.) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 648, 41 Atl. 916, 5 Am. Neg. Rep. 197, where the plaintiff was, without cause or provocation, assaulted by a baggage master, the court thus discussed the principles upon which the right of recovery turned: "The case now before the court depends not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is

to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation to use the utmost care and diligence in providing suitable and sufficient vehicles for the conveyance of its passengers, to carry the passenger therein to the end of his route, to protect him against assault and other ill treatment by those employed by and under the carrier's control while on the way, and to exercise the utmost vigilance and care in maintaining order and guarding the passenger against violence from whatever source arising, which might reasonably be anticipated or naturally expected to occur in view of all the circumstances and the number and character of persons on board. *Cooley, Torts*, 644; 5 Am. & Eng. Enc. Law, 2d ed. 541. In the application of this principle the grade of the employee by whom the injury was done, or the scope of his employment, is immaterial."

In an earlier case, where a conductor ejected from a train with unnecessary violence a passenger who refused to pay his fare, the company was held liable for the injuries inflicted. *New York, L. E. & W. R. Co. v. Haring* (1885) 47 N. J. L. 137, 54 Am. Rep. 123. The duty of protection was not adverted to, the ejection being regarded as an act clearly within the scope of the tort-feasor's authority.

¹ *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474. There a railway passenger detained on his journey by reason of the wilful act of the conductor of the train was held to be entitled to recover damages. After referring to *Wright v. Wilcox* (1838) 19

visions, express or implied, of the contract of carriage, was absolute, and that the quality of the act which produced a breach of that obligation was consequently immaterial so far as the remedial rights of a person injured by the breach were concerned. But having regard to the evidence under review, it is manifest that the doctrine, as propounded, was not formulated with reference to any other classes of torts than those arising out of the discharge of functions which had a direct connection with the actual work of transporting passengers. Nothing that was said by the court can be reasonably construed as importing a recognition of the duty subsequently recognized (see *infra*), which requires a carrier to protect passengers against the violence and insolence of his servants. In all the cases cited below it

Wend. 343, 32 Am. Dec. 507, and *Richmond Turnp. Co. v. Vanderbilt* (1841) 1 Hill, 480, s. c. on subsequent appeal (1849) 2 N. Y. 479, 51 Am. Dec. 315, in which the nonliability of a master to third persons for the wilful acts of a servant had been affirmed, the court proceeded thus: "It cannot fail to be seen that there is an important difference between those cases and the one before the court. The former are cases of wilful, unauthorized, wrongful acts by agents, unapproved by their principals, occasioning damage, but which do not involve nor work any omission or violation of duty by their principals to the persons injured; wrongs by the agents only, with which the principals are not legally connected. In the present case, by means of the wrongful, wilful detention by the conductor, the obligation assumed by the defendants to carry the wife with proper speed to her destination, unless this wilful wrong of the conductor was an excuse to them, was broken. The real wrong to the wife in this case, and from which the damage proceeded, was the not carrying her in a reasonable time to Aspinwall, as the defendants had undertaken to do; and this was a wrong of the defendants, the carriers, unless the law excused them for their delay on account of the misconduct of their agent. It is for this alleged wrong of the defendants in not performing their duty as carriers with reasonable diligence, from which injury has been experienced, that this action was brought; and the only question in relation to the point under consideration would seem to be whether

they can defend themselves by showing that the delay on the route was the wilful wrong of one of their servants. . . . Viewing the general question, as it appears to be clear we must, as being whether the defendants have discharged their duty as carriers, and the particular point of inquiry, whether the circumstance that the detention was a wilful act of their servant will excuse what would otherwise be a want of proper diligence, this part of the case is relieved from difficulty. If the detention had resulted from negligence of the conductor, the liability of the defendants would be unquestionable. A master is answerable for negligence of his servants in the performance of their duties. . . . No reasons exist for holding a master liable for injuries from negligence of his servants in his employment, which do not equally and with like force preclude him from alleging an intentional default of a servant as an excuse for delay in the performance of a duty the master has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter the act of the servant is the act of the master, constituting negligence of the master; the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. The obligation to be performed is that of the master, and delay in performance, from intentional violation of duty by an agent, is the negligence of the master."

was obviously taken for granted that the liability of the defendants was predicable only within the limits thus indicated.² In one of the

² In *Blackstock v. New York & E. R. R. Co.* (1859) 20 N. Y. 48, 75 Am. Dec. 372, affirming (1857) 1 Bosw. 77, a railroad company was held to be responsible for damages resulting from a delay to transport freight in the usual time, which was caused by a great number of its servants suddenly and wrongfully refusing to work. The court said: "The position that the defendants are not responsible, because the misconduct of their servants was wilful, and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged nonperformance of a duty which the defendants owed to the owner of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences without regard to the motives of those persons. In the common case of a contract for services, as for building a house, which the builder had been unable to perform because his workmen had abandoned his service, proof that their conduct was wilful and every way unjustifiable would not give the party injured an action against them, nor would it excuse the party who had made the contract. . . . The cases in which it has been held that if a servant, while generally engaged in his master's business, wilfully commit a trespass, as by intentionally driving his master's carriage against the carriage of another person, the master is not liable, have no application to the present case." The doctrine of this case was approved in *Geismer v. Lake Shore & M. S. R. Co.* (1886) 102 N. Y. 563, 55 Am. Rep. 837, 7 N. E. 828, but its applicability as a precedent was denied on the ground that the tort-feasors in question had left the defendant's service before the wrongful acts which it was sought to impute to the carrier had been committed.

In *Meyer v. Second Ave. R. Co.* (1861) 8 Bosw. 305, an action for injuries caused by the act of the driver of a street car who had ejected a passenger from the front platform, the plaintiff was held to have improperly been nonsuited on the ground that his own evidence showed that "the driver

forcibly and wantonly, and without any provocation, pushed the plaintiff off the car, and that such misconduct was not an act done in the course of his employment." The court said: "The precise question which the first ground of nonsuit presents is this: Is the company liable if the driver acts maliciously in ejecting the passenger? . . . In the case before us, according to the plaintiff's testimony, he entered the cars as a passenger, intending to pay his fare, and having money with which to pay it. And the driver, under circumstances, that might occur, was authorized to eject him in a proper manner, and was also authorized to determine whether occasion to eject him existed. Had he ejected him so negligently as to injure him the defendant would be liable; and the fact that the driver ejected him maliciously, instead of negligently merely, makes no difference as to the defendant's liability." This case was cited with approval in *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180.

In *Higgins v. Waterliet Turnp. & R. Co.* (1871) 46 N. Y. 23, 7 Am. Rep. 293, upon one theory propounded by the defendant, *viz.*, that the act of a conductor in removing the plaintiff from a car was unlawful and was not justified by the circumstances, the trial judge refused a request for an instruction to the effect that the plaintiff could not recover for any personal injuries occasioned by the assault of the conductor because there was no evidence of authority from the company to commit it. Upon another theory of the case, *viz.*, that the expulsion was justified by the conduct of the plaintiff, but that unnecessary force occasioning injury was used in ejecting him, the judge charged that the defendant was liable for the resulting injury. Held, that the charge requested had been properly refused, and that the charge given was correct. The court said: "There is no evidence that the act of the conductor was prompted by malice or any wrongful intention, or by any motive except to discharge what he supposed to be his duty under the circumstances. The request to charge must be regarded as having been made with reference to this view of the facts; otherwise it was

irrelevant and inapplicable to the case. The expulsion of the plaintiff, if not justified by his misconduct, was an unlawful assault, and the question arises whether the defendant is responsible for the injury occasioned by the unlawful act of its servant done under a mistake of facts, or a mistake of judgment upon the facts, though in the course of the business of his master. This question must be answered in the affirmative, in view of the nature of the service in which the conductor was engaged, and the principle upon which the liability of the master for the acts of the servant rests. The conductor was put by the defendant in charge of the car. Passengers were bound to conform to the reasonable rules and regulations of the company, and to behave themselves in an orderly manner, promoting thereby the mutual interest of the company and the public. The company had the right to enforce order and decency by expelling from the car a passenger guilty of disorderly and indecent conduct. The defendant could only act through agents. The appointment of a conductor carried with it, as an incident, authority to maintain order, and to eject a passenger who had forfeited his right to be carried by his misconduct. . . . Whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim, *Respondeat superior*, applies, provided only that the agent was acting at the time for the principal and within the scope of the business intrusted to him." Some *obiter dicta* of a contrary tenor in *Hibbard v. New York & E. R. Co.* (1857) 15 N. Y. 455 (where the actual point decided was that the plaintiff had been properly ejected for refusing to show his ticket), were disapproved.

In *Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 274, 7 Am. Rep. 448, where the plaintiff, a passenger on a street car, had been struck during a scuffle which occurred while the conductor was removing him from the car for refusal to pay the fare, the grounds upon which the action was held to have been wrongfully dismissed were thus stated: "It cannot be doubted but that the defendants are so far responsible for the act of the conductor, their agent, that if they had not the right to demand the 6 cents fare, and hence had not the right to remove any passenger

from their car for not paying that sum, they would have been liable for any force used by their agent upon the person of such passenger, though confined strictly within a degree necessary to effect such removal, and used solely for that purpose and with that intent. See *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200, 8 Am. Neg. Cas. 372. And for the reason that he was in their business, using a physical force upon another which he had no right to exert, and which they had no right to instruct and authorize him to exert, and any force was an excess of right. Does it not follow, that when they have the right to instruct and authorize the use of force, and their agent, acting in the pursuit of his duty to them and under authority which they have given, exceeds through zeal or impetuosity of temper the degree of force necessary and proper to accomplish the purpose, and injury and damage ensue, that they must respond? So we have held in *Higgins v. Watervliet Turnp. & R. Co.* (1871) 46 N. Y. 23. But it is said that the act of the conductor in striking the plaintiff a blow in his face was wilful and malicious; that it was not done by him because he mistakenly conceived it a necessary use of force to effect the removal of the plaintiff, but as a wanton act of rage and passion. This, it appears to us, was a question to be decided. And conceding the law to be clear that the defendant would not have been liable for the act of the conductor, if it was wilful and malicious on his part, still, it was a question of fact."

In *Hamilton v. Third Ave. R. Co.* (1873) 53 N. Y. 25, the liability of a street car company for the wrongful ejection of a passenger was affirmed upon the ground that "it was an act done within the scope of his authority from the defendant, in the prosecution of its business intrusted to him."

In *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480, the plaintiff alleged that, while passing over the platform of the defendant's car, under such circumstances, he was "forcibly, wilfully, and violently" seized and thrown off by the driver and seriously injured; that the driver was acting at the time as "the servant and agent and in the employment of the defendant." Held (Folger, J., dissenting), that a demurrer to the complaint

was properly overruled, that it might be assumed from his position that the driver was acting within the line of his instructions in keeping the platform clear, and that the act complained of was an error of judgment in the course of his employment, for which the company was liable; also that the averment that the act was "forcibly, wilfully, and violently" done would not be considered as a charge that it was malicious, but that it was done in the performance of his duty, he using more force and violence than was necessary. The court said: "If without comprehending the precise nature of the legal rights of the defendant, or that the obstruction of the street by the stopping of the cars conferred any privilege upon persons who desired to cross, and supposing and believing that the plaintiff had no such right, and was a trespasser unlawfully there, the driver did the act complained of, it was an error of judgment, a mistake committed in the course of his employment, for the consequences of which the defendant is liable. If it was an abuse of authority conferred, which induced him to seize and eject the plaintiff, the same rule is applicable."

In *Peck v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 587, affirming (1875) 4 Hun, 236, 6 Thomp. & C. 436, where a male passenger was held to be entitled to recover for the improper manner in which he had been ejected from a car reserved for females, the court argued thus: "The jury have found that there was an excess of force made use of by an agent or servant of the defendant, without any purpose of his own; and the question is now whether it was in the course of his employment. It is idle to debate whether the defendant, having made the rule, made it for nothing, and did not intend to carry it out, and to some extent preserve the car set apart for females from the intrusion, in the first instance, of males traveling alone. To insure the observance of the rule, they hung out placards giving notice of it. More effectually to insure it, they placed their servant at the door of the coach. It then became his immediate employment in their service to keep that coach free from males going without females in their company. It is true that the oral commission of authority to him was to direct such male persons to another car. But the object

of his giving the direction, and of the placing him there to give it, was that one car should be kept clear of such persons. Thus it became his duty to the defendant to use his best efforts to that end, up to the limit of that oral commission; hence, it was his employment in the service and business of the defendant to effect the object for which he was especially detailed. That he went beyond the limit of his instructions, if the overstep was made with an honest purpose of doing the duty put upon him, without wilfulness, or malice, or purpose of his own, did not take him beyond the scope of his employment for the defendant, or out of the sphere of its business. . . . It was his employment at that moment for the defendant, to see to it that the regulation made by it was observed by all whom it concerned. Though he was not instructed to carry it out by physical means, when he used those means he was acting, in his conception, in the purpose for which he was stationed there; he was acting in the scope of his employment, and though he may have exceeded not only his instructions, but the rights of the defendant to use force, if he did so only in excess of zeal, or impetuosity of natural temper, and without malice towards the person removed, and with no purpose of his own, he was still the agent of the defendant, and it is liable for his act."

In *Townsend v. New York C. & H. R. R. Co.* (1875) 4 Hun, 217, 6 Thomp. & C. 495, where a plaintiff recovered damages for the act of a conductor in ejecting him from a railway car, the only question discussed was the propriety of the ejection under the given circumstances.

In *Parker v. Erie R. Co.* (1875) 5 Hun, 57, where a conductor used insulting language to a passenger in the course of a dispute which had arisen between them in regard to the failure of the train to stop at the station for which the passenger had taken his ticket, the liability of the railway company was denied upon grounds thus stated: "If a wrong was done by the conductor while he was in the performance of his duty, the defendant is liable. . . . He was in the discharge of his duty in taking up the ticket held by plaintiff, and when he passed the station at which they were entitled to be let off. But was he in the discharge

cases decided during this period, it would seem that, under the given circumstances, the criterion thus adopted was improperly applied to the prejudice of the passenger.³

After the right of action had been determined upon this footing

of his duty when, after the train had passed the station, he went into the car and used insolent and insulting language to the plaintiff? It would seem that he went into the car with the intention of picking a quarrel with the plaintiff, and used the power which a little brief authority gave him, to insult and outrage the feelings of a harmless passenger. If the conductor had used the language testified to by the plaintiff while he was doing any legitimate act in the line of his duty, the defendant would have been liable. But it would be unjust to hold the company liable for insulting words used or wrongful acts done by an employee, unless done while performing duties incident to the business in which they are employed."

In *Schultz v. Third Ave. R. Co.* (1880) 14 Jones & S. 211, an action for injuries received by a boy thrown off a horse car by the conductor, who erroneously supposed that he intended to steal a ride, it was held that the trial judge had properly instructed the jury that if the conductor "acted neither maliciously nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business and with a view to the furtherance of that business and the defendant's interest, believing, upon the appearance before him and upon which he had to exercise his judgment, that his duty to the defendant required him to act, then the defendant is responsible for the manner in which he acted and the consequences of his act, though he may have acted in excess of his real authority." This decision was reversed in (1882) 89 N. Y. 242, on the ground that certain evidence had been improperly admitted, but the court laid it down that the act of the conductor would be imputable to the defendant, even though it was wilful, reckless, and malicious.

In *Murphy v. Central Park, N. & E. River R. Co.* (1882) 16 Jones & S. 96, an action for injuries received by a boy who was thrown off by the conductor of

a street car, so that he fell against a passing team, it was held that the trial judge had improperly refused to charge that if the conductor acted wilfully, and from personal motives assaulted the plaintiff, the company was not liable.

In *Flynn v. Central Park R. Co.* (1883) 17 Jones & S. 81, the conductor of a street railroad car and a passenger had a long altercation, in which the passenger was angry and excited, and used abusive and insulting language to the conductor, and finally coming out on the back platform to see where he was, said to the conductor, "I'll fix you in the morning. I will go right up to the depot and report you. I am not going to lose 20 cents by you." Thereupon the conductor, without stopping the car, which was moving fast, pushed the passenger off. A verdict against the railroad company was upheld.

³ *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418, 8 Am. Neg. Cas. 524. The grounds upon which the decision was based were thus stated: "In the present case an act was done by the conductor completely out of the scope of his authority, which there can be no possible ground warranted by the evidence for supposing the defendant authorized, and which it could never be right under any circumstances for the defendant to do. First. The car was in motion, and for no cause could the plaintiff have been thrust out into the street against her will while the car was in motion. The law forbids it, and the defendant could not lawfully have done it, and therefore no authority could be implied in the conductor to do it. Second. There is no pretense that the conductor ejected or put the plaintiff from the car, or claimed to exercise such power for disorderly conduct, non-payment of fare, or any other cause. Third. The act was not in aid and assistance of the plaintiff in leaving the car. She was not in the act of getting off the car, but was standing on the platform, demanding that the car should be fully stopped, and protesting, as she had a right to do, that she would not attempt to leave the cars while they

for about a quarter of a century, the court of appeals rendered a decision which embodied the broader theory that the contract of carriage is violated by any act which constitutes a breach of the duty to treat passengers properly.⁴ An abandonment of the more restricted

were in motion. Fourth. The act was wanton and reckless, and was committed with great force and violence, such force as to throw the plaintiff clear off, and over the step, and on the pavement. It was not in the performance of any duty to the defendant, or of any act authorized by it. It was a criminal act for which the conductor could have been punished criminally, as well as made to respond in a civil action. It was a wanton and wilful trespass, and was not the natural or necessary consequence of anything which the defendant had ordered to be done." In *Mott v. Consumers' Ice Co.* (1878) 73 N. Y. 543, doubts were expressed concerning the correctness of this decision. These doubts seem to have been fully justified. It may be conceded that the doctrine which then prevailed in New York and some other jurisdictions (see § 2241a, *ante*), was adverse to the implication of an authority to commit illegal acts, and that, if the right of recovery was to be settled with reference to that doctrine, the plaintiff's inability to maintain the action was a necessary consequence. But it seems reasonably clear that, in treating the illegality of the assault as the determinative element, the court proceeded upon an erroneous ground. The evidence was clearly consistent with the inference that the act complained of was done by the conductor for the purpose of discharging his function of controlling a passenger in respect of the time, place, and manner of alighting from the car. If we assume that inference to have been drawn, the real and essential basis of the plaintiff's claim would have been an actual authority established by direct testimony. In this point of view the circumstances would be inappropriate for the employment of the test of an implied authority in respect of the particular misfeasance which occasioned the injury.

⁴ *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547. There an action was held to be maintainable where the plaintiff, while traveling as a passenger

on one of the defendant's street cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor, the moving cause of the assault being that the plaintiff had expostulated with the driver for having committed an assault upon a third person outside the vehicle. Referring to the dismissal of the complaint by the trial judge on the ground that the defendant's servant in assaulting the plaintiff had not acted within the scope of his employment, but had attacked the plaintiff to gratify some wicked and malicious purpose of his own, the court said: "Had the person assaulted been one to whom the defendant owed no duty, the dismissal of the plaintiff's complaint would probably have been correct: but the rule which applies in such a case has no application as between a common carrier and his passenger. In such a case a different rule applies. By the defendant's contract with the plaintiff it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. . . . In the present case the defendant had intrusted the execution of the contract to the driver of the car, and the plaintiff was under his protection. Any breach of the contract committed by the driver was a breach committed by the defendant. It is conceded that any injury arising from the mere negligence of the servant constitutes a breach of the contract. Had the driver, while executing the contract, carelessly and negligently injured the plaintiff, the defendant's liability would not have been doubted. Can it be less a breach of the contract that the injury was intentionally inflicted? An act which would amount to a breach of the carrier's contract if negligently done, would be equally a breach if done wilfully and maliciously. It is immaterial whether

view of the carrier's liability which is reflected in the earlier decisions was clearly involved in the position thus taken;⁵ for its essential import was that, in an action by a passenger for injuries caused by a wilful act of a carrier's servant, it was not a prerequisite to recovery that the act should have been done within the scope of the servant's employment in the sense in which that phrase had previously been understood,—that is to say, as one which did not embrace any acts except those directly connected with the work of transportation.⁶

a breach of contract results from the negligence or wilfulness of the defendant's agent. *Weed v. Panama R. Co.* (1858) 17 N. Y. 362. It is the injury that was suffered by the plaintiff while in the defendant's car, and not the motive which induced it, which constitutes the gist of the action. No reason exists for holding a master liable for the negligence of servants in his employment, which does not with equal force preclude him from alleging intentional default of the servant as an excuse for not performing a duty which he has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter the act of the servant is the act of the master, the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty. In the present case the master had undertaken to transport the plaintiff safely. He was injured while on the defendant's car by the act of the agent to whom the defendant had intrusted the execution of the contract. It is the defendant's failure to carry safely and without injury that constitutes the breach, and it is no defense to say that that failure was the result of the wilful or malicious act of the servant. A rule which should make the carrier liable when the act resulting in the injury was carelessly, but unintentionally, done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results. By such a rule a stage company who should place a lady passenger under the protection of its driver to be carried over its route would be liable if, by his unskilful driving, he upset the coach and injured her; but if, taking advantage of his opportunity, he should assault and rob her, the carrier would go scot free. If the porter of a sleeping car, employed

to guard the car while the passengers sleep, should himself fall asleep, or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable; but if the guardian should himself turn pickpocket, and rifle the pockets of the passengers, the company would not be responsible for his acts. The carrier selects his own servants and agents, and we think he must be held to warrant that they are trustworthy as well as skilful and competent."

⁵ The failure of the court to realize that this was the actual extent of the theory announced in *Weed v. Panama R. Co.* note 1, *supra*, and that it was now giving effect to a theory of a broader scope, is indicated not only by the fact that that case is cited without any qualifying comment, as a precedent which justified its conclusions, but also by its criticism on *Isaacs v. Third Ave. R. Co.* note 3, *supra*. That case was disapproved for the reason that it was decided without reference to the consideration that the plaintiff was a passenger suing a carrier. The omission to advert to this element was certainly somewhat a remarkable oversight; but the point to be noted in the present connection is that, even if it had been taken into account, the result, so far as the rights of the plaintiff were concerned, would have been the same. The ground upon which recovery was denied was that the tort-feasor had transcended the scope of his authority. This defense, supposing it to have been established by the evidence,—which in the writer's opinion was not the actual situation (see note 3, *supra*),—would have been a valid one, even if the doctrine embodied in the *Weed Case* had been professedly followed).

⁶ Two of the authorities cited were *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg.

In one of the subsequent cases it was declared that "no matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act toward the passenger during the existence of the relations of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences."⁷ In another of those cases we find the following statement: "A carrier is

Cas. 316 (see § 2423, *ante*), and *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665 (see § 2443, *post*). It is clear that neither of these cases could have been decided in favor of the plaintiff by a court which proceeded upon the grounds indicated by the cases reviewed in note 2, *supra*.

⁷ *Dwinelle v. New York & H. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319. The defense in this case was based mainly upon the theory that the performance of the contract of carriage had been temporarily suspended when the plaintiff was assaulted by a sleeping car porter. See § 2449, note 6, *post*.

The statement given in the text was adopted as correct in *Gillespie v. Brooklyn Heights R. Co.* (1904) 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, 16 Am. Neg. Rep. 181, reversing (1903) 80 App. Div. 640, 81 N. Y. Supp. 1127. There a female passenger on a street railway car tendered the conductor an amount more than the fare, but not in excess of that permitted by the company, and asked for a transfer. After the conductor had attended to another passenger she demanded the change, whereupon the conductor denied having received any amount in excess of her fare, and in abusive and impudent manner not only refused to return the change, but grossly insulted her by calling her a deadbeat and a swindler, and by the use of other insulting and improper language, even after a fellow passenger had informed him that she had given him the amount claimed. Held, that she was entitled to compensatory damages for the humiliation and injury to her feelings, and that it was error to direct a verdict for the mere amount of the change, upon the ground that this was the extent of the company's liability. The court said: "In this case there was obviously a breach of the defendant's contract and of its duty to its passenger. It was its duty

to receive any coin or bill not in excess of the amount permitted to be tendered for fare on its car under its rules and regulations, and to make the change and return it to the plaintiff or person tendering the money for the fare. That certainly must have been a part of the contract entered into by the defendant, and the refusal of the conductor to return her change was a tortious act upon on his part, performed by him while acting in the line of his duty as the defendant's servant. To that extent, at least, the contract between the parties was broken, and as an incident to and accompanying that breach, the language and tortious acts complained of were employed and performed by the defendant's conductor. This brings us to the precise question whether, in an action to recover damages for the breach of that contract and for the tortious acts of the conductor in relation thereto, the conduct of such employee and his treatment of the plaintiff at the time may be considered upon the question of damages and in aggravation thereof. That the plaintiff suffered insult and indignity at the hands of the conductor, and was treated disrespectfully and indecorously by him under such circumstances as to occasion mental suffering, humiliation, wounded pride, and disgrace, there can be little doubt. At least the jury might have so found upon the evidence before them. This question was treated on the argument as a novel one, and as requiring the establishment of a new principle of law to enable the plaintiff to recover damages in excess of the amount retained by the defendant's conductor which rightfully belonged to her. In that we think counsel were at fault, and that the right to such a recovery is established beyond question."

In *Graville v. Manhattan R. Co.* (1887) 105 N. Y. 525, 59 Am. Rep. 516, 12 N. E. 51, the court referred to the fact that the refusal of the plaintiff to comply with the request of a brake-

liable absolutely as an insurer for the protection of a passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment *en route*. Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out." ⁸

The doctrine embodied in the above statements has been explicitly recognized in most of the cases decided in recent years by the inferior courts of the state.⁹ In some of them it would seem to have been dis-

man to leave a car platform and go into the car "tended to mitigate and explain the conduct of the brakeman, and to show that the assault was not wanton or malicious." The emphasis laid upon the aspect of the evidence was apparently due to inadvertence. Under the doctrine of the *Stewart Case*, *supra*, the defendant was clearly liable, irrespective of whether the assault was or was not "wanton or malicious."

⁸ *Busch v. Interborough Rapid Transit Co.* (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460, quoting *Thomp. Neg.* § 3186.

In another case, decided during the same year, it was laid down that "a carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage." *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A.(N.S.) 770, 83 N. E. 31, reversing (1906) 113 App. Div. 649, 99 N. Y. Supp. 936. There the right of recovery was denied on the ground that the performance of the contract of carriage had been temporarily suspended at the time when the plaintiff was assaulted. See § 2449, note 13, *post*.

⁹ *Weber v. Brooklyn, Q. C. & Suburban R. Co.* (1900) 47 App. Div. 306, 62 N. Y. Supp. 1 (defendant liable for assault made by conductor who took offense at the protest of the plaintiff against the manner in which a drunken passenger had been treated); *Monnier v. New York C. & H. R. R. Co.* (1902) 70 App. Div. 405, 75 N. Y. Supp. 521 (passenger who had been unable to procure a ticket, owing to the absence of a station agent, was ejected for refusing to pay the extra amount of fare which passengers having no tickets were required by statute to pay); *Baumstein v. New York City R. Co.* (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23

(dismissal of complaint held to be improper, where a conductor first assaulted and then gave into custody, a passenger who had asked him several times for a transfer); *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960 (discussion turned mainly upon whether the relation of carrier and passenger had been terminated when the plaintiff was assaulted—see § 2449, note 14, *post*); *Lyons v. Broadway & S. A. R. Co.* (1890; City Ct.) 32 N. Y. S. R. 232, 10 N. Y. Supp. 237 (action maintainable where driver of a street car, having taken offense at a passenger's ringing up the conductor, threw him off the front platform); *Smith v. Manhattan R. Co.* (1892; N. Y. C. P.) 45 N. Y. S. R. 865, 18 N. Y. Supp. 759 (action maintainable where trainmen tried to eject a passenger who had jumped on the rear platform in violation of the rule of the company); *Luhrs v. Brooklyn Heights R. Co.* (1896) 11 App. Div. 173, 42 N. Y. Supp. 606, rehearing denied in (1897) 13 App. Div. 126, 42 N. Y. Supp. 1101 (railroad company liable for assault made upon a passenger by a conductor).

In *Brewster v. Interborough Rapid Transit Co.* (1910; App. Div.) 68 Misc. 348, 123 N. Y. Supp. 992, an employee of a street railway company warned plaintiff, who was waiting on a station platform, not to push or he would smash his head. Plaintiff told him to go ahead and do it, whereupon the employee knocked plaintiff down. A dismissal of the complaint was held to be error, on the ground that the company could not avoid liability on the plea that the assault was not within the scope of the assailant's employment.

In *Schwartzman v. Brooklyn Heights R. Co.* (1903) 84 App. Div. 608, 82 N. Y. Supp. 890, an instruction to the effect that if the conductor of the defend-

regarded.¹⁰ But owing to the ambiguity of the phrase, "in the course of the employment," and its equivalents, as used by the courts in

ant street car company took hold of the plaintiff and threw him from the car, but the act was done wilfully and maliciously, the defendant would not be liable, was held to be erroneous. The court said: "It is true that this portion of the charge was coupled with the suggestion that in order to relieve the defendant from liability it must appear that the conductor's wilful and malicious act was not done in the management and running of the car; but there was no fact or circumstance in the case tending to indicate that there was any time when the conductor was not engaged in the running and management of the car, and the jury must have understood the charge as applicable to the facts of the case, and not as a mere abstract proposition of law. The effect of the charge was to instruct the jury that they might find the conductor's act to have been wilful, but personal in the sense of being outside of the field of his duty, the precise language being, 'If he did it maliciously and outside of the running and management of the car of the defendant, then the verdict must be for the defendant.' It needs no citation of authority to show that this is not a correct statement of the law as applicable to the conceded fact that the conductor was engaged at the time in the actual running and management of the car. The true rule is frankly admitted by the learned counsel for the respondent . . . as follows: 'This we understand to be the correct rule of law, if the conductor made the assault while in the management of the car, whether maliciously done or negligently done, the defendant would be responsible.' The charge to the contrary could have no possible effect but to mislead the jury into the belief that if they found that the act of the conductor was a wanton one, it could nevertheless in some way be so dissociated from the discharge of his duty as a servant of the defendant as to relieve the latter from its consequences; and as nothing whatever in the case even remotely suggests the possibility of such dissociation, the instruction constituted reversible error."

For other cases in which the rule that a wilful assault upon a passenger in-

volves a violation of the contract of carriage was recognized, but which turned upon points of pleading, see *Hart v. Metropolitan Street R. Co.* (1901) 65 App. Div. 493, 494, 72 N. Y. Supp. 797, adopting the doctrine laid down on the first appeal (1901) 34 Misc. 521, 60 N. Y. Supp. 906; *Block v. Third Ave. R. Co.* (1901) 60 App. Div. 191, 69 N. Y. Supp. 1107; *Willis v. Metropolitan Street R. Co.* (1902) 76 App. Div. 340, 78 N. Y. Supp. 478; *Connell v. New York, O. & W. R. Co.* (1909) 134 App. Div. 231, 118 N. Y. Supp. 944.

In several cases where the tort complained of was the ejection of the passenger, either from the vehicle in which he was being transported, or from the carrier's premises, the precise doctrinal point of view from which the right of recovery was asserted is not apparent from the report. *Muckle v. Rochester R. Co.* (1894) 79 Hun, 32, 29 N. Y. Supp. 732 (unjustifiable ejection of passenger from street car); *Wells v. New York C. & H. R. R. Co.* (1898) 25 App. Div. 365, 49 N. Y. Supp. 510 (gatemane ejected from a station a passenger who was ill and unable to take care of himself); *Charbonneau v. Nassau Electric R. Co.* (1908) 123 App. Div. 531, 108 N. Y. Supp. 105 (passenger having a transfer entitling him to travel on a car was ejected for refusing to pay another fare).

In *De Felice v. Compagnie Francaise De Navigation* (1903) 83 App. Div. 73, 82 N. Y. Supp. 552, where the officer of a ship, being actuated by some feeling of personal resentment, countenanced the throwing of a passenger's valise overboard, the court took the position that the rule formulated in the *Stewart Case*, note 4, *supra*, was broad enough to cover such an injury. The right of action under such circumstances would seem to be preferably predicated on the ground that the shipowners were liable as common carriers of the passenger's baggage.

¹⁰ In *Roun v. Christopher & T. Street R. Co.* (1885) 34 Hun. 471, the right of a passenger to recover for being wrongfully ejected from a street car was put upon the ground that his removal from the car by the driver was "in the nature

cases involving the liability of carriers (see § 2451, *post*), the precise *rationale* of some of the decisions which seem to be a reversion to the theory originally adopted in this statute is not entirely certain. As the general statements of doctrine quoted above from the opinions of the court of appeals are sufficiently broad to cover injuries inflicted by servants other than those whose functions have an immediate relation to the performance of the contract of carriage, it seems not improbable that whenever the question is directly presented it may be held that the carrier's implied duty in respect of protection extends to all classes of servants. It is true that the language used and the conclusions arrived at by the supreme court in one case were inconsistent with the theory of an obligation of so wide a scope.¹¹ But the significance of that case as an index of judicial opinion is considerably diminished by the fact that it was earlier in date than the statements above referred to.

of an unlawful assault in the judgment of the law," and that "the acts performed by him were in the regular course of his employment, and within the authority possessed by him as the driver and manager of the car."

In *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun, 625, 8 N. Y. Supp. 107, the following language was used: "The general rule is well settled that if a servant misconducts himself in the course of his employment, his acts are the acts of his master, who must answer for them, even if the acts are wilful and malicious. But if a servant goes outside of his employment, and without regard to his service, acting with malice or in order to effect some purpose of his own, wantonly causes damage to another, the master is not liable." This statement seems to be clearly and unmistakably inconsistent with the modern New York doctrine. See further as to the case, note 11, *infra*.

In *Wright v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1898) 24 App. Div. 617, 48 N. Y. Supp. 1026, where a conductor had made a representation, held to be binding on the company, that a street car would carry a passenger between two points for a specified fare, ejected the passenger before the second point was reached on the ground of his having refused to pay the extra amount demanded, it was held to be a question for the jury whether at the time of the assault in question the conductor was

engaged in the performance of his duties as agent of the company.

In *Moritz v. Interurban Street R. Co.* (1903; App. Div.) 84 N. Y. Supp. 162, where a passenger who had stepped on the front step of a street car was struck by the motorman and told to get off, the company's liability was affirmed upon the ground that a master is liable for the acts of his servant which involve a departure from the authority conferred, if they are done in the course of the employment. The court laid down the rule that a carrier is liable "for all the unlawful acts of its servant done in the prosecution of the business entrusted to him, if its passengers are thereby injured."

¹¹ In *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun, 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107, an engine which had been left on a side track with the fires banked was started by some person unknown, and ran out on the main track, where it came into collision with a passenger train on which the plaintiff was traveling. Held (1) that, as it appeared, or the jury were authorized to find, that the engine was moved maliciously to the main track by an employee of defendant or by some other person, the defendant was entitled to have the jury instructed that, if the engine was maliciously started by one of defendant's employees, other than the man left in charge of it, the defendant was not liable; and (2) that the exception to the charge given by the trial judge,

b. Arrest.—In all the cases in which the court of appeals has so far had occasion to consider the liability of a carrier for the arrest of a passenger, the right of recovery has been considered with reference to the criterion of the scope of the authority delegated to the servant.¹² As two of these cases are of later date than that which established the doctrine of a carrier's absolute liability for assaults (see preceding subsection), it would appear upon the cases as they stand, that a distinction is taken between the obligations of a carrier in respect of torts of that character and in respect of wrongful arrests. Such a position, however, is scarcely logical, and it may reasonably be anticipated that both descriptions of torts will ultimately be dealt with on the same footing.¹³ It should be observed that in

that, if the person who committed the act was an employee of the company, then whether the act was done carelessly or wilfully, the defendant was not relieved of liability, was well taken. The court said: "Whoever did put the engine on the southbound track and start it north, whether an employee or not, did an act in violation of the rules of the company without authority (because McFarland [servant in charge of the engine during the night] only had, at that time, authority over the engine), and, if an employee, not in the discharge of or in the line of his duty as employee, but outside of it. . . . If an employee of defendant moved the engine, he was not acting for defendant; he was not doing an act within his employment, or that he had a right to do, but he was committing a most heinous crime. As to that the relation of master and servant did not exist between defendant and him. Hence we think that, assuming the engine was moved by some person from where it was placed by defendant, such act was a theft of the engine,—a criminal act,—and, whether done by an employee of defendant or other person, the defendant is not responsible therefor."

¹² In *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep. 141 (arrest of passenger by gatekeeper for nonproduction of ticket, which had been lost during the journey); *Mulligan v. New York & R. B. R. Co.* (1892) 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952, reversing (1891) 39 N. Y. S. R. 20, 14 N. Y. Supp. 456 (plaintiff was pointed out by ticket agent as having paid for his ticket with

a bill believed to be counterfeit); *Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, affirming (1891) 39 N. Y. S. R. 23, 14 N. Y. Supp. 468 (woman who had purchased a ticket was followed to the platform by the ticket agent, and temporarily detained, on the ground of her having paid in counterfeit money).

For decisions of lower courts which proceeded upon the same ground, see *Rown v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471 (conductor ejected passenger and caused him to be arrested); *Corbett v. Twenty-Third Street R. Co.* (1886) 42 Hun, 587 (driver ejected passenger and then caused him to be arrested); *Shea v. Manhattan R. Co.* (1890; C. P.) 15 Daly, 528, 29 N. Y. S. R. 313, 8 N. Y. Supp. 332, affirming (1889) 27 N. Y. S. R. 33, 7 N. Y. Supp. 497 (passenger arrested by platform man for alleged disorderly conduct).

For a more complete review of the above cases, the reader is referred to the chapter (cv.) on the Master's Liability for the wrongful use of Criminal Process by his Servants.

In *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 31, reversing (1906) 113 App. Div. 649, 99 N. Y. Sup. 936, the *rationale* of the decision was that the alleged misconduct for which the plaintiff had been arrested had no connection with the contract of carriage. See § 2449, note 13, *post*.

¹³ The language of the court in *Palmeri v. Manhattan R. Co.* (see preceding note) is suggestive of a curious "halting between two opinions," for al-

two recent cases the theory that a carrier is liable as an insurer for the wrongful arrest was adopted by the supreme court.¹⁴

2434. North Carolina.—*a. Generally.*—In this state the liability of a carrier for the wilful torts of his servants is determined with reference to the theory of an implied contract on his part that passengers shall be properly treated.¹

b. Arrest.—In two cases the court seems to have argued upon the

though its argument as a whole differentiates quite distinctly between acts which are, and acts which are not done in the furtherance of the master's business, the following statement is also found in its judgment: "Once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it, in the execution of the contract which it has undertaken towards the passenger." The doctrine thus laid down seems to be rather that which presupposes the existence of an absolute obligation than that which treats the scope of the tort-feasor's employment as being the criterion of the carrier's liability.

¹⁴ In *Baumstein v. New York City R. Co.* (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23, where the conductor of a street car assaulted a passenger who had asked for a transfer, and then caused him to be arrested, that theory was adverted to as the ground on which the dismissal of the complaint was treated as error.

In *McLeod v. New York, C. & St. L. R. Co.* (1902) 72 App. Div. 116, 76 N. Y. Supp. 347, the plaintiff was searched by a railway detective, who charged him with having robbed another passenger. The conductor was appealed to for protection, but refused to interfere, and the plaintiff was then arrested and put in prison. Held, that the dismissal of the complaint on the ground that in respect of what was done the detective and the conductor were not acting within the scope of their employment was error, and that the jury should have been asked whether the maltreatment of the plaintiff was a breach of the defendant's duty to carry him safely to his destination.

See also *East v. Brooklyn Heights R. Co.* (1906) 115 App. Div. 683, 101 N. Y. Supp. 364.

In *Parke v. Fellman* (1911) 145 App. Div. 836, 130 N. Y. Supp. 361, where the arrest was made by a *special officer*, the question of authority or of guaranty could not arise, because the tort was clearly committed in the exercise of the tort-feasor's normal functions.

¹ In *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191, where the engineer on a steamboat struck a passenger whom he accused of making a disturbance, the action was held to be maintainable; the liability of the defendant company being predicated "upon the distinct principle of its obligation to protect its passengers from insult or harm." The question whether the wrongful act was done by the engineer while acting within the scope of his employment was declared to be of no moment.

In *Williams v. Gill* (1898) 122 N. C. 967, 29 S. E. 879 it was held that the trial judge had properly refused to instruct the jury that, as the plaintiff's testimony showed that the brakeman struck the plaintiff directly after he had applied a vile epithet to the brakeman, the brakeman was not acting within the scope of his authority, and the defendant was not to be held responsible for the brakeman's act.

In *Strother v. Aberdeen & A. R. Co.* (1898) 123 N. C. 197, 31 S. E. 386, a railroad company was held liable for an insulting proposition made by its conductor to a female passenger on his train.

In *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327, the doctrine as to the carrier's absolute liability was recognized; but the right of recovery was by the majority of the court discussed upon the hypothesis that when the plaintiff's intestate was shot he had ceased to be a passenger.

hypothesis that the absolute liability of a carrier extends to the protection of passengers against wrongful arrest.² But more recently the court has pronounced explicitly in favor of the view that the liability of the carrier in respect of such a tort depends upon whether it was committed within the scope of the tort-feasor's employment.³

2435. Ohio.—In the only cases in which the matter has been considered by the supreme court, the position has been explicitly taken that a carrier is not chargeable with the wilful torts of his servant, except in so far as they are within the scope of the servant's authority, or employment in respect of the functions which he was hired to perform with regard to the actual work of conveying passengers.¹ But as more than forty years have elapsed since those cases were

² *Owens v. Wilmington & W. R. Co.* (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 249; *Bowden v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783. As to both of these cases, see further in § 2452, notes 3, 4 *post*.

³ *Berry v. Carolina, C. & O. R. Co.* (1911) 155 N. C. 287, 71 S. E. 322 (arrest for disorderly conduct).

¹ In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the grounds upon which the plaintiff, who had been struck by a baggage checker at a railway station during an altercation provoked by his own conduct and words, was held not to be entitled to maintain an action against the railway company, were thus stated: "For the plaintiff below, it is insisted that the servant was impliedly invested with such powers as were essential to the regular and certain performance of his duties; that for the despatch of his business, in certain emergencies, he must be considered as authorized to suppress by force, if necessary, an interference with, or obstruction of, the quick and certain discharge of his duties. Without undertaking to lay down a general rule to govern all cases, it may safely be admitted that the servant is invested with authority to use the necessary means to the performance of the duties assigned him; and that the character of the means that may be used will vary according to the nature of the duty to be performed and the attending circumstances. But in looking at the evidence, it is to be noticed that the assault complained of was not committed

in endeavoring to eject the plaintiff from the space inclosed by the tables, over which the servant may be supposed to have had a special control. The plaintiff, according to his own statement, had gone outside of the tables, and was shaking his finger in Halpine's face, and addressing him with an opprobrious epithet. It seems to us the assault was in no way calculated to facilitate or promote the business for which the servant was employed by the master; nor could it have been supposed to be, or intended as, an act done with that view or object. It is not a case of excess of force and violence in executing the authority of the master, but rather an act beyond such authority and foreign to the objects of the employment. There was no evidence tending to show that Halpine had any charge of the portions of depot not allotted for the purpose of checking baggage; neither did his employment imply any authority or control over the persons of passengers or others who might be found there. Nor is this the case of an act done from a wrong judgment in regard to a matter committed by the master to the discretion of the servant." Discussing the second contention of the plaintiff, "that the assault was an act of the servant done in part execution of the contract of carriage between the plaintiff and the company," the court said: "This is merely presenting the question in a different form, the principle being the same as that already referred to, namely; whether the act was done in the execution or performance of the service for which the servant was

decided, and the theory exemplified by them has been abandoned in most of the American states, it is possible that they would not now be treated as valid precedents.²

engaged. Whether the service to be rendered by the master is in the performance of a contract, or in the discharge of any other duty resting on him, can, it is conceived, make no difference; the question being, in either case, whether the act is within the scope of the servant's express or implied authority in respect to the master's service. In order to withdraw this case from the operation of the general rule, and hold the company responsible on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company, in requiring the plaintiff to apply to its servant for the purpose and as the only means of getting his baggage checked, impliedly undertook to vouch for and warrant the good conduct of the servant towards the plaintiff while the two were engaged in transacting the business. Whether this position is tenable, we do not find it necessary in the decision of the case now before us to express a definitive opinion. The case was not tried on this theory in the court below, nor has this phase of the question been argued here." The court would, no doubt, have dealt with this aspect of the case, if it had been aware of the decision in *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474 (see § 2433, *ante*). But its attention was not called to this authority.

In *Passenger R. Co. v. Young* (1871) 21 Ohio St. 518, 8 Am. Rep. 78 (a decision on demurrer), the court thus explained its reasons for holding the company to be liable: "The defendant below was a common carrier of passengers, and the plaintiff and his wife were rightfully seated in one of its cars, ready to be carried as passengers, and were ready and willing to pay their fare. Being thus lawfully in the car, they were, by the procurement and order of the conductor, forcibly ejected therefrom, and thus received the injuries complained of. The car was under the control of the conductor, who was the only representative of the defendant, with whom the public desiring to avail themselves of the defendant's business as a public carrier, could deal. It was the duty of

the defendant to carry the plaintiff and his wife, and in performing this duty it acted towards them, in common with other passengers, solely through its representative the conductor. What the latter did or refused in respect to the carriage of passengers is, we think, to be regarded as the act of the defendant. The conductor, by being placed in his position, was invested by the defendant with the implied authority of excluding improper persons from the car. This necessarily included the authority of determining who ought to be admitted and who excluded. . . . In dealing with persons as passengers, whether in admitting or excluding them from the cars, or in assigning them places after they have entered, the conductor in charge is acting in the course or within the scope of his employment. When this is the character of the act, the master is responsible for it civilly, even if it be an act of positive malfeasance or misconduct."

² The conception of an absolute duty on the carrier's part to protect his passengers was recently recognized to a limited extent by one of the inferior tribunals. See *Baltimore & O. R. Co. v. Reed* (1909) 31 Ohio C. C. 521, where the court, after referring to Rev. Stat. §§ 3433, 3434, which confer police powers upon conductors, proceeded as follows: "We think the provisions of these statutes were not solely for the purpose of enabling the railroad companies to protect their properties, but also for the purpose of enabling them to protect passengers from assaults of fellow passengers or from the servants of the road, and in other respects to preserve and secure the peace, safety, and convenience of passengers. And if a conductor, while in charge of his train, makes an assault upon a passenger who is then in the peace of the state and not violating any rule of the company, as a matter of law, he would be held to be acting within the scope of his authority, and the master would be liable." The phrase, "scope of his authority," in this passage, is clearly not used in the same sense as in the earlier cases cited in note 1, *supra*.

2436. Pennsylvania.—*a. Generally.*—The theory of an implied obligation on the carrier's part to protect passengers against the wrongful acts of his servants has in one instance been recognized by the supreme court of this state. See subs. *b, infra*. But the right of action has usually been treated as being determinable with reference to the doctrine that a carrier is not liable for any wilful tort committed by a servant, except those which are within the scope of his authority,¹ or, in the phraseology of the more recent cases, in the line or course of his duty or employment.² From the decisions which have been rendered upon this footing, it is apparent that

¹ *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119, the ground upon which it was held that no action would lie against a street railway company for the act of a driver of a horse-car in striking with an iron bar, and then throwing off the car, a boy who had got on it with the intention of becoming a passenger, was that such an act must be taken to be outside the scope of the driver's authority, because no such company would ever confer authority to beat even trespassers on their cars. Upon the facts, it is submitted that the decision was erroneous in any point of view, for the ejection of persons who had, or were supposed to have, no right to be on the car was clearly one of the functions of the driver, and the company was therefore responsible for the manner in which he discharged it.

² In *Scanlon v. Suter* (1893) 158 Pa. 275, 27 Atl. 963, it was held that the plaintiff had been properly nonsuited, where the testimony showed that deceased came to his death in consequence of a quarrel with the ferryman employed by defendant, and that the death was either an accident or the result of unlawful violence on the part of the ferryman, outside of the line of his duty, and committed without the authority or consent of defendant.

The ratio decidendi in *McFarlan v. Pennsylvania R. Co.* (1901) 199 Pa. 408, 49 Atl. 270, was that "for a wilful or intentional trespass by an employee outside of the line of his duty under his employment, it is settled that the employer is not responsible, even though it be committed while the servant is in the exercise of his employment." In that case plaintiff declared for an unprovoked assault upon him by the con-

ductor as he was about to enter the train, and the defense was a total denial that any such assault took place. The defendant argued that, as the jury had found in the plaintiff's favor that the assault was committed, the supreme court was bound to take the plaintiff's version of it, and that made out a clear case of wilful and unprovoked trespass outside the line of the conductor's employment. The court, however, said: "This view ignores some of the evidence. The jury were bound, in finding their verdict, to consider and determine not only the fact of the assault but also its character and the circumstances under which it was made. The plaintiff testified that he was an intending passenger and was in the act of entering the car. Prima facie, therefore, he was within the authority and control of the conductor in the course of his employment, and there was other testimony to the same effect. Thus Mrs. Barton, a witness, testified that when the conductor caught hold of the plaintiff he said: 'Stay off until the people get out.' This was evidence that what the conductor did was not only in the course of his employment, but in the supposed performance of his duty in the orderly management of the passengers leaving and entering the train. If in so doing he used unnecessary violence, the employer would be liable, and the jury have so found."

In *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011, the grounds upon which the court refused to accept the contention of counsel that a special officer employed by a railway company was acting in the line of his duty when he assaulted the plaintiff were thus stated: The decisions cited "deal either

these phrases are to be understood in their more restricted sense, as connoting torts which are directly connected with the actual work of transportation, or with the performance of such incidental and supplementary duties as may be imposed upon them by specific instructions regarding the conduct to be observed toward passengers.

b. Arrest.—In a case where the plaintiff had been wrongfully arrested on a train by police officers acting in pursuance of a telegram received from the defendant's agent, it was declared by the

with cases where a special duty towards the injured party, arising out of the contract relation, was violated, as in the case of a conductor who in collecting fares or tickets from passengers, or in preserving peace and order in his car, commits a wilful and malicious assault on a passenger; or where an officer makes violent assault while engaged in making arrests. In every such case the employee is directly in the line of his duty, in the sense that he presently engaged in doing the work for which he was employed. It is the duty of the conductor to make his collections, and it is the duty to maintain order in the car for the protection of passengers; and it is as well the duty of the policeman to make arrests when proper occasion arises. It is for such purposes these employees are engaged. If the assault in this case had been made by Bledsoe in the course of an attempt to arrest the plaintiff, it might be contended that it was done when in the line of his duty, and it would be a question for the jury to decide; but, as we have said, every circumstance shows that here no arrest was intended; the plaintiff does not assert that it was, shows no circumstance that indicates it, while Bledsoe positively asserts that it was not. Or if it had been made in the attempt to do anything that Bledsoe was employed to do, as, for instance, keeping the peace, suppressing disorderly conduct, discovering crime, a like result would follow. This is the extent to which the cases cited go. The distinction is too apparent to require further discussion. Ordinarily, whether the assault was committed in the line of the servant's duty is a question for the jury; but no question of fact is ever submitted to a jury except it is raised by the evidence."

In *Artherholt v. Erie Electric Motor Co.* (1905) 27 Pa. Super. Ct. 141, the case was held to be for the jury where

there was testimony warranting the inference that the conductor, being angered because the plaintiff rang the signal bell, or by mistake pulled the cord which registered fares, made a wanton and malicious assault upon him, which was neither instigated nor authorized by his employer, but was in violation of the standard rules of the company requiring the conductors to treat passengers civilly. In the *Greb Case*, *infra*, this decision was said to proceed upon the ground that as the conductor "was the employee to whom the company had intrusted the safe carriage of the plaintiff, the company owed to him the duty to protect him against the conductor's unprovoked and wanton assault committed while the plaintiff was being transported, and the conductor was engaged in executing the contract of carriage."

In *Greb v. Pennsylvania R. Co.* (1909) 41 Pa. Super. Ct. 61, 72, where a passenger, after having alighted from a train, was pursued along the station platform by the baggage master and the conductor of the train, and wantonly and maliciously assaulted, the liability of the railroad company was denied on the ground that the acts of the assailants were outside of the scope of their employment. The court reviewed all the Pennsylvania decisions, and expressed the opinion that they did not sustain the broad proposition upon which the instructions of the trial judge must be taken, to have proceeded, *viz.*, that "it is the 'absolute duty' of the carrier to protect the passenger against the assaults and violence of its servants, not only while the passenger is being transported, but so long as the relation exists, therefore if the passenger is anywhere on the carrier's premises legitimately as an intending or departing passenger, the range or scope of employment of the servant who commits an

court that if the conductor of the train had participated in the tort of a telegram received from the company's agent, the defendant would have been liable, both for the reason that "the subject was within the general line of his duty," and also for the reason that "it was his duty under ordinary circumstances, as already said, to protect his passengers from trespass while under his care, and if he stood by and saw them illegally molested in any way, without an effort to protect them, it would be negligence for which the defendant would be liable."³ But the second of the grounds thus assigned reflects a conception of the carrier's liability which is plainly inconsistent with the position indicated by the cases reviewed in the preceding subsection.

2437. South Carolina.—In this state a passenger apparently cannot recover for an assault by the carrier's servant, unless it was committed by him in the course of his employment; this phrase being understood in the same restricted sense as it bears in the Pennsylvania cases.¹

2438. Tennessee.—*a. Generally.*—In this state the liability of a carrier is determined with reference to the theory of an implied obligation on his part to protect passengers against the wilful torts of his servants.¹

unprovoked, unlawful, and malicious assault upon him is immaterial in determining as to the carrier's liability." It was remarked that "if the brakeman had followed the plaintiff into the waiting room of the station, if there was one, and there committed the assault, or had vindictively assaulted an intending passenger the moment he entered the defendant's station, or if, to use the illustration suggested by appellant's counsel, the assault on the plaintiff on the station platform had been made by a track walker, who, after the train had left, had deserted his duty of inspecting the tracks, the case would not be different in principle. While general expressions may be found in cases outside this commonwealth, which, considered apart from the context and the facts of the case, may seem to give support to the proposition as above stated, yet a careful examination will show that in most of these cases some other element entered into the decision. At any rate, no Pennsylvania case that has been cited, or that we have been able to find after diligent investigation, goes to that extreme."

³ *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

¹ In *Redding v. South Carolina R. Co.* (1871) 3 S. C. 1, 16 Am. Rep. 681, the enforceability of the claim was held to be a question for the jury upon evidence that a negro passenger had been assaulted and dragged out of the parlor at a station by an employee who attended to the cleaning of the room, and that the employee had been ordered to exclude negroes from the room.

That the above decision, although rendered more than forty years ago, is still regarded as a valid precedent, would seem to be a permissible inference from the recent ruling in *Taber v. Seaboard Air Line R. Co.* (1908) 81 S. C. 317, 62 S. E. 311, to the effect that a passenger may recover punitive damages against a carrier for such wilful acts of his servants as are done within the apparent scope of their authority.

¹ In *R. R. Springer Transp. Co. v. Smith* (1886) 16 Lea. 498, 1 S. W. 280, the owners of a steamboat were held to be liable for injuries resulting from an unwarrantable assault made by the

b. Arrest.—In a case where the imprisonment of an innocent person on a charge of attempting to pass counterfeit money was wrongfully procured by a railroad detective while acting within the scope of his authority, the railroad company was declared to be liable, although in this particular matter he had exceeded his authority and acted contrary to his instructions respecting the caution to be exercised in dealing with supposed offenders.² The ground thus relied upon seems to indicate that this is one of the jurisdictions in which the liability of the carrier for a wrongful use of criminal process is determined upon a footing different from that which is adopted in actions for other wilful torts.

2439. Texas.—*a. Generally.*—In the earliest case in which the supreme court had occasion to consider the subject of a carrier's liability, an action was held to be maintainable in respect of an assault which was manifestly within the scope of the tort-feasor's employment, and the language of the opinion does not show whether the right of recovery was viewed as being conditional upon the tort's being of that description.¹ Shortly afterwards, however, it was declared to be "settled law that unwarrantable assaults upon passengers

mate upon a deck passenger whom he had ordered to move to another place. The defense unsuccessfully put forward was that, as the act of moving had been completed before the assault was committed, the tortious act was not within the scope of the mate's employment. The authority relied on was *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922 (see § 2408, note 2, *ante*).

In *Pullman Palace Car Co. v. Gavin* (1893) 93 Tenn. 53, 21 L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70, the liability of a sleeping car company for the theft of a passenger's money by the porter of a sleeping car was put upon the ground that he was charged with the performance of the company's duty in respect of watching and protecting the property of passengers.

In *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554, the court affirmed a verdict in favor of a person who had been pushed off the step of a train, although he was unable to say who had struck him, and could only testify that it was a person who wore the uniform of a railway employee. The court laid it down that "a passenger is not only entitled to civil treatment at the hands of all employees, but to their

protection, and the railroad company will be held liable for any act of rudeness and oppression resulting in injury to a passenger at the hands of any of its employees while on the train, the safety and proper treatment of the passengers being within the scope of employment and range of duties of every employee."

In *Knowville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557, the misconduct of a motor-man of a street car in making indecent and insulting remarks to and concerning a female passenger was held to be imputable to the railway company, on the ground that it was a breach of the carrier's absolute contractual duty to protect its passengers from the violence and insults of its servants.

² *Eichengreen v. Louisville & N. R. Co.* (1896) 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219.

¹ *Texas & P. R. Co. v. Graves* (1882) 2 Posey Unrep. Cas. (Tex.) 306 (passenger who had been struck by a conductor, acting under the mistaken impression that he was a bad character, and was about to rob another passenger).

by a carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier."² A few years later the theory of a contractual obligation on the carrier's part to protect his passengers was again explicitly adopted.³ For a considerable period that theory was applied without any qualification.⁴ Recently, however, the position has been taken that the carrier's duty to protect a

² *International & G. N. R. Co. v. Kentle* (1883) 2 Tex. App. Civ. Cas. (Willson) 262. The precedent relied upon was *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922, see § 2408, note 2, *ante*). The ruling of the court that a plea alleging that the servant was acting beyond the scope of his authority would, if sustained by the testimony, constitute a good defense, is presumably to be understood as having reference to a range of functions which would embrace the proper treatment of passengers. Otherwise it would be inconsistent with the statement quoted in the text.

³ In *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139, the plaintiff, who was standing on the platform of a railway car, refused to comply with the conductor's order to enter the car, and in the altercation that ensued some blows were exchanged between them. The conductor then went away for a while, and when he returned, struck the plaintiff with a ticket punch. Held, that the receivers operating the railway were liable in their official capacity for the injury. The court said: "It is urged that the court erred in charging that defendants would be liable if the acts of the conductor were wilful and malicious. There is no doubt that ordinarily the master is not liable for an injury resulting from the wilful and malicious acts of his agent, not done in the course of his employment. This is the rule in all cases in which the liability of the master depends on the sole fact that the person who inflicted the injury was in some business his servant; and if, upon inquiry, it be found that the act was not done while in the transaction of the master's business, then the act is not to be deemed the act of the master, for, as to that, the wrongdoer was not his servant. The rule, however, cannot be applied in a case in which the master, by contract, express or implied, is under obligation to pro-

tect the injured person from the servant's wrongful act as well as his own. When a duty is thus imposed on the master, the servant employed to discharge it is the representative of the master, for whose acts, whether of omission or commission, resulting in injury to the person entitled to have the duty performed, the master must be held as fully responsible and liable to make at least actual compensation as though the act were his own personal act. In such cases if the servant does what the master could not do nor suffer to be done without violation of the particular duty resting upon him, or if the servant omits to do that requisite to the full discharge of the master's incumbent duty, then the master must be held responsible for the servant's wrongful or malicious act or omission; for otherwise it would result that a master might relieve himself from obligation to perform a duty fixed by contract or otherwise by the employment of servants to conduct the business to which the duty attaches. The master's obligation cannot thus be avoided, and whether the servant's act violative of the master's duty be wilful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the injured person."

⁴ In *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, the tort involved was a wrongful arrest. See subsec. b, *infra*.

In *International & G. N. R. Co. v. Miller* (1894) 9 Tex. Civ. App. 104, 28 S. W. 233 (writ of error denied in [1895] 87 Tex. 430, 29 S. W. 235), a railroad company was held liable for injuries inflicted upon a negress, of which the proximate cause was the excessive and unnecessary force used by a passenger called upon by the conductor to assist him in removing her from the car set apart to whites).

In *Missouri, K. & T. R. Co. v. Kendrick* (1895) — Tex. Civ. App. —, 32

given passenger is not absolute, but is predicable only in respect of servants whose delegated functions have an immediate connection

S. W. 42, it was held that a breach of the company's duty as to protection was not predicable on the ground that the station agent refused to give a passenger, waiting to take a train, the name of a town where she could procure accommodation for a sick child.

In *Texas & P. R. Co. v. Bowlin* (1895) — Tex. Civ. App. —, 32 S. W. 918, 8 Am. Neg. Cas. 638, a railroad company which employed a policeman at a depot to look after passengers was held to be liable to a passenger for loss of an eye, caused by the policeman striking him with a billy. The passenger, after having been roused from a drunken sleep, had started to his train, and at the time when he was assaulted was merely attempting to come back into the depot.

In *Houston & T. C. R. Co. v. Washington* (1895) — Tex. Civ. App. —, 30 S. W. 719, where a brakeman assaulted and ejected a passenger who had tendered his fare, the court rejected the contention that the defendant could not be held liable unless the brakeman had acted within the scope of his employment.

In *St. Louis Southwestern R. Co. v. Johnson* (1902) 29 Tex. Civ. App. 184, 68 S. W. 58, a railway company was held to be liable for an unwarranted assault committed by a conductor upon a disorderly passenger whom he was trying to quiet.

In *Gulf, C. & S. F. R. Co. v. Luther* (1905) 40 Tex. Civ. App. 517, 90 S. W. 44, where the right of the plaintiff to recover damages in respect of insults offered to his wife by a negro woman employed to take care of a waiting room was affirmed, the court explained its position as follows: "The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult from whatsoever source arising. He is not regarded as an insurer of his passengers' safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passengers' journey safe and comfortable. He must not only protect his passengers against the violence and insults of strangers and copassengers,

but, *a fortiori*, against the violence and insults of his own servants. If his duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be a cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust."

In *Carpenter v. Trinity & B. Valley R. Co.* (1909) 55 Tex. Civ. App. 627, 119 S. W. 335, the remarks of a conductor that, if other conductors had carried her child without pay, he, if in her place, would not give them away, and would not tell it on them, are not open to the construction of charging her with undue intimacy with them. The judgment entered on this verdict was set aside, but merely on account of error in an instruction by which the jury were told that the plaintiff was guilty of a criminal offense if her child had been carried without payment of fare.

In *Missouri, K. & T. R. Co. v. Morgan* (1911) — Tex. Civ. App. —, 138 S. W. 216, plaintiff's wife, desiring to go to A., where she resided, and believing that defendant's fast train stopped there to let off interstate passengers such as she was, boarded the train in accordance with the direction of defendant's station agent who sold her a ticket. After having been directed to change from one car to another *en route*, she was informed by the defendant's conductor that the train would not stop at A., and that she would either have to pay her fare to D., or alight at the last stopping place before the train reached A. She declined to do either of these things, whereupon the conductor said to her that, if she lived at A., she knew that the train did not stop there, and then, before attempting to eject her, said, "Do not disgrace yourself here." He then pulled her up out of her seat and called on the auditor to help him to eject her. She then paid the fare de-

manded to the next station. Held, that the statements of the conductor imputed a falsehood to her as well as a charge of disgraceful conduct, and that, if this distressed and humiliated her, plaintiff was entitled to recover damages therefor.

In *Missouri, K. & T. R. Co. v. Brown* (1911) — Tex. Civ. App. —, 135 S. W. 1076, an instruction to find for the plaintiff if his decedent was pushed from the train by the porter, and the porter was acting "within the apparent scope of his authority, "was held to be error, for the reason that the uncontradicted evidence showed that it was no part of the porter's duty, express or implied, to collect fares or put parties off the train. "But it was error in favor of appellant. If the deceased was a passenger on appellant's train, and was wrongfully pushed therefrom by the porter or any other servant of appellant, the appellant would be responsible for such wrongful act, without reference to the authority of such servant, real or apparent."

In *Fielder v. St. Louis, B. & M. R. Co.* (1908) 51 Tex. Civ. App. 244, 112 S. W. 699, where the plaintiff was assaulted by a roadmaster in the course of a personal altercation between them, it was held that, as he was entitled at least to nominal damages, even though the damages alleged resulted from other causes (defense was that injuries were due to plaintiff's alcoholism), it was error to instruct the jury to find for defendant if the damages did not result from the assault.

The carrier was also held liable in *Texas & P. R. Co. v. Edmond* (1895) — Tex. Civ. App. —, 29 S. W. 518 (passenger kicked off the step of a car was held entitled to recover, although he was drunk at the time); *Texas & P. R. Co. v. Jones* (1897) — Tex. Civ. App. —, 39 S. W. 124, 1 Am. Neg. Rep. 531 (No. off. rep.) (woman insulted in waiting room by station agent's wife); *Galveston, H. & S. A. R. Co. v. La Puelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488 (conductor assaulted passenger with whom he had quarreled about the payment of the fare); *Houston & T. C. R. Co. v. Batchler* (1904) 37 Tex. Civ. App. 116, 83 S. W. 902 (similar facts); *Missouri, K. & T. R. Co. v. Gaines* (1904) 35 Tex. Civ. App. 257, 79 S. W. 1104 (plaintiff assaulted and insulted by conductor); *San Antonio*

Traction Co. v. Lambkin (1907) — Tex. Civ. App. —, 99 S. W. 574 (insulting language used by conductor of street car); *Texas & P. R. Co. v. Cassidy* (1911) — Tex. Civ. App. —, 137 S. W. 389 (point principally discussed was whether relationship of carrier and passenger had ended when the latter was assaulted by a porter).

In the following cases where the right of recovery was affirmed, the existence of the duty of protection was presumably taken for granted, although it was not explicitly referred to: *Texas & P. R. Co. v. Tarkington* (1901) 27 Tex. Civ. App. 353, 66 S. W. 137 (words of conductor importing that a female passenger who had brought a child on to the train without taking a ticket for it was attempting to evade the payment of its fare); *Denison & S. R. Co. v. Randall* (1902) 29 Tex. Civ. App. 460, 69 S. W. 1013 (ejection of a passenger who had paid his fare); *San Antonio Traction Co. v. Crawford* (1902) — Tex. Civ. App. —, 71 S. W. 306 (motorman addressed a female passenger in an insulting manner, and shook his fingers and an iron bar in her face, after she had, against her will, been carried past her destination); *El Paso Electric R. Co. v. Alderete* (1904) 36 Tex. Civ. App. 146, 81 S. W. 1246 (passenger ejected by conductor from a street car for refusing to unfold her transfer ticket upon handing it to the conductor; such refusal not a valid reason for ejection); *Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905 (assault by train auditor); *Dallas Consol. Electric Street R. Co. v. Gilmore* (1911) — Tex. Civ. App. —, 138 S. W. 1134 (negro was ejected from portion of street car reserved for white persons, and then assaulted).

In *Galveston, H. & S. A. R. Co. v. McMonigal* (1893) — Tex. Civ. App. —, 25 S. W. 341, where a porter had excluded the plaintiff from a car, on account of the nature of certain articles carried by him, the rough treatment to which he had been subjected was held to be properly considered in assessing the damages, because it was inflicted by the porter in enforcing a regulation of the defendant. The tort-feasor was, therefore, acting in the course of the master's service, although he had gone beyond his orders. The doctrinal standpoint in this case is clearly inconsistent

with the performance of the contract of carriage as regards that particular passenger.⁵

b. Arrest.—In one case the supreme court viewed the right of recovery in respect of a wrongful arrest as being dependent upon whether it was within the scope of the tort-feasor's authority.⁶ Subsequently the carrier's implied obligation to protect his passengers was treated as being applicable to a tort of this description.⁷

with that which was adopted in *Dillingham v. Anthony*, note 3, *supra*.

⁵ *Houston & T. C. R. Co. v. Bush* (1911) — Tex. —, 32 L.R.A.(N.S.) 1201, 133 S. W. 245, reversing (1909) — Tex. Civ. App. —, 123 S. W. 201. Some extracts from the opinion are given in § 2450, note 4, *post*.

⁶ *Galveston, H. & S. A. R. Co. v. Donahoe* (1882) 56 Tex. 162, 8 Am. Neg. Cas. 624. The standpoint of the court is apparent from the following remarks: "In the case before us it is distinctly alleged that the conductor was acting within the scope of his authority in making the affidavit, causing appellee to be arrested and wrongfully confined in prison; and for that reason the corporation was liable for the injuries resulting from each and all of these acts of the conductor. As a matter of law, it cannot be said that it was within the scope of the power and duty of the conductor, as agent of the corporation, to institute the prosecution, and to cause appellee to be confined in the county jail. These are questions of fact to be determined by the jury from the evidence."

⁷ *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, reversing (1904) — Tex. Civ. App. —, 82 S. W. 524, where the baggage master at a station, who was charged with the duty of checking baggage and attending to the waiting room, assisted an officer in unlawfully arresting a passenger while she was about to take a train. The tort-feasor testified, in explanation of his presence near the place of arrest, that it was his duty to be there. The depot was conducted under the charge of the station agent, and there is no evidence that he or any of the trainmen had any connection with or opportunity to prevent the arrest. The defendant's contention that it was not liable for the act of the baggage master was rejected on grounds thus stated: "Plaintiff was a passenger, and

was under the protection of the defendant and of those of its servants to whom it committed the performance of the various duties to her which it assumed by the contract of carriage. The question in such cases is, what servants are chargeable with the performance of the carrier's undertaking, so that their breach of it will be ascribed to the carrier?" After a review of numerous authorities, the court proceeded thus: "It appears that the baggage master was one of the employees selected by the defendant to render service to passengers about the station provided for their use, and that he was present and on duty when the arrest was made. In such places the passenger is as much entitled to proper treatment and protection as when he is aboard a conveyance; and employees put there to be brought in contact with passengers, and to render to them services due to them from the carriers, are as fully within the principle stated as are such employees upon trains and vessels. The case is therefore governed by the broad principle deduced from the obligation of the contract, and is not of the class in which a person employed by another for some purposes commits a wrong while he is not engaged in his master's business. One employed as was Barton is engaged in the master's business, in respect of the duty of according proper treatment to a passenger when he is on duty in such capacity around such a place. The fact that he is not at the particular time actively doing anything for the carrier does not make conduct on his part violative of the master's obligation any the less attributable to the master."

In *St. Louis Southwestern R. Co. v. Franklin* (1898) — Tex. Civ. App. —, 44 S. W. 701, the liability of a railway company for the act of a station agent in procuring the arrest of a passenger on a charge of tendering counterfeit coin in payment of his fare was affirmed on

2440. Virginia.—The doctrine of an absolute contractual obligation on the carrier's part to protect his passengers against the wilful torts of his servants is applied in this state.¹

2441. Washington.—*a. Generally.*—It was recently laid down that the contract on the part of a carrier is "safely carry its passengers, and to compensate them for all unlawful and tortious injuries inflicted by its servants."¹ From this unqualified language the only reasonable inference is that, in respect, at least, of torts other than the wrongful use of criminal process (see subsec. *b.*,) a carrier's liability in this state is deemed to be absolute.²

b. Arrest.—In one case the right of plaintiff to recover against a carrier in respect of a wrongful arrest was denied on the ground that the servant at whose instance he was arrested was not shown to have been acting within the scope of his authority.³

2442. West Virginia.—*a. Generally.*—The doctrine adopted in this state is that, "in the case of a passenger, the carrier is not allowed to say that the assault or wilful wrong of the servant was an excess, outside his duty, and his own personal act."¹

the ground that "one who is a passenger of a carrier, the latter is liable for injury inflicted upon him by its servant, in whatever capacity the servant may be employed."

¹In *Norfolk & W. R. Co. v. Anderson* (1893) 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757, where a passenger was illegally ejected by the conductor on the ground of his having refused to sign his ticket, the decision awarding exemplary damages was based upon the doctrine stated in *Richmond, F. & P. R. Co. v. Ashby* (1884) 79 Va. 130, 52 Am. Rep. 620, that "the carrier's duty is to carry his passengers safely and respectfully, and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." The language of the court in *New Jersey S. B. Co. v. Brockett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, was also referred to with approval.

See also *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018, where a railway company was held liable for the act of a brakeman in assaulting without justification a disorderly passenger after the latter had been removed to another car. The statement of the law in § 1093 of Hutchinson on Carriers was adopted as correct.

¹*Blomsness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414 (assault; for facts, see § 2449, note 15, *post*).

²In the context of the passage quoted in the text it was remarked that the defendant would not be liable unless the act complained of was "within the scope of the servant's employment," and also within the apparent scope of the master's business. These statements, if taken literally, might be thought to connote a narrower range of liability than that of a guarantor; but their actual significance is indicated by the circumstance that the question upon which the decision actually turned was whether the relationship of carrier and passenger had ceased at the time when the alleged assault was made.

³*Cunningham v. Seattle Electric R. & P. Co.* (1892) 3 Wash. 471, 28 Pac. 745 (arrest by conductor for disorderly conduct). The only precedent cited was *Galveston, H. & S. A. R. Co. v. Donahoe* (1882) 56 Tex. 162, 8 Am. Neg. Cas. 624. See § 2439, *ante*.

¹*Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126. "It is among the implied provisions of the contract between a passenger and a railway company that the latter has em-

b. Arrest.—In one case the liability of a railway company to a passenger who had been wrongfully arrested was affirmed on the ground that the tort was a violation of the company's contract to treat passengers properly and carry them safely.²

ployed suitable servants to run its trains, and that passengers shall receive proper treatment from them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, though the act of its servant was wilful and malicious, as for a malicious assault upon a passenger, committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual; and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers or by their own servants. 2 Wood, Railway Law, p. 1194. There is no inquiry in such a case as to whether the wrong to the passenger is within the scope of his authority, or whether his act is wanton."

In *Ricketts v. Chesapeake & O. R. Co.* (1890) 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801,—decided a year before the above case,—the liability of the carrier for an assault made by a brakeman during a personal altercation between him and a passenger who was smoking in the ladies' car was taken for granted; the only question considered being the right of the plaintiff to recover exemplary damages.

The doctrine that a carrier is under an absolute contractual duty to protect passengers from wilful and unlawful injury by its servants was also applied in *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, where the plaintiff's decedent was shot by a special policeman in the course of an altercation which arose out of the nonpayment of the fare. The effect of the decision is thus stated in the syllabus of the court: A public officer, specially employed by a carrier to perform services for it, is its servant while acting within the scope of his employment; and if he, in the performance of such services, wrongfully inflicts an injury upon a passenger, the carrier is liable, though the injury was wilful and malicious, and prompted by personal motive, such as resentment of insults or punishment for a wrong perpetrated

upon himself. It was held not to be error for the trial judge to refuse an instruction to the effect (1) that the jury should find for the carrier if the injurious act, which was incident to the particular transaction in which the employee was engaged, was not within the scope of his duty, and (2) that, if he left defendant's train, engaging in a quarrel with the employee or special police officer by whom he was killed, defendant was not liable. The latter instruction was held to have been properly modified by the insertion of the word "unlawfully" before "engaging." It should be observed that the words "within the scope of his employment," as used in the syllabus, and the words "within the scope of his duty" as used in the instruction disapproved, have two entirely different connotations. The former phrase relates to the distinction predicable between acts done by the tort-feasor as a public officer and acts done by him as a servant. The latter has reference to the general rule which limits the vicarious liability of a master to such torts as have an immediate connection with the performance of the servant's duties,—a rule which as is shown in § 2449, *post*, has sometimes been viewed as not being applicable at all in cases where a passenger is suing a carrier, and sometimes as being applicable only in a special sense, determined by the existence of the contract of carriage and its resulting obligations.

For other cases which embody the doctrine stated in the text, see *Smith v. Norfolk & W. R. Co.* (1900) 48 W. Va. 69, 35 S. E. 834, 7 Am. Neg. Rep. 673 (defendant held liable for an aggravated and unjustifiable assault by a conductor upon a passenger who was being ejected for disorderly conduct); *Teel v. Coal & Coke R. Co.* (1909) 66 W. Va. 315, 66 S. E. 470 (main question discussed was whether assault by brakeman was justifiable as being made for defensive purposes); *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378 (similar remark applies).

² *Gillingham v. Ohio River R. Co.*

2443. Wisconsin.—The actual scope of the earliest relevant decision in this state was that the effect of the contract of carriage was to render the defendant railway company liable to passengers in respect of the wilful as well as of the negligent acts of its servants, but that this liability was restricted to such wilful torts as were within the scope of the tort-feasor's employment.¹ The court avowedly followed the leading New York case in which a doctrine of a similar purport had been enunciated two years previously. Fifteen years later, however, the conception of a carrier's absolute liability in respect of the indemnification of passengers emerges in a statement to the effect that the defendant railway company was "responsible for

(1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243 (plaintiff, having been mistaken for the actual culprit was given into custody by a conductor on a charge of disorderly conduct). The court said: "It makes no difference what was the conductor's motive for doing the act,—how exclusively personal it may have been, or how foreign to the master's business then in hand, of transporting the passenger,—if the act was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge and perform as the master's servant and in the master's place. And the same principle applies to other acts in the same circumstances, such as assault and battery." In answer to one of the interrogatories the jury had stated that the conductor had been authorized by the company to cause the arrest, but did not give the name of any special official, or the manner or the time of conferring the authority. Commenting upon this answer the court said: "No special authority from any official was needed. The liability of the company grew out of its obligation to answer for any injury inflicted upon the passenger by the wilful misconduct or negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passengers safely. This special question also was therefore immaterial, and, if it had been answered as to the special official with a 'No' instead of a 'Yes,' it would still have been the duty of the court not to permit it to control the general verdict."

¹ In *Milwaukee & M. R. Co. v. Finney* (1860) 10 Wis. 388, where a conductor

had wrongfully expelled a passenger from a train, the court, in laying down the law with reference to a new trial, thus commented upon *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474: "The rule established by that case, as we think with much reason, is, that where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such misconduct be wilful or malicious, or merely negligent. The action, though undeniably in tort, is treated virtually as an action *ex contractu* and governed by the same rule as to damages, unless the malice or wantonness of the agent is brought home and directly charged to the principal. In this case the contract between the plaintiff and defendants was, that in consideration of his having paid to them the fee demanded, they were carefully to transport him in their cars from Madison to Edgerton. It is no defense for their breach of this contract that it was occasioned by the wilful act of their agent. The corporation was incapable of executing it except through the medium of its agents. If in so doing they violate it, no matter from what motive, their acts are the acts of their principals, who hold them out to the world as capable and faithful in the discharge of their duties. In no other way could the company be held to a performance of its contracts. The case differs materially from those cases where the agent or servant goes out of the line of his duty in the service of his principal or master, and commits a wilful injury. Such wrong involves no violation of duty or contract on the part of the master or principal."

the acts of the officers in the conduct and management of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train.”² The theory upon which two subsequent decisions proceeded was that of an absolute obligation on the carrier’s part to protect his passenger against the wrongful acts of his servants.³ In a still later

² *Bass v. Chicago & N. W. R. Co.* (1874) 36 Wis. 450, 17 Am. Rep. 495 (defendant liable for wrongful expulsion of passenger from a train by a conductor). It should be observed that, as the tort here involved was clearly within the scope of the tort-feasor’s authority, the decision in favor of the plaintiff did not require for its support so broad a doctrine as that which was formulated.

³ In *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665, a verdict in favor of a female passenger against a railroad company whose conductor had attempted improper familiarities with her was sustained. The court reasoned thus: “We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfil the principal’s contract, the principal is not liable for the malicious breach by the agent of the contract which he was appointed to perform for his principal; as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is, that it limits the contract. The carrier’s contract is to protect the passenger against all the world; the appellant’s construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her; reserving

to the shepherd’s dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity. . . . We are unwilling to waste time or patience in discussing the conductor’s violation of the appellant’s contract with the respondent. Every woman has a right to assume that a passenger car is not a brothel; and that when she travels in it, she will meet nothing, see nothing, hear nothing, to wound her delicacy or insult her womanhood. It is enough to say that the appellant’s contract of careful carriage with the respondent was not kept,—was tortiously violated by the officer appointed by the appellant to keep it.” The decision in *Wilson v. Young* (1872) 31 Wis. 574, was overruled.

In *Fick v. Chicago & N. W. R. Co.* (1887) 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527, an employee left in charge of the ticket office by the ticket agent failed to return the proper change upon the sale of a ticket, and, upon being asked therefor by the purchaser, assaulted and struck him. Held, that the railway company was liable. The court said: “Of course the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against the violent acts or misconduct of its agents. There would probably be no controversy as to the correctness of this view of the law, or as to the liability of the defendant for the wilful act of a servant while acting in the course of his employment. . . . While it may be true that Edward W. Davis was not the regular ticket agent, yet, under the circumstances, he must be regarded as authorized to issue the ticket. The special verdict finds that at this time the ‘fracas’ occurred, or the unlawful assault was committed. Now, to say that Edward W. Davis was a servant of the defendant in selling the ticket and receiving pay for it, but while in the act of refusing to return the proper change

case, we find the carrier's liability predicated upon the ground that the tort was committed by the servant "within the scope of his employment."⁴ Although the opinion does not allude to the contractual obligations of a carrier, it seems probable, in view of the earlier rulings, that this phrase was used in its broader sense. But it is somewhat remarkable that the doctrinal standpoint of the court was not defined more clearly.

B. GENERAL DISCUSSION OF THEORIES RESPECTING THE NATURE AND EXTENT OF A CARRIER'S LIABILITY.

2444. Introductory.—The character of the torts for which damages were claimed in the cases cited in the following general review will be merely indicated by brief memoranda. For further information regarding the circumstance involved and the doctrinal position of the courts, the reader will consult the separate sections which deal with the decisions in each jurisdiction. An analysis of those decisions shows that they illustrate three different theories as to the nature and limits of a carrier's liability in respect of injuries resulting from wilful misconduct of his servant.

2445. Theory which treats the contract as a negligible factor.—Under one theory no specific significance is attached to the element of privity of contract as between the carrier and the passenger. In

and in making the assault was acting outside the course of his employment, is refining too much upon the transaction. It is not as though the fracas had occurred at a subsequent time and place disconnected with the act of selling the ticket and making change. . . . It would be unjust to hold that the defendant, which was bound to use all due diligence to carry the plaintiff safely to his destination, was not bound to protect him against the violent act of its servant under the circumstances of the case. True, the jury, in answer to the fourteenth question, find that the striking of the plaintiff by Edward W. Davis was not done by him in the course of his employment. But this, in view of the other findings, amounts only to a conclusion of law, and is not controlling as to the fact." The phrase "in the course of the employment" clearly cannot be intended to bear the same meaning as attaches to it in cases where no privity of contract is involved; for the

assault in question was not made in furtherance of the master's business, but merely to gratify the personal resentment of the servant. The sense which is ascribed to it by the statement in the text seems to be the one which is indicated by the general course of the reasoning in the opinion. It is noteworthy, however, that the *Craker Case*, *supra*, was cited by counsel, but was not referred to at all by the court.

⁴*Lugner v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 175, 131 N. W. 342 (assault committed by conductor in attempting to eject passenger for nonpayment of fare).

In *Robinson v. Superior Rapid Transit R. Co.* (1896) 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. Rep. 896, 68 N. W. 961, where the defendant was held liable for ejecting a passenger who had paid his fare, the only point actually discussed was whether exemplary damages were recoverable.

this point of view it is obvious that the only question to be considered is whether the given act was or was not within the scope of the tort-feasor's employment or authority, in the sense in which that phrase is used in actions by strangers. That is to say, the passenger is or is not deemed to be entitled to recover, according as the immediate purpose of the act was or was not the furtherance of the carrier's business. It is upon this basis that the passenger's right of recovery always has been and is still tested in the United Kingdom and the British Possessions generally. The same doctrine has been applied at one time or another in a considerable number of American cases. The decisions rendered with reference to it have involved the following descriptions of torts:

(1) The wrongful removal of a passenger from a vehicle or other place where he had a right to be.¹

(2) The removal of a passenger in an improper manner from a vehicle or other place where he had no right to be.²

(3) The subjection of a passenger's person to some other kind of violence.³

¹ For cases in which actions were held to be maintainable by persons who had been ejected from vehicles, railway cars, see: *Bayley v. Manchester, S. & L. R. Co.* (1873) L. R. 8 C. P. (Exch. Ch.) 148, 42 L. J. C. P. N. S. 78, 28 L. T. N. S. 366, affirming (1872) L. R. 7 C. P. 415, 41 L. J. C. P. N. S. 278; *Lowe v. Great Northern R. Co.* (1893) 62 L. J. Q. B. N. S. 524, 9 Times L. R. 516, 5 Reports, 535; *Hanlon v. Glasgow & S. W. R. Co.* (1899) 1 Sc. Sess. Cas. 5th Series, 559; *Turner v. North Beach & M. R. Co.* (1868) 34 Cal. 594, 8 Am. Neg. Cas. 49; *Chicago, B. & Q. R. Co. v. Bryan* (1878) 90 Ill. 126, 8 Am. Neg. Cas. 175; *Chicago Union Traction Co. v. McClevey* (1906) 126 Ill. App. 21; *Evansville & C. R. Co. v. Baum* (1866) 26 Ind. 70, 8 Am. Neg. Cas. 201; *Jeffersonville R. Co. v. Rogers* (1871) 38 Ind. 116, 10 Am. Rep. 103; *Indianapolis, P. & C. R. Co. v. Anthony* (1873) 43 Ind. 183; *Terre Haute & I. R. Co. v. Fitzgerald* (1874) 47 Ind. 79; *Pittsburgh, C. & St. L. R. Co. v. Theobald* (1875) 51 Ind. 246; *Moore v. Fitchburg R. Corp.* (1855) 4 Gray, 465, 64 Am. Dec. 83; *Passenger R. Co. v. Young* (1871) 21 Ohio St. 518, 8 Am. Rep. 78; *Great Western R. Co. v. Miller* (1869) 19 Mich. 305, 8 Am. Neg. Cas. 421; *Travers v. Kansas P. R. Co.* (1876) 63 Mo. 421; *Lugner v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 175, 131 N. W. 342.

The action was also held to be maintainable in *Trabing v. California Nav. & Improv. Co.* (1898) 121 Cal. 1371, 53 Pac. 644 (officers of steamer imprisoned plaintiff and ejected him before he reached his destination); *Redding v. South Carolina R. Co.* (1871) 3 S. C. 1, 16 Am. Rep. 681 (negro passenger assaulted and dragged out of waiting room was held to be entitled to damages).

² The action was held to be maintainable in *Seymour v. Greenwood* (1861) 7 Hurlst. & N. (Exch. Ch.) 335, 8 Jur. N. S. 214, 30 L. J. Exch. N. S. 327, 9 Week. Rep. 785, 4 L. T. N. S. 833, affirming (1861) 6 Hurlst. & N. 359, 30 L. J. Exch. N. S. 189, 9 Week. Rep. 518; *Converse v. Washington & G. R. Co.* (1876) 2 MacArth. 504, 8 Am. Neg. Cas. 110 (ejection from moving train); *New York, L. E. & W. R. Co. v. Haring* (1885) 47 N. J. L. 137, 54 Am. Rep. 123 (conductor used unnecessary force in ejecting a passenger for refusal to pay his fare); *McKinley v. Chicago & N. W. R. Co.* (1876) 44 Iowa, 314, 24 Am. Rep. 748 (brakeman used excessive force in preventing a man from entering a car reserved for ladies).

³ The carrier was held liable in

(4) Wrongful arrest, false imprisonment, or malicious prosecution.⁴

In several of the jurisdictions in which cases have been decided with reference to this criterion, the conception of an absolute duty on the carrier's part to protect his passengers against the torts of his servants (see § 2447, *post*) has now been adopted. This, however, is a doctrinal development, which, so far as actual right of re-

Louisville, N. A. & C. R. Co. v. Wood (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, 3 Am. Neg. Cas. 197 (railway passenger, while alighting, was seized and thrown off); *Baltimore & O. R. Co. v. Blocher* (1867) 27 Md. 277, 8 Am. Neg. Cas. 341 (plaintiff was compelled by a threat of expulsion to pay his fare a second time); *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200, 8 Am. Neg. Cas. 372 (assault committed to enforce the payment of fare); *Texas & P. R. Co. v. Graves* (1882; Tex. Sup.) 2 Posey Unrep. Cas. (Tex.) 306 (assault made upon plaintiff by conductor for the purpose of protecting another passenger who was supposed to be in danger of being injured by plaintiff); *Robertson v. Balmain New Ferry Co.* (1906) 6 New So. Wales St. Rep. 195, 23 W. N. 70 (recovery allowed for an assault committed by the servants of a ferry company, in attempting to enforce a regulation).

Recovery was denied on the ground of lack of authority in *Pittsburg, A. & M. Pass. R. Co. v. Donahue* (1871) 70 Pa. 119, where a passenger was struck by a driver with an iron bar, so that he was forced off. But this is a very dubious decision. See § 2436, note 1, *ante*.

For cases in which the right of recovery was denied for the reason that the given torts were outside the line of duty of the tort-feasors, see *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166 (passenger accidentally struck while he was engaged in a friendly scuffle with a fellow servant,—dubious decision, so far as Alabama is concerned. See § 2409, note 2, *ante*); *Little Miami R. Co. v. Wetmore* (1896) 19 Ohio St. 110, 2 Am. Rep. 373 (assault actuated by personal resentment); *Scanlon v. Suter* (1893) 158 Pa. 275, 27 Atl. 963 (assault during personal altercation); *Berryman v. Pennsylvania*

R. Co. (1910) 228 Pa. 621, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011 (assault during personal altercation); *Emerson v. Niagara Nav. Co.* (1883) 2 Ont. Rep. 528 (assault made by the purser of a steamboat upon a passenger with whom he had had a dispute regarding the payment of the fare).

In *McFarlan v. Pennsylvania R. Co.* (1901) 199 Pa. 408, 49 Atl. 270, where a conductor assaulted the plaintiff as he was entering a train, a verdict in his favor was sustained on the ground that the evidence justified the inference that the tort was committed in the course of the conductor's employment.

* Recovery was allowed in *Moore v. Metropolitan R. Co.* (1872) L. R. 8 Q. B. 36, 42 L. J. Q. B. N. S. 23, 27 L. T. N. S. 579, 21 Week. Rep. 145; *West Chicago Street R. Co. v. Luleich* (1899) 85 Ill. App. 643; *Berry v. Carolina, C. & O. R. Co.* (1911) 155 N. C. 287, 71 S. E. 322; *Eichengreen v. Louisville & N. R. Co.* (1896) 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219; *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

The right of action was denied in *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297 (ticket collector); *Little Rock Traction & Electric Co. v. Walker* (1898) 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57; *Lafitte v. New Orleans City & Lake R. Co.* (1891) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L.R.A. (N.S.) 162, 40 So. 714; *Central R. Co. v. Brewer* (1894) 78 Md. 401, 27 L.R.A. 63, 28 Atl. 615; *Galveston, H. & S. A. R. Co. v. Donahoe* (1882) 56 Tex. 162, 8 Am. Neg. Cas. 624 (now overruled. See § 2447, *post*); *Cunningham v. Seattle Electric R. & P. Co.* (1892) 3 Wash. 471, 28 Pac. 745.

covery is concerned, can be material only in relation to circumstances under which claims are non enforceable, if the carrier is assumed not to be answerable for any torts of his servants except those committed within the scope of their employment or authority. It is obvious, therefore, that, as the plaintiffs were successful in most of the cases cited in the present section, they were in no wise prejudiced by the fact that those cases were decided with reference to the more restricted theory regarding the carrier's liability. The decisions show that that theory has been superseded as the test of responsibility for wilful torts generally, in Illinois, Indiana, Iowa, Maryland, Massachusetts, Texas, and Wisconsin; and, as the test of responsibility for the abuse of criminal process also, in Arkansas, Maryland, Missouri, and Texas. The Tennessee cases indicate a supersession in respect of torts of the former description only.

2446. Theory which treats the contract as a factor extending the carrier's liability to a limited class of acts.—Under another theory the contract of carriage has been regarded as an element which operates so as to extend the carrier's liability to wilful torts in so far as they are "within the scope of the employment" of the tort-feasors; this phrase being used in the same sense as it bears in the class of cases adverted to in the preceding section. This theory was first propounded in New York at a time when the general rule which prevailed both in that jurisdiction and elsewhere (see § 2433, note 1, *ante*) limited the vicarious liability of a master to negligent acts. Its adoption, therefore, established an important distinction in favor of passengers, as contrasted with strangers. In cases decided in that state both before and after the recognition of the broader doctrine discussed in the following section, it was applied with reference to claims in respect of the following torts:

- (1) Misconduct which caused delay in the movement of a train.¹
- (2) A sudden cessation of work, which caused a delay in the transportation of goods.²
- (3) The wrongful removal of a passenger from a railway car.³

¹ *Weed v. Panama R. Co.* (1858) 17 N. Y. 362, 72 Am. Dec. 474 (act of conductor which caused delay in movement of train).

² *Blackstock v. New York & E. R. Co.* (1859) 20 N. Y. 48, 75 Am. Dec. 372, affirming (1857) 1 Bosw. 77.

³ The liability of the carrier was affirmed in the following cases, decided before the change of doctrine in New York: *Higgins v. Waterliet Turnp. &*

R. Co. (1871) 46 N. Y. 23, 7 Am. Rep. 293; *Hamilton v. Third Ave. R. Co.* (1873) 53 N. Y. 25; *Schultz v. Third Ave. R. Co.* (1880) 14 Jones & S. 211; *Murphy v. Central Park, N. & E. River R. Co.* (1882) 16 Jones & S. 96; *Roun v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471; *Wright v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1898) 24 App. Div. 617, 48 N. Y. Supp. 1026.

(4) The removal of a passenger in an improper manner from a railway car,⁴ or from some part thereof.⁵

(5) The use of insulting language to a passenger.⁶

(6) Wrongful arrest and false imprisonment.⁷

The original doctrine of the New York courts has been applied in a few other jurisdictions.⁸

2447. Theory which treats the contract as imposing absolute obligations upon the carrier.—Under a third theory the contract of carriage is regarded as an element which operates so as to impose upon the carrier an absolute liability in respect of the wilful torts of his servants. The torts in respect of which liability has been imputed to carriers upon this footing have in many instances been of such a nature that the plaintiffs would have been entitled to recover under either of the theories discussed in the two preceding sections.

(1) The wrongful removal of a passenger from a railway car or other place where he had a right to be, by a servant authorized to effect the removal.¹

⁴ For cases in which the action was held to be maintainable, see *Jackson v. Second Ave. R. Co.* (1872) 47 N. Y. 274, 7 Am. Rep. 448; *Peck v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 587, affirming (1875) 4 Hun, 236, 6 Thomp. & C. 436; *Meyer v. Second Ave. R. Co.* (1861) 8 Bosw. 305.

It is apprehended that the decision in *Isaacs v. Third Ave. R. Co.* (1871) 47 N. Y. 122, 7 Am. Rep. 418, where the act of a conductor in ejecting a passenger in an improper manner was held not to be within the scope of his employment, was, upon the facts, erroneous. See § 2433, note 3, *ante*.

⁵ *Shea v. Sixth Ave. R. Co.* (1875) 62 N. Y. 180, 20 Am. Rep. 480; *Moritz v. Interurban Street R. Co.* (1903; App. Term) 84 N. Y. Supp. 162 (action held to be maintainable when motorman struck plaintiff for the purpose of making him get off the front platform of a street car). The last-mentioned case was decided after the change of doctrine.

⁶ In *Parker v. Erie R. Co.* (1875) 5 Hun, 57, insulting words uttered by a conductor in the course of a personal altercation were held not to be imputable to the carrier.

⁷ The actions were held to be maintainable in *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep.

141; *Mulligan v. New York & R. B. R. Co.* (1892) 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; *Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; *Rown v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471; *Corbett v. Twenty-Third Street R. Co.* (1886) 42 Hun, 587; *Shea v. Manhattan R. Co.* (1890; C. P.) 15 Daly, 528, 29 N. Y. S. R. 313, 8 N. Y. S. R. 332. It should be observed that all these cases except the first were decided after the change of doctrine.

⁸ The *Weed Case*, note 1, *supra*, was relied upon in *Converse v. Washington & G. R. Co.* (1876) 2 MacArth. 504, 8 Am. Neg. Cas. 110 (ejection from moving train); *Milwaukee & M. R. Co. v. Finney* (1860) 10 Wis. 388 (ejection from train).

¹ In the following cases the plaintiffs were ejected from railway cars by or under the directions of conductors: *Murphy v. Western & A. R. Co.* (1885) 23 Fed. 637; *Louisville & N. R. Co. v. Perkins* (1905) 144 Ala. 325, 39 So. 305; *Atlanta Consol. Street R. v. Keeny* (1896) 99 Ga. 266, 33 L.R.A. 824, 25 S. E. 629; *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 266 (ejection by brakeman acting under orders of conductor); *Southern Kansas R. Co. v. Rice* (1888) 38 Kan. 398, 5 Am. St. Rep.

(2) The removal of a passenger by such a servant in an improper manner from a railway car or other place where he had no right to be.²

(3) An assault committed upon a passenger for the purpose of enforcing a regulation which he was bound to observe.³

766, 16 Pac. 817, 8 Am. Neg. Cas. 274; *Winnegar v. Central Pass R. Co.* (1887) 85 Ky. 547, 4 S. W. 237; *Tanger v. Southwest Missouri Electric R. Co.* (1900) 85 Mo. App. 28; *Quigley v. Central P. R. Co.* (1876) 11 Nev. 350, 21 Am. Rep. 757; *Muckle v. Rochester R. Co.* (1894) 79 Hun, 32, 29 N. Y. Supp. 732; *Smith v. Manhattan R. Co.* (1892; C. P.) 45 N. Y. S. R. 865, 18 N. Y. Supp. 759; *Monnier v. New York C. & H. R. R. Co.* (1902) 70 App. Div. 405, 75 N. Y. Supp. 521; *Schwartzman v. Brooklyn Heights R. Co.* (1903) 84 App. Div. 608, 82 N. Y. Supp. 890.

"When a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects the passenger from the cars, the railway company must bear the blame and pay the damages." Cooley, Torts, 2d ed. p. 626, quoted in *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 594, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

The remedial rights of a passenger wrongfully ejected from a railroad train cannot be effected by any rule of the carrier prescribing the duties of its agents or conductors. *Baltimore & O. R. Co. v. Thornton* (1911) 110 C. C. A. 502, 188 Fed. 868 (ejection of person who had purchased a wrong ticket from the company's agent).

The right of a passenger to recover damages for being wrongfully compelled to move to another car in the same train was affirmed in *Southern R. Co. v. Thurman* (1906) 121 Ky. 716, 2 L.R.A. (N.S.) 1108, 90 S. W. 240.

In *Seaboard Air-Line R. Co. v. O'Quin* (1905) 124 Ga. 357, 2 L.R.A. (N.S.) 472, 52 S. E. 427, the law is thus laid down in the syllabus written by the court: "When a common carrier undertakes, through its servants, to exercise its right to eject from its cars passengers who have been guilty of disorderly conduct, it acts at its peril in determining their identity; and if by mistake one who has in no way forfeited

his rights as a passenger be ejected, the carrier will be liable to respond in damages for the tort thus committed by its servants, their good faith being only available in defeating a recovery of punitive damages."

² Railway companies were held liable for the acts of conductors in *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116 (conductor used loaded revolver in ejecting passenger); *Louisville & N. R. Co. v. Whitman* (1885) 79 Ala. 328, 8 Am. Neg. Cas. 9; *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842 (unnecessary force used in ejecting person who went on freight train to treat with conductor about a passage in the customary manner); *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 266 (passenger ejected from moving train by brakeman acting under order of conductor); *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17 (unreasonable force used in ejecting a passenger who had misconducted himself); *Illinois C. R. Co. v. Sheehan* (1888) 29 Ill. App. 90 (passenger ejected from moving train); *Baltimore & O. R. Co. v. Norris* (1897) 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 N. E. 554, 1 Am. Neg. Rep. 579 (unnecessary force used in ejecting person who refused to pay proper fare); *Citizens' Street R. Co. v. Clark* (1904) 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53; *McGinnis v. Missouri P. R. Co.* (1886) 21 Mo. App. 399; *International & G. N. R. Co. v. Miller* (1894) 9 Tex. Civ. App. 104, 28 S. W. 233 (writ of error denied in [1895] 87 Tex. 430, 29 S. W. 235).

Passengers who had been subjected to unwarrantable violence by servants engaged in removing them from one part of a vessel to another were held to be entitled to recover in *New Jersey S. B. Co. v. Brockett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; *R. R. Springer Transp. Co. v. Smith* (1886) 16 Lea, 498, 1 S. W. 280.

³ *Central of Georgia R. Co. v. Motes* (1903) 117 Ga. 923, 62 L.R.A. 507, 97

On the other hand, the wider consequences of predicating an absolute obligation on the carrier's part to protect the passenger against the wrongful acts of his servants are apparent in decisions by which the liability of the carrier has been affirmed in respect of such misfeasances as these:

(4) The wrongful removal of a passenger from a railway car by a servant not authorized to effect the removal.⁴

(5) An assault made upon the passenger in the course of a personal altercation between him and a servant.⁵

Am. St. Rep. 223, 43 S. E. 990; *St. Louis Southwestern R. Co. v. Johnson* (1902) 29 Tex. Civ. App. 184, 68 S. W. 58 (conductor used force in trying to quiet a disorderly passenger). See also the cases cited in notes 1, 2, *supra*.

⁴ *Lindsay v. Oregon Short Line R. Co.* (1907) 13 Idaho, 477, 12 L.R.A. (N.S.) 184, 90 Pac. 477; *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85; *Cain v. Minneapolis & St. L. R. Co.* (1888) 39 Minn. 297, 39 N. W. 635.

⁵ *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109; *Texas & P. R. Co. v. Williams* (1894) 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440; *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116 (charge to jury); *Rohrback v. Pullman's Palace Car Co.* (1909) 166 Fed. 797; *Lampkin v. Louisville & N. R. Co.* (1894) 106 Ala. 287, 17 So. 448; *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Birmingham, R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701; *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142; *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412; *Pelot v. Atlantic Coast Line R. Co.* (1910) 60 Fla. 159, 53 So. 937; *Gasway v. Atlantic & W. P. R. Co.* (1877) 58 Ga. 216; *Peoples v. Brunswick & A. R. Co.* (1878) 60 Ga. 281; *Atlanta & W. P. R. Co. v. Condor* (1885) 75 Ga. 51, 8 Am. Neg. Cas. 129; *Peavy v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70; *Savannah Street R. Co. v. Bryan* (1890) 86 Ga. 312, 22 Am. St. Rep. 464, 12 S. E. 307; *East Tennessee, V. & G. R. Co. v. Fleetwood* (1892) 90 Ga. 23, 15 S. E. 778; *Georgia R. & Bkg. Co. v. Richmond* (1896) 98 Ga. 495, 25 S. E. 565; *Brunswick & W. R. Co. v. Moore* (1897) 101 Ga. 684, 28 S. E. 1000, 3 Am. Neg. Rep. 779; *Georgia R. & Bkg. Co. v. Hopkins* (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965; *Dannenberg v. Berkner* (1903) 118 Ga. 886, 899, 45 S. E. 682 (first appeal (1902) 116 Ga. 955, 60 L.R.A. 559, 43 S. E. 63); *Savannah Electric Co. v. Pritchard* (1910) 133 Ga. 747, 66 S. E. 952; *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225; *Chicago & E. R. Co. v. Flexman* (1882) 103 Ill. 546, 42 Am. Rep. 33, affirming (1881) 9 Ill. App. 250; *McMahon v. Chicago City R. Co.* (1909) 239 Ill. 334, 88 N. E. 223, affirming (1908) 143 Ill. App. 608; *Hanson v. Urbana & C. Electric Street R. Co.* (1897) 75 Ill. App. 474; *Terre Haute & I. R. Co. v. Jackson* (1881) 81 Ind. 19; *Indianapolis Union R. Co. v. Cooper* (1892) 6 Ind. App. 202, 33 N. E. 219; *Baltimore & O. S. W. R. Co. v. Davis* (1909) 44 Ind. App. 375, 89 N. E. 403; *Memphis & C. Packet Co. v. Pikey* (1895) 142 Ind. 304, 40 N. E. 527 (passenger shot by second mate of steamer); *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; *Missouri P. R. Co. v. Divinney* (1903) 66 Kan. 776, 71 Pac. 855, 13 Am. Neg. Rep. 523; *Sherley v. Billings* (1871) 8 Bush, 147, 8 Am. Rep. 451; *Wise v. Covington & C. Street R. Co.* (1891) 91 Ky. 537, 16 S. W. 351; *Louisville R. Co. v. Kupper* (1909) — Ky. —, 118 S. W. 266; *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197; *Block v. Bannerman* (1855) 10 La. Ann. 1; *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, 8 Am. Neg. Cas. 302; *Lafitte v. New Orleans City & Lake R. Co.* (1891) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; *Goddard*

- v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709; *McGilvray v. West End Street R. Co.* (1895) 164 Mass. 122, 41 N. E. 116; *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A.(N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615; *Horgan v. Boston Elev. R. Co.* (1911) 208 Mass. 287, 94 N. E. 386; *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404; *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709; *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986; *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, 8 Am. Neg. Cas. 392; *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219; *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A.(N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615; *Johnson v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 453, 90 N. W. 274; *Conger v. St. Paul, M. & M. R. Co.* (1891) 45 Minn. 207, 47 N. W. 788; *Malecek v. Tower Grove & L. R. Co.* (1874) 57 Mo. 17; *Spohn v. Missouri P. R. Co.* (1894) 122 Mo. 1, 26 S. W. 663, 4 Am. Neg. Cas. 763; *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; *Randolph v. Hannibal & St. J. R. Co.* (1885) 18 Mo. App. 609; *Eads v. Metropolitan R. Co.* (1891) 43 Mo. App. 536; *Murphy v. St. Louis Transit Co.* (1902) 96 Mo. App. 272, 70 S. W. 159; *Strauss v. St. Louis Transp. Co.* (1903) 102 Mo. App. 644, 77 S. W. 156; *O'Donnell v. St. Louis Transit Co.* (1904) 107 Mo. App. 34, 80 S. W. 315; *Flynn v. St. Louis Transit Co.* (1905) 113 Mo. App. 185, 87 S. W. 560; *McQuerry v. Metropolitan Street R. Co.* (1906) 117 Mo. App. 255, 92 S. W. 912; *Keen v. St. Louis, I. M. & S. R. Co.* (1908) 129 Mo. App. 301, 108 S. W. 1125; *Shelby v. Metropolitan Street R. Co.* (1910) 141 Mo. App. 514, 125 S. W. 1189; *Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830; *Haver v. Central R. Co.* (1898; Err. & App.) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 648, 41 Atl. 916, 5 Am. Neg. Rep. 197; *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547; *Dwinelle v. New York C. & H. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; *Gillespie v. Brooklyn Heights R. Co.* (1904) 178 N. Y. 347, 16 Am. Neg. Rep. 181, 70 N. E. 857, 66 L.R.A. 618, 102 Am. St. Rep. 503 (1903) 80 App. Div. 640, 81 N. Y. Supp. 1127; *Busch v. Interborough Rapid Transit Co.* (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460; *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A.(N.S.) 770, 83 N. E. 31; *Weber v. Brooklyn, Q. C. & Suburban R. Co.* (1900) 47 App. Div. 306, 62 N. Y. Supp. 1; *Reilly v. New York City R. Co.* (1904; App. Div.) 46 Misc. 72, 91 N. Y. Supp. 319; *Brown v. Interborough Rapid Transit Co.* (1907) 56 Misc. 637, 107 N. Y. Supp. 629; *Baumstein v. New York City R. Co.* (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23; *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960; *Brewster v. Interborough Rapid Transit Co.* (1910; App. Div.) 68 Misc. 348, 123 N. Y. Supp. 992; *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 631, 4 L.R.A.(N.S.) 485, 23 S. E. 327, 44 Am. St. Rep. 489, 20 S. E. 191; *Williams v. Gill* (1898) 122 N. C. 967, 29 S. E. 879; *Palmer v. Winston Salam R. & Electric Co.* (1902) 131 N. C. 250, 42 S. E. 604; *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554; *International & G. N. R. Co. v. Kentile* (1883) 2 Tex. App. Civ. Cas. (Willson) 262; *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; *Houston & T. C. R. Co. v. Bush* (1911) — Tex. —, 32 L.R.A.(N.S.) 1201, 133 S. W. 245; *International & G. N. R. Co. v. Miller*, (1894) 9 Tex. Civ. App. 104, 28 S. W. 233 (writ of error denied in [1895] 87 Tex. 430, 29 S. W. 235); *Texas & P. R. Co. v. Bowlin* (1895) — Tex. Civ. App. —, 32 S. W. 918, 8 Am. Neg. Cas. 638; *Houston & T. C. R. Co. v. Washington* (1895) — Tex. Civ. App. —, 30 S. W. 719; *Texas & P. R. Co. v. Edmond* (1895) — Tex. Civ. App. —, 29 S. W. 518; *Galveston, H. & S. H. R. Co. v. La Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488; *San Antonio Traction Co. v. Crawford* (1902) — Tex. Civ. App. —, 71 S. W. 306; *Houston & T. C. R. Co. v. Batchler*, (1904) 37 Tex. Civ. App. 116, 83 S. W. 902; *Fielder v. St. Louis, B. & M. R. Co.* (1908) 51 Tex. Civ. App. 244, 112 S. W. 699; *Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905; *Texas*

- (6) The use of insulting language.⁶
- (7) Producing fear with a malicious intent.⁷
- (8) Indecent or otherwise improper conduct in regard to a female passenger.⁸

& *P. R. Co. v. Cassidy* (1911) — Tex. Civ. App. —, 137 S. W. 389; *Missouri, K. & T. R. Co. v. Brown* (1911) — Tex. Civ. App. —, 135 S. W. 1076; *Dallas Consol. Electric R. Co. v. Gilmore* (1911) — Tex. Civ. App. —, 138 S. W. 1134; *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018; *Blomsness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414; *Ricketts v. Chesapeake & O. R. Co.* (1890) 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801; *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126; *Smith v. Norfolk & W. R. Co.* (1900) 48 W. Va. 69, 35 S. E. 834, 7 Am. Neg. Rep. 673; *Teel v. Coal & Coke R. Co.* (1909) 66 W. Va. 315, 66 S. E. 470; *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103 (passenger shot); *Fick v. Chicago & N. W. R. Co.* (1887) 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527.

⁶ *Lampkin v. Louisville & N. R. Co.* (1894) 106 Ala. 287, 17 So. 448; *Bleecker v. Colorado & S. R. Co.* (1911) 50 Colo. 140, 33 L.R.A. (N.S.) 386, 114 Pac. 481; *Atlanta & W. P. R. Co. v. Condor* (1885) 75 Ga. 51, 8 Am. Neg. Cas. 129; *Cole v. Atlanta & W. P. R. Co.* (1897) 102 Ga. 474, 31 S. E. 107; *Georgia R. & Electric Co. v. Baker* (1904) 120 Ga. 991, 48 S. E. 355; *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 51 S. E. 569, 18 Am. Neg. Rep. 355; *Wolfe v. Georgia R. & Electric Co.* (1907) 2 Ga. App. 499, 58 S. E. 899; *Wise v. Covington & C. Street R. Co.* (1891) 91 Ky. 537, 16 S. W. 351; *Louisville & N. R. Co. v. Donaldson* (1897) 19 Ky. L. Rep. 1384, 43 S. W. 439 (no off. rep.); *Southern R. Co. v. Thurman* (1906) 121 Ky. 716, 2 L.R.A. (N.S.) 1108, 90 S. W. 240; *Louisville, N. O. & T. R. Co. v. Patterson* (1891) 69 Miss. 421, 22 L.R.A. 259, 13 So. 697; *Randolph v. Hannibal & St. J. R. Co.* (1885) 18 Mo. App. 609; *Gillespie v. Brooklyn Heights R. Co.* (1904) 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, 16 Am. Neg. Rep. 181; *Strother v. Aberdeen & A. R. Co.*

(1898) 123 N. C. 197, 31 S. E. 386; *Knoxville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *Texas & P. R. Co. v. Jones* (1897) — Tex. Civ. App. —, 39 S. W. 124, 1 Am. Neg. Rep. 531; *Texas & P. R. Co. v. Tarkington* (1901) 27 Tex. Civ. App. 353, 66 S. W. 137; *San Antonio Traction Co. v. Crawford* (1902) — Tex. Civ. App. —, 71 S. W. 306; *Gluf, C. & S. F. R. Co. v. Luther* (1905) 40 Tex. Civ. App. 517, 90 S. W. 44; *San Antonio Traction Co. v. Lambkin* (1907) — Tex. Civ. App. —, 99 S. W. 574; *Carpenter v. Trinity & B. Valley R. Co.* (1909) 55 Tex. Civ. App. 627, 119 S. W. 335; *Missouri, K. & T. R. Co. v. Morgan* (1911) — Tex. Civ. App. —, 138 S. W. 216.

⁷ In the following cases the passengers were so alarmed by the threats of servants that they jumped from moving trains: *Garsway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216; *Spohn v. Missouri P. R. Co.* (1894) 122 Mo. 1, 26 S. W. 663, 4 Am. Neg. Cas. 763; *Ephland v. Missouri P. R. Co.* (1896) 71 Mo. App. 597.

⁸ *Pullman's Palace Car Co. v. Campbell* (1894) 154 U. S. 513, 38 L. ed. 1069, 14 Sup. Ct. Rep. 1151, affirming (1890) 42 Fed. 484 (indecent assault); *Birmingham R. Light & P. Co. v. Parker* (1909) 161 Ala. 248, 50 So. 55 (indecent assault); *Savannah, F. W. R. Co. v. Quo* (1897) 103 Ga. 125, 40 L.R.A. 483, 68 Am. St. Rep. 85, 29 S. E. 607, 3 Am. Neg. Rep. 777 (assault with intent to ravish); *Garvik v. Burlington, C. R. & N. R. Co.* (1906) 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327 (rape); *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665 (woman kissed).

"The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct, or wanton approach." *Birmingham R. Light & P. Co. v. Parker* (1909) 161 Ala. 248, 50 So. 55.

See also the passage quoted in § 2408, note 1, *ante*, from the opinion in

(9) Wrongful arrest or other abuse of criminal process.⁹

In another section it is shown that in an action brought by a stranger against a master to recover damages in respect of the tortious act of his servant, the fact that the servant was carefully selected is not a valid defense.¹⁰ The same rule is *a fortiori* applicable in a case where the master of the tort-feasor is a carrier.¹¹

An obvious consequence of the theory that the duties which a carrier owes to his passengers are absolute is that his responsibility in respect of their performance cannot be avoided by delegating them to an independent contractor.¹²

Chamberlain v. Chandler (1823) 3 Mason, 242, Fed. Cas. No. 2,575, where Story, J., defines the contractual obligations of the master of a ship in respect of female passengers.

⁹ *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168; *Moore v. Louisiana & A. R. Co.* (1911) 99 Ark. 233, 34 L.R.A. (N.S.) 299, 137 S. W. 826; *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; *Baltimore & O. R. Co. v. Cain* (1895) 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801; *Tolchester Beach Improv. Co. v. Scharnagl* (1907) 105 Md. 199, 65 Atl. 916; *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986; *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730; *Baumstein v. New York City R. Co.* (1907; App. Div.) 56 Misc. 498, 107 N. Y. Supp. 23; *McLeod v. New York, C. & St. L. R. Co.* (1902) 72 App. Div. 116, 76 N. Y. Supp. 347; *Owens v. Wilmington & W. R. Co.* (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259; *Bowden v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783; *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135; *St. Louis Southwestern R. Co. v. Franklin* (1898) — Tex. Civ. App. —, 44 S. W. 701; *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

¹⁰ See § 2224, note 10, *ante*.

¹¹ *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225. The court said: "A carrier is liable for the tort of its servant upon its passenger, and it is no reply to say that it used ordinary care, or even extraordinary care,

in selecting its servants. To hold that a tort committed upon a passenger by a servant of the carrier, in the discharge of the business intrusted to him, the carrier could free itself from liability by showing that it used care in selecting the servant, would be to subvert all rules on that subject as heretofore laid down."

¹² In *Barrow S. S. Co. v. Kane* (1898) 31 C. C. A. 452, 59 U. S. App. 574, 88 Fed. 197, the plaintiff, while he was being conveyed on a tender to a steamer on which he had taken his passage, was assaulted and maltreated by two persons in the employ of a firm which was the agent of the steamship company at the port of embarkation, one of them being a manager for that firm and the other a porter. In a suit brought to recover damages for the injuries thus sustained it was argued by the steamship company that the agent was an independent contractor for performing that part of the transportation which consisted in transferring passengers to the steamship, and that, because the persons who had injured him were the employees of the agent, the relation of master and servant did not exist between the steamship company and those by whose misconduct K. was injured. The court rejected this contention, saying: "The rule *respondeat superior* rests on the power which the responsible party has a right to exercise over the acts of his subordinates, and which, for the prevention of injuries to third persons, he is bound to exercise, and applies only to cases in which such power exists. In those undertakings in which this power, in whole or in part, may properly be devolved upon others, and has been so devolved by a contract which substitutes another in the place

2448. Rationale of the theory of absolute obligations.—An examination of the cases shows that the *rationale* of the theory stated in the preceding section has been explained by judges in more than one way.

(1) The carrier's liability has been treated as a necessary consequence of attributing to his servants certain duties in regard to the intercourse with passengers.¹

(2) His liability has been predicated upon the ground that it is his duty, under the contract of carriage, to exercise a very high degree of care with regard to the safe transportation of his passengers, and that any misconduct of which his servants may be guilty necessarily constitutes a violation of the duty in respect of the particular passengers who suffer damage by reason of the misconduct.² This method of explaining the theory is open to two serious objec-

of the original principal, and delegates to him exclusively the control of the subordinate agents whom he may find it expedient to employ, the subordinate agents are his servants, and not the servants of the original principal, and the latter is not responsible for their negligent or wrongful acts. But the undertaking of a common carrier to a passenger is not of that character. His obligation to transport the passenger safely cannot be shifted from himself by delegation to an independent contractor, and it extends to all the agencies employed, and includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation."

¹See *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922, and *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197, and the connection of these cases as noted in §§ 2408, 2422, *ante*, with the case of *Chamberlain v. Chandler* (1823) 3 Mason, 242, Fed. Cas. No. 2,575. A similar doctrinal standpoint is reflected in some of the language used in *Sherley v. Billings* (1871) 8 Bush, 147.

In *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, 19 Am. Neg. Rep. 281, it was remarked: "One of the reasons for the liability [of a carrier] is that the servant, through his relation to his master, owes a duty to protect the passenger from

injuries by others, and *a fortiori* from injuries by himself."

²"The grounds of the carrier's liability may be briefly stated thus: The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier, by notice or special contract, even, to deprive his passenger of this degree of care. If the passenger does not have such care, but, on the contrary, is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The carrier's obligation is to carry his passenger safely and properly and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust." *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316.

The duty of a carrier is to protect his passengers from the violence and insults of his servants "in so far as this can

tions: *viz.* (1) that a duty which is, *ex hypothesi*, not absolute, cannot, as it would seem, afford a logical basis for an absolute liability;³ and (2) that the wilful misconduct of a servant cannot, without a very undesirable confusion of juristic concepts, be treated as being a breach of the duty to exercise care.

(3) According to another view,—which is the one commonly accepted,—his liability is referable to the consideration that his contract not only binds him to exercise a high degree of care in transporting his passengers, but also embraces an implied stipulation that they shall not in any event be subjected to personal maltreatment

be done by the exercise of a high degree of care." *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139.

"A common carrier of passengers impliedly agrees to exercise the utmost care and diligence consistent with the proper management of his business, to protect his passengers from injury through the misconduct of other persons while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passengers on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not guarantee perfection in these particulars, he is under an obligation of implied contract and consequent legal duty to use a very high degree of care to prevent injuries that might be caused by the negligence or wilful misconduct of others. . . . In the application of the rule to injuries caused by servants of the carrier while engaged in the performance of his contract of carriage, it is held that he is liable absolutely for their misconduct." *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 552, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, 19 Am. Neg. Rep. 281.

"A railroad company, as a common carrier of passengers, is bound to use extraordinary care not only to carry its passengers safely, but also to protect them . . . from assault or injury

from its agents in charge of the train, and from others." *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168.

"Unwarrantable assaults upon passengers by the servants of the carrier are a breach of the implied contract of the carrier to convey the passenger safely to his destination." *Thomp. Neg.* § 3184 (quoted in *Rohrbach v. Pullman's Palace Car Co.* [1909] 166 Fed. 797; *Garvik v. Burlington, C. R. & N. R. Co.* [1906] 131 Iowa, 415, 117 Am. St. Rep. 432, 108 N. W. 327). It should be observed, however, that in a subsequent section of his treatise, the learned author, without adverting to the inconsistency between the two positions, cites the cases which refer the carrier's liability to the conception of a non-delegable duty with regard to the proper treatment of passengers. See note 4, *infra*.

³ This difficulty may be avoided by taking the position which is indicated by the following statement: "It is no doubt true that, if the violence could not have been seen or prevented by the highest degree of care, the carrier would be absolved from liability. . . . The duty of protecting passengers from violence . . . is not an absolute one. If the care which the law requires is exercised by the carrier, then the duty is discharged and there is no liability." *Louisville & N. R. Co. v. Kelly* (1883) 92 Ind. 371, 47 Am. Rep. 149, 8 Am. Neg. Cas. 213. But the doctrine that a carrier can escape liability by adducing affirmative evidence which proves that the misconduct which caused the given injury could not have been prevented by the exercise of the obligatory degree of care is apparently not countenanced by any other case.

either by himself or his servants. He is regarded as being subject, under one part of his contract, to a duty which is qualified in its character and scope; and, under another part, to an absolute duty, for the discharge of which he is answerable, irrespective of whether he undertakes to perform it himself or deposes its performance to servants. The resulting situation, so far as regards the cases in which he intrusts the performance of the duty to servants, has been stated in phraseology which is expressive simply of the notion that it is absolute, and therefore non-delegable;⁴ and in phraseology which is expressive of the notion that its existence renders the carrier in-

⁴ The obligation which a carrier assumes in regard to the safety of a passenger "includes an implied stipulation for good treatment of the passenger during the passage, trip, or voyage; and especially against ill treatment by the carrier or his employees, and against every degree of violence on their part, or wanton interference with his person." *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922. In another part of the opinion it was said: "Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance."

By this contract with a passenger the carrier "undertakes to carry him safely and treat him respectfully." *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547.

"The defendant owed the plaintiff the duty to transport him . . . and during its performance to care for his comfort and safety. This duty of protecting the personal safety of the passenger, and promoting, by every reasonable means, the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional services required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's conduct, and he must be

held responsible for it. "*Dwinelle v. New York C. & H. R. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

"As to . . . [passengers] the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort, and from insult, from indignities, and from personal violence." *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456.

"The carrier's duty is to carry his passengers safely and [treat them] respectfully; and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." *Norfolk & W. R. Co. v. Anderson* (1893) 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757.

"The carrier undoubtedly owes to the passenger many contractual duties, non-performance of which is not excused by diligence and good faith, and in respect to which liability follows failure as certainly and inevitably as a right of recovery arises on the nonpayment of a debt. Is the right of a passenger to immunity from intentional injury at the hands of the servants of the carrier within this principle? It seems so. . . . This makes the liability rest, not upon instigation, encouragement, or express or implied authorization of the master, but upon the breach of the carrier's obligation; and the inquiry is not

ferentially a guarantor or insurer in respect of the protection of his passengers against the misfeasance of his servants.⁵ But both these

whether the servant acted as the carrier's agent in inflicting the injury, but whether the master has broken his contract for the safe carriage of the passenger. This is the certain import of the decisions of this court." *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 618, 67 S. E. 1103.

The reason for imputing a broader liability to a carrier than to other employers "arises from the fact that the servant, in mistreating the passenger, wholly for some private purpose of his own, in the very act violates the contractual obligation of the employer for the performance of which he has put the employee in his place." *Houston & T. C. R. Co. v. Bush* (1911) — Tex. —, 32 L.R.A.(N.S.) 1201, 133 S. W. 248. In another part of the opinion it was declared to be the duty of the carrier to "carry his passenger safely, and provide for his safety and convenience."

That it is the duty of a carrier to protect a passenger from "violence and insults," as well as to carry him safely, was laid down in *Spohn v. Missouri P. R. Co.* (1885) 87 Mo. 74, 4 Am. Neg. Cas. 564, (1890) 101 Mo. 417, 14 S. W. 880, 4 Am. Neg. Cas. 629.

In *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665, the court, after referring to the conflict of opinion which the cases disclosed with respect to the liability of a master for the wilful torts of the servant, proceeded thus: "However that may be, in general there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the

duty. If one owe bread to another and appoint an agent to furnish it, and the agent, of malice, furnish a stone instead, the principal is responsible for the stone and its consequences."

The duty to treat a passenger properly is also referred to as a distinct obligation in *International & G. N. R. Co. v. Kentle* (1883) 2 Tex. App. Civ. Cas. (Willson) 262.

⁵ "The plaintiff was entitled, in virtue of that contract, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the company's business, and when acting within the general scope of their employment, is, of necessity, to be imputed to the corporation which constituted them agents for the performance of its contract with the passenger." *New Jersey S. B. Co. v. Brockett* (1887) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039. The following paragraph of the headnote to this case was adopted as a correct statement of the law in *New Orleans & N. E. R. Co. v. Jopes* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109: "A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment."

"While a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger." *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547.

"A carrier is liable absolutely as an insurer for the protection of a passenger against assaults and insults at the hands of his servants." *Busch v. Interborough Rapid Transit Co.* (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460, quoting *Thomp. Neg.* § 3186.

"A carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage."

Zeccardi v. Yonkers R. Co. (1907) 190 N. Y. 389, 17 L.R.A.(N.S.) 770, 83 N. E. 31.

"A common carrier of passengers undertakes to protect them from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passengers." *Scott v. Central Park, N. & E. River R. Co.* (1889) 53 Hun, 414, 6 N. Y. Supp. 382.

A carrier is bound to protect his passengers "against all wrongs done by employees while engaged in and about the performance of their prescribed duties." *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986.

The contract "was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant (conductor) in charge of the train." *Chicago & E. R. Co. v. Flewman* (1882) 103 Ill. 546, 42 Am. Rep. 33.

A passenger is "under the protection of the carrier and those of its servants to whom it commits the performance of the various duties to him which it assumes by the contract of carriage." *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135.

"The duty of the carrier towards a passenger is contractual; and, among other implied obligations, is that of protecting a passenger from insults or assaults by other passengers, or by their own servants." Wood Railway Law, § 315, quoted in *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191.

"The carrier is liable absolutely as an insurer for the protection of the passenger against assaults and insults at the hands of its own servants because he contracts to carry the passenger safely and to give him decent treatment *en route*. Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out. The intentment of the law is that he contracts absolutely to protect his passenger against the misconduct of his own servants whom he employs to execute the contract of carriage." Thomp. Neg. § 3186, quoted in *Gillespie v. Brooklyn Heights R. Co.* (1904) 178 N. Y. 347, 354, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E.

857, 16 Am. Neg. Rep. 181; *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412; *Gulf, C. & S. F. R. Co. v. Luther* (1905) 40 Tex. Civ. App. 517, 90 S. W. 46.

"The relation (of carrier and passenger) places the carrier under the obligation to carry the passenger safely and properly, and treat him respectfully; and holds him responsible for the conduct of his servants to whom he intrusts the performance of his duty. He is bound to protect his passengers from violence and insults by strangers and copassengers, and *a fortiori* against the violence and insults of his own servants." Buswell, Personal Injuries, § 34, quoted in *Tanger v. Southwest Missouri Electric R. Co.* (1900) 85 Mo. App. 28.

"As against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier, and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well settled law that when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier may be held responsible even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty." Hutchinson, Carr. §§ 1093, 1595, quoted in *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018. Also cited in *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412; *Louisville & N. R. Co. v. Kelly* (1883) 92 Ind. 371, 47 Am. Rep. 149, 8 Am. Neg. Cas. 213; *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939.

For other cases in which the duty of protection was affirmed, see *Birmingham R. Light & P. Co. v. Parker* (1909),

notions are not unfrequently reflected in the language of the same opinion.⁶

161 Ala. 248, 50 So. 55 ("insult, indignity, and personal violence"); *Baltimore & O. S. W. R. Co. v. Davis* (1909) 44 Ind. App. 375, 89 N. E. 403 ("bodily discomfort, insult, indignities, and personal violence"); *Central R. Co. v. Peacock* (1888) 69 Md. 262, 9 Am. St. Rep. 425, 14 Atl. 709; *Johnson v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 453, 90 N. W. 274; *St. Louis & S. F. R. Co. v. Sanderson* (1911) 99 Miss. 148, 54 So. 885; *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939 (assaults and insults); *Quigley v. Central P. R. Co.* (1876) 11 Nev. 350, 21 Am. Rep. 757 ("violence and insults"); *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, 5 Am. Neg. Rep. 197 ("assault and other ill treatment"); *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191 ("insult or harm"); *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554 ("acts of rudeness and oppression"); *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103; *Craker v. Chicago & N. W. R. Co.* (1875) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665.

⁶"Of course the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against violent acts or misconduct of the agents." *Fick v. Chicago & N. W. R. Co.* (1887) 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527.

"It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers shall receive proper treatment from them. . . . The duty of the carrier towards a passenger is contractual, and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers or by their own servants." *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126.

"When . . . [the plaintiff] entered the car of the defendant company and paid her fare, there was an implied contract on the part of the company that

she should receive proper, polite, and courteous treatment from its employees, and that she should be protected against hearing obscenity, witnessing immodest conduct, or submitting to wanton approach." The contract "includes the obligation on the part of the carrier to guarantee to its passengers respectful and courteous treatment, and to protect them not only from violence and insults from strangers, but also against violence and insult from the carrier's own servants." *Knowville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557.

"The carrier is responsible for the malicious and wanton acts of the servant to a passenger, whether done in the line of his employment or service or not, if done during the course of the discharge of his duty to the master which relates to the passenger. For he owes him, as before stated, not only carriage, but protection also, and if he furnishes a servant who, instead of protecting, insults or assaults or beats the passenger, he has directly failed of his duty to the passenger." *Eads v. Metropolitan R. Co.* (1891) 43 Mo. App. 545. This passage was quoted with approval in *Tanger v. Southwest Missouri Electric R. Co.* (1900) 85 Mo. App. 28.

"It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as the relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not. A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants, and shall not be wilfully insulted and harmed by them; and if it commits the discharge of this duty to an employee, it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting the servants." 4 Elliott, Railroads, § 1579, quoted in *Gulf, C. & S. F. R. Co. v. Luther* (1905) 40 Tex. Civ. App. 517, 90 S. W. 44; cited also in *St. Louis, I. M. & S. R. Co. v. Dowgiallo* (1907) 82 Ark. 289, 101 S. W. 412; *Haver v. Cen-*

The imputation of an absolute liability to the carrier has sometimes been justified on the simple ground that he "selects his own servants and agents," and must therefore "be held to warrant that they are trustworthy as well as skilful."⁷ But as the power of selection has been treated as one of the foundations of the general rule, *Respondeat superior*, some further consideration would seem to be necessary to afford an adequate support for a liability which is more extensive than that which that rule contemplates. Such a consideration has been found in the circumstance that the carrier's servants are not only selected by him, but are also intrusted with functions which necessarily involve the exercise of a large measure of control over his passengers.⁸

tral R. Co. (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, 5 Am. Neg. Rep. 197.

⁷*Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547.

In *Chicago & E. R. Co. v. Flewman* (1882) 103 Ill. 546, 42 Am. Rep. 33, the court adverted to the circumstance that the railway company had placed the tort-feasors in charge of the train, and that it alone had the power of removing them.

In *Gallena v. Hot Springs R. Co.* (1882) 4 McCrary, 371, 13 Fed. 116, the trial judge, in charging the jury, observed that railroad companies "select and appoint their own conductors without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passengers of which the conductors may be guilty."

In *Missouri, K. & T. R. Co. v. Weaver* (1876) 16 Kan. 456, the court observed that upon the strict accountability of the carrier "in no small degree depend the safety and comfort of passengers. The carrier selects his own agents, and unless he finds that violence and abuse on the part of such agents towards his passengers meet with swift and severe punishment, he will soon become indifferent to the character and conduct, of such agent, and rudeness, insult, and violence will take the place of politeness, courtesy, and assistance."

"Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it

has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, Railroads, § 1638, quoted in *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, 5 Am. Neg. Rep. 197; *Knoxville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *St. Louis Southwestern R. Co. v. Johnson* (1902) 29 Tex. Civ. App. 184, 185, 68 S. W. 58.

⁸"Shipowners, as well as the proprietors of conveyances by land, select and appoint their own agents without consulting their passengers, and it is but reasonable that they should be held responsible for any act of violence to the passenger of which such employees may be guilty, as the moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor, and subject to their orders. Fit or unfit, humane or brutal, good tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress." *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922.

"A passenger while traveling on a train is under the care and control of the railway company, and is hence entitled to be protected against the wilful misconduct of the company's agents and servants in charge of the train, and to whose authority he is required for the

2449. Carrier's liability considered with reference to the existence or nonexistence of his contractual obligation at the time when the alleged tort was committed.—*a. Generally.*—A detailed examination of the circumstances under which a carrier's contractual obligations are deemed to have been assumed in respect of a particular person would carry us beyond the scope of the present work. For information on the subject the reader is referred to treatises which deal specially with carriers.¹ The cases bearing upon the question whether a given claimant was a passenger in the strict sense of the word, or was merely a person riding in a vehicle by the invitation of the employee in charge of it, or was a licensee or a trespasser, are reviewed in chapter CVII.

b. Commencement of the relation of carrier and passenger.—The contractual obligations of a railway company or other carrier come into existence as regards a given person when, with the intention of taking his passage, he enters a place provided for the accommodation of passengers, at a time when such a place is open for the reception of persons intending to travel on the vehicle provided by the carrier.² Some cases in which the liability of the defendants for the wilful torts of their servants was determined with reference to this doctrine are cited below.³

c. Continuity of the obligation.—The general rule is that the absolute obligation of a carrier with regard to the protection of his passengers continues to rest upon him and his servants as long as the

time being to yield a greater or less obedience." *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85.

¹ 4 Elliott, Railroads, §§ 1578 *et seq.*; Hutchinson, Carr. 3d ed. §§ 997 *et seq.*

The liability of a sleeping car company for injury to a passenger on an ordinary car in the same train, who enters the car for the purpose of asking the privilege of washing his hands, and is there, wantonly and without provocation, assaulted and beaten by the porter of the car, is not governed by the principles regulating the liability of common carriers, but by the general law of master and servant. *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, 8 Am. Neg. Cas. 302.

² 4 Elliott, Railroads, § 1579.

³ In *Horgan v. Boston Elev. R. Co.* (1911) 208 Mass. 287, 94 N. E. 386 (action for assault by special police officer), the court observed: "Having

entered the subway station of the defendant, and paid his fare, with the intention of becoming a passenger, the plaintiff was lawfully on the premises; and if, while passing through the turnstile to take a car, its servants unlawfully molested him by physical restraint, the defendant is responsible for the injury."

In *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986 (unlawful arrest), the court said: "By the undisputed evidence the plaintiff was a passenger of the defendant at the time the alleged trespasses were committed. He had entered a room provided by the defendant company for the accommodation of passengers, to wait for a train to take him to his home. This, under all the authorities, establishes the relation of carrier and passenger. The rule is well settled that a person is a passenger who enters upon the depot grounds for the purpose of

contract of carriage is in process of performance.⁴ In the case of a railway company which operates trains on its own land, its obligation is not suspended where a passenger leaves his car temporarily and still remains on its premises.⁵ His rights also remain in force while he is going from one train to another in the course of the same journey.⁶ On the other hand, a person who relinquishes his original

taking passage on the train of the carrier. The fare does not have to be paid, nor the train entered; but the person must merely enter within the control of the carrier at the depot through the usual channels of business, with the intention of becoming a passenger by either paying fare before or after entering the train."

In his concurring opinion in *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327, Avery, J., said: "The contract of carriage begins not later than the time when a person enters upon the premises of a carrier for the purpose of securing passage; but where carriages are furnished by it to transport passengers to a station, a person entering such vehicle or even halting one for the purpose of boarding it, with the same object in view, and under the implied invitation of the carrier, is entitled to the same right of protection as after the purchase of a ticket."

In *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216, the syllabus written by the court is as follows: "The liability [i. e., absolute liability] of the company extends to tortious acts of its servants done about its business, in checking the baggage of passengers at the several stations on its line of road, and to the platform or area along the cars, necessary to be used or traversed by the passengers in attending to procuring seats and checking baggage, and other lawful and peaceful acts in connection with their travel."

In *Indianapolis Union R. Co. v. Cooper* (1892) 6 Ind. App. 202, 33 N. E. 219, where a gateman made an unprovoked assault upon a person who had purchased a ticket and was walking to his train, it was held that the company was liable, whether it was committed at the time he was passing through the gate, or before, or after he got through.

For cases in which the action was held to be maintainable, although the

intending passenger had not actually taken his ticket when the tort was committed, see *Texas & P. R. Co. v. Jones* (1897) — Tex. Civ. App. —, 39 S. W. 124, 1 Am. Neg. Rep. 531 (woman insulted in waiting room by station agent's wife); *St. Louis Southwestern R. Co. v. Franklin* (1898) — Tex. Civ. App. —, 44 S. W. 701 (arrest in waiting room).

⁴ "The relation, and the duties arising out of it, continues until the passenger is safely landed at his destination." *Alabama City, G. & A. R. Co. v. Samp-ley* (1910) 169 Ala. 372, 53 So. 142.

⁵ *Parsons v. New York C. & H. R. Co.* (1889) 113 N. Y. 362, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145; 4 Elliott, Railroads, § 1592.

⁶ In *Dwinelle v. New York C. & H. R. Co.* (1890) 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319, reversing (1887) 45 Hun, 139, the effect of the plaintiff's evidence was as follows: He took tickets for himself and wife for a continuous passage from G. to N. Y., in one of defendant's ordinary cars, and purchased from the porter, there being no other person acting as a conductor, tickets for a section in a sleeping car, which, upon plaintiff and his wife retiring, were taken up by said porter. The train was detained by a washout, and after waiting until nearly noon the next day, the porter informed plaintiff he must take another train. The porter conducted plaintiff and his wife to a sleeping car in the other train, and, upon finding it filled, he conducted them into an ordinary car, where there were no vacant seats. On being requested to return the sleeping car tickets or procure for plaintiff something to show that he was entitled to a section in a sleeping car to N. Y., the porter refused to do so. As he turned to go away the plaintiff touched him lightly on the arm, saying to him he must not leave without some satisfaction; whereupon the porter struck plaintiff a violent blow in the face,

intention of traveling by the train for which he holds a ticket, and who, after having left the premises of the company, returns to the station to make some inquiries regarding his baggage, is not entitled to the full rights of passengers.⁷

knocking him down and injuring him. Held, that the question whether the porter was engaged in the performance of his duties as defendant's servant at the time of the assault had been improperly taken from the jury. The contention that the porter had performed all the duties which, as the servant of the defendant, he owed to the plaintiff, was thus discussed by the court: "The contract of carriage between the plaintiff and defendant was but partially performed, and was in the actual process of performance. The plaintiff had been waiting through the forenoon to enable the defendant to make the necessary arrangements to complete his contract of carriage. The arrangement made by the defendant for that purpose was to start an independent train from Utica. This required the transfer of the plaintiff and his luggage to such other train. It was necessary that the plaintiff should be informed of this, and that he, with his luggage, should be transferred to such other train. The porter was attending to this duty, and to that end had placed the plaintiff in an ordinary car to resume his journey. . . . If it is the duty of the passenger to make inquiry, it is the corresponding duty of the carrier to give the information sought. The porter had undertaken to furnish such information to the plaintiff, or to introduce him to the conductor of the sleeping car for that purpose, and while so engaged had refused to complete the work, and struck plaintiff the blow complained of. . . . The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed

the temporary or particular service he was performing, or had completed the performance of it, when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

⁷In *Georgia R. & Bkg. Co. v. Richmond* (1896) 98 Ga. 494, 25 S. E. 565, the plaintiff, having failed to get his baggage checked in time to be placed on the train by which he had expected to travel, went to a hotel, intending to take another train on the following day. Held (1) that although he was not a "passenger" when he returned to the station, he had the right to go to the station for the purpose stated, and, if he conducted himself properly, was entitled to respectful treatment from, and immunity from an unlawful assault by, the agent while engaged in transacting with him the business mentioned; and (2) that if his real purpose in returning was not to look after his baggage, or to attend to other legitimate business with the agent, but merely to upbraid him for a real or supposed breach of duty occurring at an earlier hour of the day, and a difficulty thereupon ensued, he could not hold the company responsible for an assault by the agent. It should be observed, however, that this decision, in so far as it predicates an absolute obligation on the part of railway servants to refrain from maltreating persons who come upon the railway premises for the transaction of business, turns upon the unqualified phraseology of the provision of the Georgia Code regarding the liability of railway companies. See *Columbus & R. R. Co. v. Christian* (1894) 97 Ga. 56, 25 S. E. 411. Under common-law principles the fact that this was the object of the injured person's visit to the premises is not necessarily conclusive in respect of the company's liability. See, for example, *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 441, 136 Fed. 306, 18 Am. Neg. Rep. 289.

To a passenger on a street railway car the carrier, as a general rule, owes no contractual obligation after he has alighted from the car, even though he may not then have reached his destination. See next subsection.

d. Termination of the obligation.—In a standard treatise we find the following statement with regard to passengers on ordinary railroad cars: "As a general rule it may be said that the relation of carrier and passenger . . . continues until the passenger has had a reasonable time and opportunity to safely alight from the train at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises in the customary manner."⁸ In one case decided from this standpoint, it was held that a mail clerk engaged in the delivery of mail bags to the postoffice of a certain town was entitled to recover in respect of the misconduct of a porter deputed to carry the bags, by whom he had been several times assaulted and insulted, first on the defendant's premises, and after-

⁸ Hutchinson, Carr. § 1016. See also the note to *Glenn v. Lake Erie & W. R. Co.* 2 L.R.A. (N.S.) 873.

For cases in which the liability of the defendants for assaults was affirmed with reference to this doctrine, see *Peebles v. Brunswick & A. R. Co.* (1878) 60 Ga. 281 (complaint in action for assault made by a conductor upon a passenger after he had been delivered at his destination was held demurrable because it did not allege that the act was done within the scope of the conductor's duties); *Brunswick & W. R. Co. v. Moore* (1897) 101 Ga. 684, 28 S. E. 1000, 3 Am. Neg. Rep. 779 (company liable where conductor shot plaintiff just after he had alighted from the train); *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378.

In *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17, it was laid down, on the one hand, that the severance of the relation of carrier and passenger is not necessarily dependent upon the fact that the passenger, upon reaching his destination had actually left the car, and, on the other hand, that the mere fact that the passenger had had sufficient time and opportunity to leave the conveyance, and failed to do so, does not operate in every instance as a severance of the relation. If a passenger, having time and opportunity safely to leave the train,

remains in the car for the unlawful purpose of assaulting the servants of the carrier, he must be considered as having abandoned the protection afforded him by his contract. In this case, as the disputed fact, viz., whether the plaintiff, when assaulted by the conductor, still occupied the relation of a passenger, was made by the instruction of the trial judge to depend simply upon the question whether he had actually left the car or not, the verdict was set aside.

In *Krantz v. Rio Grande Western R. Co.* (1895) 12 Utah, 104, 30 L.R.A. 297, 41 Pac. 717, the court was of opinion that when the plaintiff alighted from the train at the station in question, and made his way towards the section house for the purpose of engaging in his regular business, the relation of carrier and passenger, as between him and the company, had ceased; and consequently an assault committed upon him by a section foreman not acting within the scope of his employment could not be imputed to the company on the ground of a breach of its contractual obligations to protect him. The action was, however, held to be maintainable on the special ground that, having regard to the local conditions, the ticket agent was the representative of the company, and although he was present when the injury was inflicted, made no effort to prevent the assault.

wards on the street leading to the office.⁹ But the authorities upon this subject are not harmonious. Some of the cases proceed upon the theory "that the contract of carriage is performed when the passenger, at the end of his journey, has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged; and that the degree of care to which he is then entitled is less than during the continuance of his contract, as a carrier of goods is held to a liability less strict after they have reached their destination and been put in a freight house than while they are in transit."¹⁰

As passengers in street cars alight on public highways, there is, in the case of a carrier operating such cars, no room for any conflict of opinion with regard to the position which passengers in a train operated on land belonging to the carrier are to be regarded as occupying between the time when they leave the train and the time when they leave the carrier's premises. A street car company impliedly stipulates to protect a passenger from maltreatment by its employees until he has safely alighted.¹¹ But this is ordinarily the

⁹ In *Texas & P. R. Co. v. Cassidy* (1911) — Tex. Civ. App. —, 137 S. W. 389, the court said: "This relation [i. e., of carrier and passenger], it seems to us, was not severed by reason of the mail being taken from the train and placed upon the truck in charge of appellant's porter at Whitesboro, and the alighting of the appellee at the same place in the discharge of his duty. The duty of the appellant, under its contract, had not changed. It was still under obligation to care for and deliver the mail at the postoffice. The duty of appellee to remain with the mail remained the same. The circumstances required, of necessity, that appellee and appellant's porter should be thrown together in the compliance of appellant's contract with regard to said mail being delivered at the postoffice; therefore we conclude that the relation of carrier and passenger existed between the appellant and appellee until so delivered: or, in other words, the appellant owed the appellee protection from the assault and abuse of its servants, and it is liable to appellee for the breach of such duty by its servant."

Compare cases cited in note 16, *infra*.

¹⁰ So stated by the court, *arguendo*, in *Dodge v. Boston & B. S. S. Co.* (1889) 148 Mass. 207, 2 L.R.A. 83, 12

Am. St. Rep. 541, 19 N. E. 373, 3 Am. Neg. Cas. 843.

For decisions rendered from the standpoint indicated in the concluding sentences of this passage, see *Berryman v. Pennsylvania R. Co.* (1910) 228 Pa. 621, 30 L.R.A. (N.S.) 1049, 77 Atl. 1011, where it was held that a verdict should have been directed for the defendant upon evidence given by the plaintiff to the effect that, after alighting from a train at a station, and while standing upon the station platform, he had been assaulted by a special policeman in the company's employ. The court said: "Here there was no evidence which could possibly support a finding that Bledsoe was in the line of duty under his employment when he committed the assault. The fact that it was committed at the defendant company's station is of no importance. Plaintiff had been a passenger, but that relationship ceased when he alighted at his destination and had so far proceeded on his way as to be out of danger from the movement of the train, or further necessity of relation with the servants of the company. The defendant company thereafter owed him no special duty, no contract relation existing between them."

¹¹ *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730

full extent of its undertaking.¹² His right of action is determinable with reference to this rule, although he may have alighted with the intention of continuing his journey upon the same or another car.¹³ But the rule is subject to some qualifications. Thus, the liability of

(conductor pushed off a passenger who was descending from a street car, and at the same moment called on a policeman to arrest him; held, that the passenger had not ceased to be a passenger when the order to the policeman was given); *McQuerry v. Metropolitan Street R. Co.* (1906) 117 Mo. App. 255, 92 S. W. 912.

¹² In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, the facts involved and the conclusions of the court were stated as follows: "During the first part of the journey they [the plaintiff and one of defendant's conductors] engaged in a verbal quarrel which resulted in ill feeling between them; but there was no testimony that during the last half of the journey the dispute was renewed, or that the plaintiff was told that if upon request he did not depart, he would be put off when the car stopped at the turnout, where the conductor was to set a switch and display a signal light. If, as the defendant contended and its witnesses testified, the jury were satisfied that the encounter took place after the conductor returned from the switch, they could find that the plaintiff, having passed from the car, had become a traveler, and the defendant would not be responsible for any injury then inflicted out of a spirit of vindictiveness for what had taken place on the car, or by anger aroused by the insult with which, as the conductor testified, the plaintiff then greeted him."

In *Palmer v. Winston-Salem R. & Electric Co.* (1902) 131 N. C. 250, 42 S. E. 604, a passenger on a street car got into an altercation with the motorman, and after alighting from the car and depositing certain bundles, which he carried on the sidewalk, returned to the car. The motorman then left the car and assaulted plaintiff in the street. Held, that plaintiff was not entitled to recover. The court said: "If the plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left the car at his destination, the employee had immediately followed

the passenger up and assaulted him, the defendant concedes that there would be no question as to the liability of the company. . . . But here the plaintiff was neither a passenger, nor was the employee acting within the scope of his employment. . . . The employee in this case had left the car, and was not engaged in any work or employment for the company at the time of the assault. He had for the time being abandoned his post and was not doing service for the company."

See also *Hanson v. Urbana & C. Electric Street R. Co.* (1897) 75 Ill. App. 474 (company not liable for assault committed on a passenger after he had alighted); *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730 (carrier not liable for wrongful arrest of passenger after he had left the car); *Reilly v. New York City R. Co.* (1904; App. Term) 46 Misc. 72, 91 N. Y. Supp. 319 (carrier not liable for an assault made by a conductor on a passenger who, after having voluntarily alighted from a car, waited for him on his return trip, and spoke to him in an office of the street railway company).

In *Brown v. Interborough Rapid Transit Co.* (1907) 56 Misc. 637, 107 N. Y. Supp. 629, plaintiff boarded defendant's north-bound car and, falling asleep, was carried several blocks beyond his destination. He then crossed the street to another station to catch defendant's south-bound car, which he persisted in getting on without paying his fare. The trainmen by force kept him off the train. Held, that defendant was not liable for the assault, having fully performed its contract when it carried plaintiff on its north-bound train to his destination. It was under no obligation to furnish him a return passage free of charge.

¹³ In *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709, a passenger to whom the driver had used insulting and abusive language threatened to report him when they should arrive at the defendant's office, which was at the stables at which the car stopped for a change of horses.

the carrier has been affirmed where a passenger on a crowded car, having alighted from the front platform, walked to the rear platform

Plaintiff alighted a block from the office, intending to report the driver while the horses were being changed, and then to resume his seat, but he did not communicate his purpose to the driver. The car went on, but was afterwards stopped before reaching the stables, and the driver went to the sidewalk where plaintiff was, and assaulted him. Held, that the defendant was not liable for the assault. The court said: "When he [the passenger] left the car, the carrier was certainly not liable for his conduct on the street, nor for the conduct of a stranger to him on the street. Why, then, should the appellant be answerable for the assault of its driver, who actually stopped his team, and left it in the street with his passengers unguarded, in order that he might pursue his victim, and knock him down? In doing this, he cannot be regarded as acting within the sphere of his duty or scope of his authority. He left and stepped aside from both in order to gratify his spleen; and, upon the authorities already cited, we cannot doubt that it was error to hold the appellant responsible." The following statement in Cooley on Torts, p. 535, was quoted with approval: "If the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is ejected from the cars is obvious. The one is a trespass he has stepped aside to commit; the other is committed in the course of his employment." Discussing the effect of the element introduced by the claimant's intention of resuming his journey, the court said: "After he had alighted and walked a square, could he resume his place in the car without paying another fare, without the assent of the conductor? Would the conductor be justified in omitting to charge another fare? We think not. Had he remained in the car until the stables were reached and the horses were being changed, the carrier would have understood his journey was not completed, and whilst the horses were being changed he would still have been regarded as a passenger, and would have been entitled to protection as against the employees, if he

then had gone into the office to execute his declared purpose to report."

In *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 17 L.R.A. (N.S.) 770, 83 N. E. 31, reversing (1906) 113 App. Div. 649, 99 N. Y. Supp. 936, while the plaintiff and a friend were passengers on defendant's car, the conductor quarreled with the latter about the payment of fare, and ejected him from the car. Thereupon he and the conductor engaged in a fight upon the ground, the car being stopped at the time. Plaintiff did not know what the fight was about, but stepped out to separate the men. The motorman took hold of him and knocked him down and punched him. Subsequently the conductor charged plaintiff in a police court with having assaulted him, and plaintiff was acquitted. Held, that defendant was not liable for the motorman's assault on and the false charge against plaintiff. The court said: "It is . . . true that a passenger during his journey may alight from the car without losing his status as passenger. *Parsons v. New York C. & H. R. R. Co.* (1889) 113 N. Y. 362, 3 L.R.A. 683, 10 Am. St. Rep. 450, 21 N. E. 145. In this case, however, the wrongs for which the plaintiff seeks redress were suffered when the plaintiff entered upon an enterprise totally disconnected with the carriage. His intervention to end the quarrel which was taking place on the street between the conductor and the other passenger may have been, and doubtless was, on his statement, praiseworthy, but it occurred neither on the defendant's car nor on its property, and was a matter wholly foreign to and disconnected with the defendants contract of carriage. The fact that one of the combatants was the defendant's conductor did not alter the relation the defendant would have borne to it had it been a contest entirely between strangers. Had the plaintiff been assaulted for trying to alight from the car or trying to again obtain entrance in it a very different question would be presented. His injuries were occasioned during his voluntary intervention in a quarrel, as to which the defendant owed him no duty."

In *McGilvray v. West End Street R. Co.* (1895) 164 Mass. 122, 41 N. E. 116,

to procure a transfer, and was there assaulted by the conductor;¹⁴ and where a passenger who had twice asked for a transfer ticket while he was still on the car, and who had continued to demand it after he had, in obedience to the conductor's order to get off the car, alighted at the transfer point, was assaulted during an altercation which then took place;¹⁵ and where the assault complained of, although it was committed when the aggrieved party was on the highway, was merely the last of a continuous series of acts commenced while he was still on the car.¹⁶ The right of recovery in respect of an injury resulting from the use of excessive force in carrying out

a passenger got off when the car was switched into the car house before reaching the point to which he had paid his fare, and, while standing in the street, with one foot resting on the step to the car house, engaged in an altercation with the conductor regarding the fact that the car did not run through, and that he was not informed that it would be switched. Held, that an assault committed by the conductor upon him during the altercation was not imputable to the carrier. The court said: "The only reasonable inference to be drawn from the whole evidence is that, while waiting in the public street to take one of the defendant's cars, he saw fit to engage in an altercation with a person who was in fact one of the defendant's servants, and received from him an assault which was not made for any purpose which the jury could find to be part of the defendant's business. The defendant had no control over the place where the plaintiff was, and no duty to protect the plaintiff there from any assaults, although it would be responsible to him for assaults committed upon him there, as elsewhere, by its servants in the scope of their employment. The suggestion that it could be found within the scope of that employment for a servant to punish him for asserting his rights against the defendant is, of course, untenable; nor is there in the suggestion that the assault was for the purpose of putting him out of the defendant's premises sufficient ground to warrant submitting the case to a jury."

¹⁴ *Miller v. Brooklyn Heights R. Co.* (1908) 124 App. Div. 537, 108 N. Y. Supp. 960. It was held that he was still a passenger because he would have been entitled to continue his journey on

the same ticket, if the conductor had refused to give him a transfer.

¹⁵ In *Blomness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A.(N.S.) 763, 92 Pac. 414, the court said: "It must be conceded that, under the contract made by the respondent, the appellant had not arrived at his destination when he alighted from the car in the city of Seattle, for he had paid for transportation to the city of Ballard. It was necessary for him to alight for the purpose of changing cars, and, to receive the benefit of his contract, it was necessary for him to travel outside of the car between the car from which he alighted and the Ballard car. The trip was a continuous one, and the fact that he had to change cars could not in justice or fairness affect his rights as a passenger."

¹⁶ In *Savannah Street R. Co. v. Bryan* (1890) 86 Ga. 312, 22 Am. St. Rep. 464. 12 S. E. 307, an action was held to be maintainable where a passenger on a street car, who had delayed a short time in paying his fare, was assaulted by the conductor, first on the car, and then at the company's office, where he had gone to make a complaint.

In *Wise v. Covington & O. Street R. Co.* (1891) 91 Ky. 537, 16 S. W. 351, where a driver insulted a passenger, and, after he had left the car on account of the insult, pursued him into the street and there assaulted him, it was held error to give an instruction which limited the jury to a consideration solely of what occurred on the car.

In *Louisville R. Co. v. Kupper* (1909) — Ky. —, 118 S. W. 266, a passenger was knocked from a car by the conductor and the assault was continued in the street. On the approach of an officer, the conductor directed him to ar-

rest plaintiff, which he did. Held, that the whole affair was but a single transaction, and that defendant was liable both for the assault and arrest. Referring to the contention "that while the rule stated [*i. e.*, as to the carriers duty] applies to assaults where the assault is begun on the car and continued after the passenger leaves it, it is not applicable to a case of this kind, where the direction to make the arrest was made after the passenger ceased to be a passenger," the court said: "We are unable to see upon what reasoning it can be said that the plaintiff was a passenger while the assault was going on, and not a passenger when the direction to arrest him was given by the conductor. . . . It was not error to omit from the instructions the question whether or not the conductor was acting at the time within the scope of his employment."

In *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939, a conductor, having engaged in a quarrel with a passenger as he was stepping off the car, struck him and followed him to the sidewalk and there killed him. Held, that an action was maintainable against the carrier. Discussing the contention of the defendant "that as this killing occurred on the sidewalk, the conductor was beyond the field in which his act as servant was chargeable to the master, and for that reason the plaintiff, on her own evidence, was not entitled to go to the jury," the court said: "We have now to look, not only to the law of master and servant, but also to that of carrier and passenger. . . . If it be conceded, therefore, that under the law of master and servant the conductor was outside of the field of his employment when he followed (if he did so) this man to the sidewalk and assaulted him, still, under the law of carrier and passenger, the man was under the care and entitled to the protection of the carrier not only while he was in the car, but while he was alighting, and until the act of alighting had been entirely accomplished. Whilst it is true a conductor is not employed to follow passengers out to the sidewalk and beat or shoot them, yet they are employed to protect them from assault while they are leaving the car and to see that they alight in safety. If a stranger on the car had done to this man what the evi-

dence for plaintiff tends to show the conductor did, and if the conductor could have prevented the wrong by the exercise of a very high degree of care and failed to do so, the defendant would have been liable; with what stronger reason, therefore, is the defendant liable when the conductor himself is the offender." Criticizing an instruction given by the trial court, Valliant, J., said: It "drops out of view, as if it were immaterial, the question of whether the conductor was dragged off the car, as defendant's evidence tended to prove, or voluntarily followed the plaintiff's husband to the sidewalk, and there undertook to preserve the peace. It would be an extraordinary case . . . that would justify a conductor in his capacity as a preserver of the peace to follow the offender to the sidewalk."

In *McQuerry v. Metropolitan Street R. Co.* (1906) 117 Mo. App. 255, 92 S. W. 912, a conductor, being exasperated by the conduct of a passenger who persisted in smoking inside a car after having been warned not to do so, knocked his cigarette out of his mouth. Thereupon plaintiff knocked the conductor down, and was engaged in pummeling him when the motorman came to the rescue, hit plaintiff with the sand punch, and ordered him to "get off the car." Plaintiff immediately left the car and went to the sidewalk, where he stood for a few minutes. After getting up, the conductor proceeded to leave the car for the purpose of finding an officer to arrest the plaintiff. The plaintiff then started to run away, and, fearing that he might escape, the conductor followed, in order to keep him in sight until he could find an officer. Seeing that he was pursued, plaintiff suddenly stopped, turned and advanced upon the conductor, knocked him down, cut him in the face with a knife, and was endeavoring to inflict further injury upon him when the conductor drew his revolver and took a shot at plaintiff, who, in the meantime, had turned and fled. The court said: "The passenger is in duty bound to conduct himself in a decent and orderly manner. He should observe and obey the reasonable rules established by the carrier for the benefit of its service or for the safety, convenience, and comfort of its other passengers, and, if he refuses to do this, he forfeits his rights under the contract of carriage, and subjects himself to remov-

al from the car. [*Eads v. Metropolitan Street R. Co.* (1890) 43 Mo. App. 536.] . . . Plaintiff's own testimony admits of no other construction than that he knowingly and deliberately violated this rule and was guilty of impertinent conduct after he had been asked to desist. Up to this point, plaintiff was clearly in the wrong and defendant's trainmen would have been justified in ordering him to leave the car, and, had he refused, in employing force necessary to eject him. But the conductor, instead of following this course, according to his own admission, became a wrongdoer himself. We do not mean to say that a conductor must degrade his manhood and tamely submit to gross insult, but in serving the public and in performing his master's contract to treat passengers with all due consideration, he is expected to exercise some degree of self-restraint, and not to fly into a rage and misbehave at every impertinence from a passenger. His right and duty to eject a passenger on account of misconduct, not grossly insulting or offensive, does not justify him in assaulting the passenger unless the resistance of the latter during his removal is of a nature to make physical violence an imperative necessity. When the conductor, instead of ordering the plaintiff to leave the car, employed physical violence, plaintiff then became the injured party, and was justified in defending himself, and it does not appear that plaintiff used any more force than was required to free himself from his assailants. Defendant is liable for the wrongful acts of its agents and servants, committed in the course and scope of their employment, and, under the conceded facts, must be held liable for the damages from the unjustifiable, though not entirely unprovoked, assault of the conductor and motorman in the car. According to the testimony of plaintiff, the conductor continued to be the wrongful aggressor after plaintiff left the car. His attack was continuous and persistent from the moment the first blow was struck until the shot was fired; for during that whole period he was actuated by the single purpose of inflicting immediate bodily injury upon plaintiff. The momentary pause that occurred while plaintiff was escaping from the car was not due to any relaxation in the conductor's purpose. So that when plaintiff left the car he did not alight

in safety, as defendant agreed he should, but in imminent danger from defendant's servant; the same danger, too, but of increased potentiality, that threatened him in the car. . . . From start to finish, the conductor, though twice defeated, kept after him with ferocious intent, and finally brought him down with a shot from his revolver. We have here every element of a continuous assault; and, as it began during the existence of the relation of carrier and passenger, and appears as a consistent and indivisible whole, the fact that part of it occurred on the car and part in the street does not affect the relation between the parties. The whole affray is included within the exercise by the carrier of excessive violence in ejecting a passenger, who had forfeited his right to be carried further, but who yet retained the right not to be subjected to unnecessary violence in his removal from the car. . . . But the conductor's testimony presents a situation radically different from that just reviewed, and defendant was entitled to have its statement of the facts fairly submitted to the jury, and to have the cause of action presented in the instructions confined within the limits of that pleaded in the petition. . . . The jury was directed to find for plaintiff, either under the hypothesis that the assault was continuous, or that two separate assaults were made: the first during the relation of carrier and passenger, and the second after the termination of that relation. The cause of action pleaded being based solely upon a tort committed by a carrier upon its passenger during the performance of the contract of carriage, a recovery should not have been permitted for another injury inflicted by the carrier through the hand of its servant after the act of ejecting plaintiff from the car had been fully accomplished. According to the testimony of the conductor, the first fight was all over when plaintiff left the car, and he was free to go his way. He stood on the sidewalk near the car, and it was several minutes before the conductor started out to look for an officer. If this is true,—and it was a question of fact for the jury,—the duty of defendant to plaintiff as a carrier had ended before the conductor had renewed hostilities; and, if the second fight resulted from the conductor's effort to perform a duty

a justifiable ejection of a passenger depends upon the same considerations as where the withdrawal from the car was voluntary.¹⁷

incident to his employment, that is, to procure the arrest of a disorderly passenger after the latter's expulsion from the car, defendant would be liable for the wrongful act of the servant, committed in the discharge of that duty, but upon an entirely different principle from that applying to an assault made by the servant upon the passenger during his transportation. One liability is founded upon the breach of the duty of an insurer; the other, upon the breach of the duty one stranger owes another not to wrongfully injure him. Considering the state of the pleadings and the conflict in the testimony noted, plaintiff's right to recover should have been restricted to the finding that the assault was continuous."

In *Flynn v. St. Louis Transit Co.* (1905) 113 Mo. App. 185, 87 S. W. 560, the evidence tended to show that defendant's conductor first assaulted the plaintiff while he was on the car, then pushed him off, and finally kicked him while he was in the street, and attempting to take his umbrella from the car platform. The court said: "In these circumstances it cannot be said that plaintiff's status as a passenger had entirely ceased, and that defendant had discharged its whole duty to him by seeing him safely off the car. The evidence shows that the difficulty was begun on the car, and that plaintiff was first assaulted by the conductor while he was a passenger on the car; and the time between the first assault and the ending of it in the street, when the conductor was induced to desist from beating the plaintiff, is too inappreciable to split the transaction into two parts. The evidence tends to show the wrong was a continued one. Nor do we think the evidence shows that plaintiff had entirely ceased to be a passenger at the time he was kicked. Plaintiff had the unquestionable right to take his umbrella from the car, and having been pushed from the car without it, he had the right to return for it."

In *Jacobs v. Third Ave. R. Co.* (1902) 71 App. Div. 199, 75 N. Y. Supp. 679, 10 N. Y. Anno. Cas. 462, 11 Am. Neg. Rep. 615, reversing (1901) 34 Misc. 512, 69 N. Y. Supp. 981, it was held that where a passenger is ejected from

a street car because his transfer ticket is not properly punched, and is arrested at the instance of the conductor, and imprisoned, the refusal of the transfer, ejection, arrest, and imprisonment are to be treated as continuous acts, for which the company is responsible.

In *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142, the defendant's conductor had, according to the plaintiff's evidence, attacked him before he had alighted from the car, and continued the assault afterwards. The evidence offered by the defendant tended to prove that the conductor, having been dragged from the car step by plaintiff, acted in self defense against an attack made upon him by plaintiff, and possibly one of his companions, after the latter had alighted from the car, and that in any case the conductor's attack was deferred until the plaintiff had gone some 15 feet away from the car. The court expressed the opinion that if the attack had been in point of fact thus deferred, the conductor's wrongful act was done outside the range of his employment, and the defendant was not liable; while if the plaintiff's version of the evidence was correct, the defendant was responsible "not only for the initial assault, but for such consequences as followed therefrom in natural sequence and as a part of one continuous transaction."

¹⁷ *Eads v. Metropolitan Street R. Co.* (1890) 43 Mo. App. 536. Discussing the evidence as to the circumstances under which the plaintiff was ejected, the court said: "In removing him the servants were acting in the line of their duty or service to the carrier, and the carrier is responsible to him, though he was no longer a passenger, for any unnecessary force on the part of the servants, though it be wanton and malicious, in effecting such removal. But for whatever occurred after his expulsion, the carrier is no longer responsible; for such acts of the servants are acts with strangers, and are not in the line of their employment. It seems not to be certain when plaintiff was struck over the head with the bell register. If he was struck after his expulsion was completed, defendant should not be held therefor. But if he was struck during

The liability of the owner or operator of a passenger boat for the misconduct of the crew is, in the present point of view, determined on the same footing as that of railway companies.¹⁸

2450. Carrier's liability considered with reference to the capacity in which the tort-feasor was acting.—The decision rendered and the language used in a recent Massachusetts case apparently import the adoption of the broad doctrine that the carrier's liability in respect of a particular passenger is not restricted to the acts of servants whose functions have an immediate relation to the performance of the contract entered into with that passenger.¹

the time he was being put off, or as the final exertion or effort to get him off, so that the stroke was but a direct continuation of the effort to get him off, defendant would be liable, provided such stroke was not reasonably necessary under all the circumstances surrounding the struggling parties to accomplish the purpose and to prevent his immediately getting back on the car." The general doctrine laid down in this case is doubtless correct, but, having regard to the facts, and to the other Missouri cases cited in note 16, *supra*, the theory of the court that the carrier could not properly have been found liable if the plaintiff had been struck by the bell register after his expulsion would apparently not be approved in that state at the present time.

¹⁸ In *McKay v. Hudson River Line* (1900) 56 App. Div. 201, 67 N. Y. Supp. 651, it appeared that the plaintiff having reached a public highway, after having severed her relations with defendant by leaving the boat and delivering up her ticket at a gate on the pier, an altercation occurred between her and another woman, who charged her with theft. Thereupon the purser of the boat required the two women to enter a waiting room, locked the door, and asked plaintiff to establish her innocence, which she did, and she was allowed to depart. Held, that a nonsuit was properly granted for the reason that what the purser did after the plaintiff had ceased to be a passenger was outside of the scope of his employment.

¹ In *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 553, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, 19 Am. Neg. Rep. 281, where a passenger on a street car was injured

by a missile thrown in sport at the motorman by the conductor of another car, the court reasoned thus: "Under the authorities it is plain that if the wrongful act which caused the injury in the present case had been done by the conductor or motorman of the car on which the plaintiff was riding, the defendant would be liable. The only question upon which there is ground for any doubt is whether the rule applies to an injury done by a servant who was engaged in the same general service, but was employed upon another car, and was not charged directly and primarily with any duty to provide for the safety of the plaintiff. We are of opinion that the liability of the defendant is the same as if the conductor who threw the hen had been in charge of the plaintiff's car. The rule of liability in such cases is made absolute. The reason for the rule applies as well when the servant is employed upon another car as when he is working on the car upon which the injury occurs. If one of the reasons for the liability is that the servant, through his relation to his master, owes a duty to protect the passenger from injuries by others, and *a fortiori*, from injuries by himself, this duty, so far as it relates to the last branch of the obligation, is not confined to servants the nature of whose service requires them to give personal attention to the passenger in reference to possible injuries from others, but it includes those employed in the general business of transportation, and involves a duty to refrain from doing injury to any of the master's passengers, whether in the special charge of the servant or not. It would be too strict and narrow a rule to hold that this liability of the master extends only to injuries by servants especially

It may be that a doctrine of a scope indicated by the statement in the text is also reflected in the statements quoted below; but they are of too general a character to warrant any definite inference in this regard.² In the opinion of the present writer this is the only view which is logically defensible.

According to other authorities, the carrier's guaranty of protection is applicable only to the misconduct of servants to whom he has intrusted functions of the description specified above. In some of the cases which have proceeded upon this ground there was no general discussion of principles³ But in a recent Texas case in which it has been elaborately discussed, the doctrine of limited liability is treated as being deducible from the consideration that no other

charged with the duty of protecting passengers from injury. In *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, 8 Am. Neg. Cas. 392, it was said that 'in respect to such treatment of passengers, not merely the officers, but the crew, are the agents of the carriers.' The great diligence and learning of the defendant's counsel have discovered for our enlightenment no case in which it has been held that the carrier was not liable, because the servant, at the time of his wrongful act, was not directly employed in carrying the passenger injured, if he was engaged in the general business of which the transportation of the passenger was a part. Of course, if he was at the time in a position wholly disconnected with his duties to the carrier, as, if his misconduct was away from his place of employment, at an hour of the day when he was at liberty to go where he pleased, the master would not be liable. But the mere fact that he was on one car and his wrongful act was directed to a passenger on another car should make no difference with the master's liability."

² "The fact that the intestate was on the premises and under the protection of the company, if such was his status, gave him the right to claim absolute immunity from injury at the hands of any of its servants. The duty of insuring his safety against injury by intruders might possibly depend upon the question whether a servant was at the time on duty at the place of the threatened injury. But for any injury sustained at the hands of its servant, whether on or off duty, a person on its premises by its invitation may hold a

railroad company unconditionally responsible." Concurring opinion of Avery, J., in *Daniel v. Petersburg R. Co.* (1895) 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327 (the majority of the court treated the case as one in which the relation of carrier and passenger had ceased).

A railroad company is bound to "protect passengers during the carriage from assault or injury from its agents in charge of the train and from others." *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168.

A passenger is entitled to protection against "all wrongs done by the carrier's employees whilst they were engaged in and about the performance of their prescribed duties." *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986.

The carrier's contract is "to compensate for all unlawful and tortious injuries inflicted by his servants." *Blomness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414.

For other cases in which the courts seem to have conceived of the carrier's liability as extending to all classes of servants, see *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554.

³ In *Mars v. Delaware & H. Canal Co.* (1889) 54 Hun, 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107, where an engine

description of servants can properly be said to represent the carrier in respect of the discharge of his contractual duties to the passenger.⁴ It is submitted that the boundaries assigned in this point of view to the assumed sphere of delegation are purely arbitrary. A manifest *petitio principii* is involved in treating as axiomatic the conception upon which the argument of the court is founded, *viz.*,

standing on a side track was moved on the main track, where it collided with a passenger train, one of the points decided was that the company would be liable if the engine had been moved by the man in charge of it, but not if it had been moved by any other servant.

In *Goodwin v. Cincinnati Traction Co.* (1910) 99 C. C. A. 661, 175 Fed. 61, where the passenger was assaulted at a transfer point by one of the inspectors of a street railway company, the right of recovery was viewed as being dependent upon whether the assault was committed before or after he had passed under the control of another inspector.

The reports contain numerous statements of which the general purport is that a carrier is absolutely liable for the torts of servants who are engaged in the operation of the train or other vehicle which is the instrumentality of transportation. See, for example, *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922 ("agents employed in the management of the ship or other conveyance"); *Louisville R. Co. v. Kupper* (1909) — Ky. —, 118 S. W. 266 ("acts of servant who is placed in charge of, or has control over, passengers"). But such statements, being merely in the nature of affirmative declarations relating to certain conditions of fact, afford no precise information as to the view which the courts in question would take with regard to the right of passengers to recover damages in respect of the torts of classes of servants outside the one mentioned.

⁴*Houston & T. C. R. Co. v. Bush* (1911) — Tex. —, 32 L.R.A.(N.S.) 1201, 133 S. W. 245. There the tortfeasor, A., was employed as porter at G. station, where it was his duty to give assistance in respect of the baggage and express matter, or passenger trains, and to receive and deliver the mail sacks. The train on which plaintiff was traveling made its usual stop at G., and that was the only reason for plaintiff's

presence at that station. A., learning that he was on the train, and actuated by a long-standing personal grudge, slipped into the car, purposely avoiding the notice of other servants of the defendant, and made the assault for which damages were claimed. By the court of appeals the action was held to be maintainable on the ground that "if a servant of the carrier, in the performance of his duties, is placed where he comes in contact with the passengers, then he owes such passengers the duty of proper treatment." But the judgment was reversed by the supreme court, which, after remarking that the only direct precedent which had been found for imputing liability to the carrier under the given circumstances was *Hayne v. Union Street R. Co.* (see note 1, *supra*), proceeded thus: "In every other case . . . in which the carrier was held liable for an assault on the passenger by a servant when not acting in the carrier's business and in the scope of his employment, the servant was employed about the particular premises or conveyance used in performing the obligations of the carrier to the particular passenger, and charged with rendering some part of the various services the aggregate of which was to constitute the execution of the contract of carriage. In other words, there was delegated to the servant the doing of some part of the work, or the rendering of some part of the attention, provided for the safety, comfort, or convenience of passengers using the place or conveyance. In discussing cases of that kind judges have expressed the rule as to the liability of the carrier for the servant's mistreatment of the passenger in various language, some of it, if abstracted from the case before the court, and disassociated from its context, comprehensive enough, perhaps, to impute the liability from the act of any servant in any branch of the service whatever. But we have always supposed that such expressions had reference to such servants as those

that only a certain class of servants are to be regarded as the carrier's agents with regard to the performance of the contract. Assuming the obligation of the carrier to be absolute,—and such it is, according to all the authorities,—the more reasonable position would rather seem to be that an implied restriction upon its scope can be justified only upon some specific ground of expediency or public policy. No

whose actions were brought in question, to whom was intrusted, in part, the execution of the carrier's undertaking with the passenger; and this is the form in which the doctrine is generally expressed. If there is no such limitation, the courts have put themselves to much unnecessary trouble in trying to state the principle so as to indicate the class of servants whose misconduct is treated as a breach of the carrier's contract. It would always have been very easy to have said that the liability arose from the misconduct of any servant, or of any servant 'employed in the general business of transportation,' if no limitation was intended. The almost uniform modes of expression indicate to our minds the consensus that there is a limitation suggested by the nature of the carrier's undertaking and the means provided to execute it. His undertaking with each passenger, and he has no contract except with the individual passenger, is to carry him safely and to provide for his comfort and convenience as far as can be done by the exercise of the care which the law exacts. This obligation as to a safe carriage involves the duty to exercise the requisite care to protect the passenger from assaults from all quarters, and hence the carrier himself cannot commit, nor authorize the commission of, an assault without a breach of his undertaking. Most carriers perform that undertaking by servants to whom they commit the doing of everything essential thereto. Railway companies have stations in which passengers are received and servants are there employed, each charged with the rendition of some service which enters into the discharge of the carrier's duty to those coming to that station for transportation. These servants act for the carrier in dealing with passengers at the station where they are employed, but not elsewhere. The performance of the duty of the carrier to those taking passage at other stations is not delegated to them, but to a different corps

of employees. How, then, is a servant to break the contract of carriage? Since it includes the obligation to carry safely, the carrier breaks it if he makes the carriage unsafe by assaulting the passenger. The same result follows from like acts of one who stands in the carrier's place, charged with the performance of his duty, and thus, and not otherwise, servants in whose care the carrier has left the passenger may commit a breach of the contract. Certainly it will not be contended that a stranger to a contract can break it. Can it be said with greater force that a servant or agent who had no part either in the making or the carrying of it out can break it? If not, how is the conduct of an employee to constitute a breach of the obligation assumed by the employer, except upon the theory of authority delegated by the latter; and how can the delegation be sufficient unless it charge the employee with the duty which forbids the act? There is such a delegation to all those to whom the carrier has intrusted the execution, in whole or in part, of his contract with the passenger, because either an omission or an act of theirs which is inconsistent with his obligations is a breach thereof. . . . The law does not make the carrier an insurer of the safety of the passenger, but only requires that, in order to secure it, he exercise the high degree of care and skill so often defined in the books. It does not make him liable for assaults committed by others than himself or those put by him in his stead, unless they could have been anticipated and prevented by the exercise of requisite care. He must provide an equipment and a force of employees such as that degree of care exacts in order properly to discharge each of his duties, and will be held liable for the consequences of any deficiencies in those respects, but when he has done that there is no principle of which we have knowledge that requires to hold each servant at the service of every passenger, so that every

such ground was adduced in the case under discussion. The court laid some stress upon the circumstance that, in nearly all the reported decisions, the torts for which recovery has been allowed have been committed by servants whose duties pertained to the work of transportation. But this is really a consideration of very little moment. The paucity of cases involving the misconduct of servants outside the category thus indicated is readily accounted for by the fact that, in the nature of things, passengers very seldom suffer injuries from such misconduct.

For an injury caused to a passenger by the wrongful act of a person regularly in the employ of the carrier, but not on duty at the time when the act was done, the carrier cannot be held responsible, unless the circumstances under which the injury was sustained were such that the passenger could have recovered if the tort-feasor had been a fellow passenger or a stranger.⁵

servant must be regarded as his representative in all his conduct towards the passenger. The only good reason for making the carrier responsible for the misconduct of the servant perpetrated in his own interest, and not in that of his employer, or otherwise within the scope of his employment, is that the servant is clothed with the delegated authority and charged with the duty by the carrier to execute his undertaking with the passenger. And it cannot be said, we think, that there is any such delegation to the employees at a station with reference to passengers embarking at another or traveling on the train. . . . The proposition that the carrier clothes every employee engaged in the transportation business with the comprehensive duty of protecting every passenger with whom he may in any way come in contact, and thereby makes himself liable for every assault committed by such servant without regard to the inquiry whether or not the passenger has come within the sphere of duty of that servant as indicated by the employment, is regarded as not only not sustained by the authorities, but as being unsound and oppressive both to the employer and the employee."

This decision overrides, so far as Texas is concerned, the general statement previously made by the court of appeals to the effect that a carrier is liable "for injury inflicted upon the passenger by

his servant in whatever capacity the servant may be employed." *St. Louis Southwestern R. Co. v. Franklin* (1898) — Tex. Civ. App. —, 44 S. W. 701. It also qualifies a remark made by the supreme court itself in an earlier case: "The fact that the servant is not at the particular time doing anything for the carrier does not make conduct on his part violative of the master's obligation any the less attributable to the master." *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135.

⁵ In *Hayne v. Union Street R. Co.* (1905) 189 Mass. 551, 553, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219, 19 Am. Neg. Rep. 281, it was observed: "Of course, if . . . [the servant] was at the time in a position wholly disconnected with his duties to the carrier, as if his misconduct was away from his place of employment at an hour of the day when he was at liberty to go where he pleased, the master would not be liable." The court clearly meant "would not be absolutely liable," as for the torts of a servant.

In *St. Louis & S. F. R. Co. v. Wyatt* (1907) 84 Ark. 193, 105 S. W. 72, the liability of a railway company for an assault committed at a station by a switchman was denied on the ground of its having been committed so suddenly that it could not reasonably have been anticipated, prevented, or stopped.

2451. Meaning of the phrases "scope of employment," etc., as used with reference to the carrier's absolute liability.—So far as regards cases in which the liability of a carrier to his passengers is avowedly treated as being determinable upon the same footing as those in which the aggrieved parties are strangers, no misconception can be produced by the use of such phrases as "scope," "line," or "course of employment," "line of duty," and the like, for the purpose of defining the class of wilful torts in respect of which the liability is predicated.¹ In cases of that description such expressions are obviously to be understood as signifying torts of which the essence is the breach of duties imposed upon the carrier's servants with regard to the operation of his instrumentalities, the enforcement of his regulations, and the discharge of such other functions as are incidental to the actual work of conveying the passengers to their destination.

The situation is less simple where the right of action comes to be considered with reference to the theory that a carrier impliedly stipulates to protect his passengers against the misconduct of his servants. The effect of this theory is to cast upon the carrier's servants, as representing him in the performance of the contract of carriage, certain duties in addition to those of the descriptions just specified. It is clear that these supplementary duties may, without any terminological impropriety, be designated by the various phrases referred to.² But the consequences of applying them indiscriminately to both classes of duties have been far from satisfactory. In order to show

¹ This remark is applicable to all the cases cited in §§ 2445, 2446, *ante*.

² This aspect of the matter has been adverted to by several of the courts.

"All intercourse between the officers and passengers naturally and legitimately growing out of the relationship existing between them may properly be said to come within the course of their employment, and their actions in the premises, if legal and proper, are within the scope of their authority." *Sherley v. Billings* (1871) 8 Bush, 147, 8 Am. Rep. 451.

"The safety and the proper treatment of the passengers are within the scope of the employment and range of duties of every employee." *Louisville & N. R. Co. v. Ray* (1898) 101 Tenn. 1, 46 S. W. 554.

The servants in question were "engaged in the master's business in respect

of the duty of according property treatment to a passenger." *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135.

"Any act or order which would directly affect the comfort or safety of a passenger would be within the apparent scope of his employment." *Coal Belt Electric R. Co. v. Young* (1906) 126 Ill. App. 651.

In *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709, it was pointed out that there was no necessary conflict between the doctrine as to the carrier's absolute duty to protect passengers against the misconduct of his servants, and "the doctrine that, to render the carrier liable, the employee must be at the time acting in the employment of the carrier and within the line of his duty."

more clearly the confusion which has resulted from that practice, it will be advisable to classify the cases under several different heads.

(1) Cases in which the given torts were immediately related to the actual work of transportation, and in which the carrier's liability was affirmed on the ground that the torts belonged to the category defined by these phrases.³ As the decisions in this class of cases would have been the same whether the phrases were understood in their broader or narrower sense, their promiscuous application has produced no worse result than an awkward ambiguity.⁴ In most instances the intention of the court to use them in the broader sense is either explicitly stated or is readily deducible from the course of its argument.⁵ But the number of those in which the doctrinal standpoint cannot be determined with certainty from the language of the opinions is by no means insignificant.⁶

³ See § 2447, notes 1, 2, 3, *ante*.

⁴ The remarks of the court in *New Orleans & N. E. R. Co. v. Jopes* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, furnish a striking illustration of the confusion which is sometimes thus produced. In one part of the opinion we find the following statement: "In most of the cases in which an injury done by an employee has been the cause of the litigation, the defense has been, not that the act of the employee was lawful, but that it was a wanton and wilful act on his part, *outside the scope of his employment*, and therefore something for which his employer was not responsible. And if the act was of that character, the general rule is that the employee alone, and not the employer, is responsible. But, owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and wilful, and *outside the scope of the employment*." (The italics are ours.) In another place reference was made to the case of *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, as having decided that "a common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and *acting within the general scope of their employment*." (This phraseology, it should be observed in passing, is not

found in the opinion of the court in the earlier case, but was adopted from the reporter's headnote.) The expression "scope of employment" obviously does not bear the same meaning in both of the statements quoted.

⁵ This remark is applicable to *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039 (forcible removal of plaintiff from one part of a steamer to another), where the court quoted from *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602 (a case in which the plaintiff was a third person), the general rule that the master is liable "whether the act of the servant be one of omission or commission, whether negligent or fraudulent, if it be done in the course of his employment."

See also *Savannah Electric Co. v. Wheeler* (1907) 128 Ga. 550, 10 L.R.A. (N.S.) 1176, 58 S. E. 38 (assault made during personal altercation was spoken of as made by the servant, while "acting in the prosecution and scope of the business intrusted to him"); *Wabash R. Co. v. Savage* (1886) 110 Ind. 156, 9 N. E. 85 (ejection of passenger from train said to be "within the line of his duty"); *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280 (arrest by conductor said to have been made by "one in charge of a train and engaged in the business intrusted to him by the railway company").

⁶ The truth of the remark will proba-

(2) Cases in which the given torts had no immediate connection with the actual work of transportation, and the carrier's liability was affirmed on the ground that the torts belonged to the category defined by these phrases.⁷ In this class of cases the phrases have manifestly been used in their broader sense.

(3) Cases in which the given torts did not pertain to the actual work of transportation, and in which the carrier's liability was denied upon the ground that the torts were outside the category defined by these phrases. In cases of this type there is always some room for doubt in regard to the actual position of the courts, for the decisions are susceptible of being explained either as expressions of opinion that the phrases, even when taken in their broader sense, were not sufficiently comprehensive to embrace the acts in question, or as con-

bly be admitted by anyone who examines such cases as the following: *Texas & P. R. Co. v. Williams* (1894) 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440, § 2408, note 4, *ante*; *Wabash, St. L. & P. R. Co. v. Rector* (1882) 104 Ill. 296, 2 Am. Neg. Cas. 648 (§ 2417, note 3, *ante*); *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 266 (§ 2417, note 3, *ante*); *Citizens' Street R. Co. v. Willooby* (1893) 134 Ind. 563, 33 N. E. 627; (§ 2418, note 3, *ante*); *Louisville, N. A. & C. R. Co. v. Wood* (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197, 3 Am. Neg. Cas. 197; (§ 2418, note 3, *ante*); *Indianapolis Union R. Co. v. Cooper* (1892) 6 Ind. App. 202, 33 N. E. 219 (§ 2418, note 2, *ante*); *Roun v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471 (§ 2432, note 10, *ante*); *Wright v. Glens Falls, S. H. & Ft. E. Street R. Co.* (1898) 24 App. Div. 617, 48 N. Y. Supp. 1026 (§ 2432, note 10, *ante*); *Moriz v. Interurban Street R. Co.* (1903; App. Div.) 84 N. Y. Supp. 162 (§ 2432, note 10, *ante*); *Schwartzman v. Brooklyn Heights R. Co.* (1903) 84 App. Div. 608, 82 N. Y. Supp. 890 (§ 2432, note 9, *ante*).

The following cases involved assaults incident to personal altercations: *Keene v. Lizardi* (1833) 5 La. 431, 25 Am. Dec. 197 ("acting within the scope of their duties"); *Central R. Co. v. Peacock* (1888) 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709 ("acting in the employment of the railroad, and within the line of his duty"); *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32,

71 Atl. 986 ("acting within the scope of his employment"); *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, 8 Am. Neg. Cas. 392 ("tort was referred to as having been committed in connection with the carrier's business"); *Conger v. St. Paul, M. & M. R. Co.* (1891) 45 Minn. 207, 47 N. W. 788 ("in the line of his duty"); *Fick v. Chicago & N. W. R. Co.* (1887) 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527 (category of acts "done in the course of a servant's employment" was regarded as being co-extensive with that of acts done while the servant is engaged in the performance of his prescribed functions; that is, while he is "on duty").

In *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243 (action for assault), it was observed that a railway company's liability grows "out of its obligation to answer for any injury inflicted upon the passenger by the wilful misconduct or negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passengers safely."

In *Lampkin v. Louisville & N. R. Co.* (1894) 106 Ala. 287, 17 So. 448, the court adverted to the distinction which is predicable between such a tort as an insult "when committed by an agent of the railroad, while acting in the line and discharge of his duty, and when committed by him as an individual, and not connected with his service to his company."

clusions based upon an erroneous application of those phrases in their narrower sense.⁸

(4) Cases in which the carrier's liability has been declared to be predicable, irrespective of whether the given torts did or did not belong to the category connoted by these phrases.⁹ A declaration of this tenor plainly implies that the attention of the court was directed only to the narrower sense of the phrases.

(5) Cases in which the defense relied upon by the carrier was that the tort in question had been committed after the contract of carriage had been completely performed.¹⁰ The phrases, when used

⁸ See *Goodloe v. Memphis & C. R. Co.* (1894) 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166 (Ala.) § 2409, note 2, *ante*; *Chicago City R. Co. v. Cooper* (1906) 128 Ill. App. 528, (§ 2417, note 2, *ante*). In the opinion of the present writer both these cases were wrongly decided. See discussion in the sections referred to.

⁹ "It is of no consequence when the wrong is committed by the carrier's own servant . . . that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty, but is utterly violative of all duty, and apart and away from the scope of employment, as that term is understood in the class of cases . . . [where the plaintiff is a third person]. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment." *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456.

"It is not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not." *Haver v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. 647, 41 Atl. 916, 5 Am. Neg. Rep. 197, adopting the language of Elliott on Railroads, vol. 4, § 1638.

"It makes no difference . . . how

foreign the act may have been to the master's business then in hand, of transporting the passenger, if the act was in violation of the master's duty to the passenger." *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

See also *Pelot v. Atlantic Coast Line R. Co.* (1910) 60 Fla. 159, 53 So. 937 (carrier liable "regardless of whether the wrong is committed in the execution of the servant's employment"); *Citizens' Street R. Co. v. Clark* (1903) 33 Ind. App. 190, 104 Am. St. Rep. 249, 71 N. E. 53 (carrier liable irrespective of whether servant was "acting within the scope of his employment"); *Eads v. Metropolitan R. Co.* (1890) 43 Mo. App. 536 (carrier liable whether the act of the servant was done in the line of his employment or not); *White v. Norfolk & S. R. Co.* (1894) 115 N. C. 637, 44 Am. St. Rep. 489, 20 S. E. 191 (immaterial whether servant was "acting within the scope of his employment"); *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126 (carrier liable whether the act was "within the line of his employment or not," or "within the scope of his authority, or wanton"); *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103 (instruction to find for the defendant if the injurious act was not within the scope of the servant's duty held to have been properly refused).

¹⁰ See *Blomness v. Puget Sound Electric R. Co.* (1907) 47 Wash. 620, 17 L.R.A. (N.S.) 763, 92 Pac. 414, where it was laid down that the carrier would not be liable unless the servant's act was within the scope of his employment."

with reference to the validity of such a defense, are manifestly to be understood in their broader sense.

(6) Cases in which the defense relied upon was that, at the time when the jury was inflicted, the tort-feasor was not engaged in performing the contract of carriage in respect of the injured person.¹¹ As used in such cases, the phrases may bear either the broader or the narrower sense.

(7) Cases in which the tort-feasor was employed in the dual capacity of a servant and of a public officer.¹² The phrases when used in this connection are obviously intended to apply to acts done by him in the former capacity.

The conclusion which seems to be strongly indicated by the foregoing summary is that these phrases should not be used at all in any case where the enforceability of a claim is determined with reference to the theory of an absolute liability on the carriers' part. Perspicuity, precision, and doctrinal consistency would unquestionably be subserved by the adoption of a terminology expressive merely of the essential fact that the tort complained of was or was not a breach of the contract of carriage.

2452. Limits of the carrier's absolute obligation to protect passengers from wrongful arrest.— In jurisdictions where the right to maintain an action against a carrier for a wrongful arrest is treated as being determinable with reference to the theory of a duty on the carrier's part to afford protection to his passengers (see § 2447, note 9, *ante*), that duty is deemed to be absolute only as regards arrests made by the carriers' servants on their own initiative. In respect of arrests made by officers of the law, a passenger cannot recover damages unless he can prove that the carrier's servants were guilty of some positive misconduct with relation to the tort. It has been laid down that such misconduct may be inferred where the servants had notice, actual or constructive, of the illegality of his arrest, and failed to take such measures as were requisite for his protection.¹ But ap-

¹¹ See *Goodwin v. Cincinnati Traction Co.* (1910) 99 C. C. A. 661, 175 Fed. 61, where the right of recovery was treated as depending upon whether one of the inspectors of a street railway company had assaulted a passenger before or after he had passed under the control of another inspector.

¹² *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103 ("acting within the scope of his employment"). It should be observed,

however, that in another part of its opinion the court used a similar phrase in a different sense.

¹ *Duggan v. Baltimore & O. R. Co.* note 2, *infra*.

"If the conductor had knowledge that the arrest was unlawful, then it would be his duty to use extraordinary diligence to prevent it and protect the passenger; but even in that case the company would not be an insurer against such arrest. If the conductor had

parently no case has yet been decided in which the defendant's liability turned directly upon the nature and extent of the obligations which such notice imposed upon his servants. When the point is actually presented, the manifest difficulties involved in a doctrine which seems to offer to the carrier's servants the dilemma of an election between interference with the execution of criminal process and a cause of action which will render their employer liable for damages may lead to its definitive repudiation. Be this as it may, there can be no doubt that, in the absence of evidence of such notice, liability cannot be imputed to the carrier on the mere ground that he did not inquire into the authority of the officers, nor resist them and prevent the arrest.² It is also clear that, irrespective of the question

notice that the arrest was wrongful, it would be his duty to make inquiry into the matter." *Brunswick & W. R. Co. v. Ponder* (1903) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254.

² In *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186, the court thus discussed the obligations of a conductor to whom a telegram addressed to the police, and ordering the arrest of a passenger, had been handed: "The conductor has general power and control over the train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of the trainmen, and of passengers willings to assist, for these purposes. These extensive powers involve the correlative duty to protect passengers, not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties. . . . He was not, however, required to enter into a contest with or put himself in opposition to the officers of the law, and if he merely stood by without taking part in the arrest by known policemen, he was not necessarily bound to inquire into their authority, or assert his own against it. How far the conductor in the present case assisted in the arrest is the subject of some conflict in the testimony, and what knowledge he had of the illegality of it is not clear. Although the telegram was addressed to him as the conductor of that train, he does not seem to have assumed the direction of the affair, but rather to have acquiesced in

what the police whom he found there on his arrival should do, with the suggestion that they should not detain his train. The case must, therefore, go to the jury to determine what he did, and whether, in accordance with the principles of law, it was a proper performance of his duty."

"It would never do to allow a railroad conductor to interfere with officers of the law and prevent arrests by them merely because he did not know whether or not they were acting within their power and authority. . . . Where the arrest is by officers of the law and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest." *Brunswick & W. R. Co. v. Ponder* (1903) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254. The court said: "The duty defined did not, we think, obligate either the carrier or its servants to oppose active resistance to the officer of the law, or to inquire into the authority under which he was assuming to act. The law affords other remedies for its violation by its officers." *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, reversing (1904) — Tex. Civ. App. —, 82 S. W. 524.

"The duty to protect the passenger from violence or assault from others does not demand that the conductor should place himself in opposition to the due administration of the law; and he cannot, therefore, be said to be guilty of misconduct or of negligence

of notice, he may be held liable if his servants actively participated in the arrest. But such participation is not established by testimony which merely shows that a servant in charge of a railway train or other vehicle of transportation pointed out the passenger as the person indicated by a telegram sent to the officer who made the arrest,³ or facilitated the entrance of the officers into a place where the passenger had taken refuge,⁴ or stopped the train while the arrest was being effected.⁵ Nor is the carrier under any duty to see that the officers use only such force as is necessary to make the arrest.⁶

where he simply submits to and complies with the request or demands of those officers whose duty it is to enforce the criminal laws." *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A.(N.S.) 525, 133 S. W. 168, 170. The court relied upon the *Duggan Case*, *supra*, and quoted with approval the statement in *Hutchinson, Carr.* § 987.

See also *Owens v. Wilmington & W. R. Co.* and *Bowden v. Atlantic Coast Line R. Co.* notes 3, 4, *infra*.

³ *Owens v. Wilmington & W. R. Co.* (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

⁴ In *Bowden v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783, evidence that, on demand of police officers who were endeavoring to arrest plaintiff, defendant's conductor instructed the train porter to deliver to such officers the key to a water-closet wherein plaintiff had locked himself, without the conductor's knowledge, bolting the door on the inside so that the key was of no avail, was held not to be evidence of "a purpose to actively aid and abet the officers."

⁵ In *Brunswick & W. R. Co. v. Ponder* (1903) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254, the court thus commented upon the contention of counsel in this regard: "The conductor was ordered to stop the train, and as he had a right to presume that the arrest was legal, his obeying the command of the officers was no breach of duty to the passenger. An officer may stop a train to make an arrest of a person thereon. *St. Johnsbury & L. C. R. Co. v. Hunt* (1888) 60 Vt. 588, 1 L.R.A. 189, 6 Am. St. Rep. 138, 15 Atl. 186. And certain-

ly an officer may, after having made the arrest, stop the train to remove his prisoner. It would have been an interference with the officers to have carried them on out of their town while they were endeavoring to make an arrest within it. In this particular case it further appears that, at the time the train stopped upon the command of the officers, Ponder had ceased resisting and agreed to get off."

For another decision to the same effect, see *Bowden v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783, note 4, *supra*.

⁶ In *Brunswick & W. R. Co. v. Ponder* (1903) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254, the contention of counsel under this head was discussed by the court: "In the first place the conductor seems to have done what he could to prevent this, and but little force was used after he arrived upon the scene, the violent assaults having occurred before he discovered what was going on or had time to take part. Nor is there any evidence of negligence on the part of the company's agents in not sooner discovering that the officers were on the train, endeavoring to arrest Ponder. Then, too, if our conclusions be correct, that the conductor could assume that the arrest was a lawful one and was under no duty to prevent it, we think the company cannot be held liable for the excessive force used. Ponder became the prisoner of the officers as soon as they laid hold on him and before he was removed from the train. He was taken out from under the protection of the conductor as against the officers of the law. He was then in the custody of the law, and whether or not the conductor or anyone else was authorized to

2453. Carrier's liability, how far affected by antecedent misfeasances of passenger.—*a. Assault made by servant in repelling an assault made upon him by the injured passenger.*—The general rule is that damages in respect of an assault committed by a carrier's servant for the purpose of defending himself against the violence of a passenger cannot be recovered in an action against the carrier.¹ This rule is a necessary deduction from the more general principle that "if an act of an employee be lawful, and one which he is justified in

prevent the use of unnecessary force in making the arrest, the railroad company was in this regard no longer under any duty to him as a passenger. See, in this connection, *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590."

¹ In *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360, the court observed, *arguendo*: "There may be, and doubtless are, cases in which the conduct of a passenger towards the employee of a railroad company was such that the company would not be liable for the act of the employee. A conductor, for example, would be justified in the defense of his own person, or the property of the company in his charge, in using such force as would be necessary for their protection against a passenger or anyone else, without rendering the company liable. Because he occupies the position of a conductor, and his assailant that of a passenger, does not deprive the former of the right of defending himself or the property in his charge, so far as it becomes necessary."

In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N. S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, the answer, after a denial of allegations to the effect that the plaintiff had been assaulted by the defendant's conductor, raised by further affirmance the issues that, if an assault was committed, the conductor at the time was not acting within the scope of his employment, or, if he was so acting, that the force used was not excessive, but was justifiable in self-defense, to repel an attack by the plaintiff. The court said: "There is no evidence to which this last averment is applicable. It appears that neither in the car, nor while passing from the car to the ground, did the plaintiff threaten him with bodily

harm or lay hands upon the person of the conductor. If the defendant intended to rely upon the defense that the plaintiff was rightly ejected with the use of no more force than was necessary, it should have pleaded the avoidance. It was not available under the present answer."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, the court thus laid down the law: "A servant of a carrier assaulted by a passenger may use such force in resisting the same as is actually or apparently necessary to successfully repel it, but no more. The servant may rightfully do what his principal could do if he were present and acting, and the measure of the right and duty of the former is, under these circumstances, the same as that of the latter. Self-defense, made within the limitations prescribed by law, is always permissible and never a violation of law. Hence, it justifies resistance sufficient to repel the assault wherever and upon whomsoever made. *New Orleans & N. E. R. Co. v. Jopes* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109."

In *Murphy v. St. Louis Transit Co.* (1902) 96 Mo. App. 272, 70 S. W. 159, the defense was that whatever injuries plaintiff received were inflicted by the servants of the company in defending themselves against an assault by the plaintiff. An instruction was given by the court which told the jury that if plaintiff began the assault he could not recover. Held, that the refusal of an instruction submitting the issue whether the plaintiff was a trespasser on the car or not was not error, that issue being immaterial, since he had no higher right to commit an assault if he was a passenger than he would have had if he had been a trespasser.

In *Hayes v. St. Louis R. Co.* (1884) 15 Mo. App. 583, where a passenger

doing, and which casts no personal responsibility on him, no responsibility attaches to the employer therefor." ² Being founded

who had violently assaulted a conductor of a street car was pushed off by him while the car was in motion, it was held that the railway company would not be liable if he had good reason to believe that the act was necessary for his protection.

In *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669, where the plaintiff struck the conductor of a street car and then dragged him from the car to the sidewalk, it was held that the carrier was not liable for what occurred on the sidewalk.

In *Russell v. New York C. & H. R. R. Co.* (1896) 12 App. Div. 160, 42 N. Y. Supp. 678, an action for an alleged assault committed by its conductor, a verdict for the passenger was set aside for the reason that evidence which was substantially uncontroverted tended to show that the plaintiff was disorderly, and that he struck the first blow, and that the conductor used no unnecessary force.

For other cases in which the doctrine stated in the text was recognized or applied, see *Culberson v. Empire Coal Co.* (1908) 156 Ala. 416, 47 So. 237; *Alabama City, G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142; *Coleman v. Yazoo & M. Valley R. Co.* (1907) 90 Miss. 629, 43 So. 473; *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; *O'Donnel v. St. Louis Transit Co.* (1904) 107 Mo. App. 34, 80 S. W. 315; *James v. Metropolitan Street R. Co.* (1903) 80 App. Div. 364, 80 N. Y. Supp. 710; *Reed v. New York & Q. C. R. Co.* (1907) 116 App. Div. 709, 102 N. Y. Supp. 19; *Williams v. Gill* (1898) 122 N. C. 967, 29 S. E. 879; *International & G. N. R. Co. v. Washington* (1909) 54 Tex. Civ. App. 166, 117 S. W. 992; *Houston Electric Co. v. Park* (1911) — Tex. Civ. App. —, 135 S. W. 229.

² *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 190. Referring to the cases of *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039, the court said: "It will be noticed that that which, according to this decision, the carrier engages absolutely against, is

the misconduct or negligence of his employee. If this shooting was lawfully done, and in the just exercise of the right of self-defense, there was neither misconduct nor negligence. . . . If an employee may use force to protect other passengers, so he may to protect himself. He has not forfeited his right of self-defense by assuming service with a common carrier; nor does the common carrier engage aught against the exercise of that right by his employee. There is no misconduct when a conductor uses force and does injury in simple self-defense; and the rules which determine what is self-defense are of universal application, and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to his passengers for the assaults of his employees is of a most stringent character, far greater than that of ordinary employers for the actions of their employees, yet they all limit the liability to cases in which the assault and injury are wrongful." Here the defense was that the act of the conductor in shooting a passenger was lawful; the court said: "If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? Suppose we eliminate the employee, and assume a case in which the carrier has no servants, and himself does the work of carriage; should he assault and wound a passenger in the manner suggested by the instruction, it is undeniable that if sued as an individual he would be held from responsibility, and the act adjudged lawful. Can it be that, if sued as a carrier for the same act, a different rule obtains, and he be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which, as an individual, he was justified in doing? The question carries its own answer."

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, the court observed that the responsibility of the carrier "rests upon the assumption that the battery cannot be justified. If it can be, no responsibility attaches to any-

upon that principle, it is subject to the obvious qualification that the carrier may be held liable if the defensive action of the servant in question was accompanied with a degree of violence which, in view of the given circumstances, appears to have been excessive and unreasonable.³

"The servant is justified in using force upon a passenger only

one. If it cannot be, both the servant and the carrier are liable."

The consideration that no culpable act upon which an action could be founded had been committed by the servant was also especially relied upon as the *ratio decidendi* in *Monnier v. New York C. & H. R. R. Co.* (1903) 175 N. Y. 281, 62 L.R.A. 357, 96 Am. St. Rep. 619, 67 N. E. 569, 14 Am. Neg. Rep. 423, reversing (1902) 70 App. Div. 405, 75 N. Y. Supp. 521, where a passenger had used force in resisting a conductor who attempted to enforce a regulation regarding the payment of fare.

³ So laid down in *Haver v. Central R. Co.* (1900; Err. & App.) 64 N. J. L. 312, 45 Atl. 593, 7 Am. Neg. Rep. 296, where a baggage master ejected from a train a passenger who had assaulted him. This was the second appeal of the case after the new trial which had been ordered on the ground that the plaintiff had been improperly nonsuited. See (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, 5 Am. Neg. Rep. 197, (§ 2432, note 1, ante).

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, the court observed: "Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or resistance is over. If he does, he makes the carrier as well as himself liable for the injury. If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his re-

sistance, and was returning to his seat with his back to the brakeman. Under the instructions of the court the jury must have so found, or they could not have returned a verdict for the plaintiff; and in our judgment the evidence fully justified the finding."

In *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 354, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, the court said, *arguendo*: "Of course a conductor has the right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled, and he must be without fault. To be sure, he need not retreat from his car. And he may assault a passenger when necessary to protect other passengers from assault, using no more than necessary force, and this may become a duty,—indeed, it is a duty whenever it is a right."

In *Neuer v. Metropolitan Street R. Co.* (1910) 143 Mo. App. 402, 127 S. W. 669, the court said: "With some exceptions, perhaps, the rule is well established that, notwithstanding one person may instigate a combat by insulting language or conduct, yet the law does not justify his adversary, on the plea of self-defense, in the use of unnecessary or unreasonable force. And this rule applies to the relationship of carrier and passenger. A carrier is liable for the act of its conductor while engaged in the performance of his duty as such precisely as the conductor himself would be in a case of assault on such passenger."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, the court said: "If the servant of a carrier, assuming to exercise this right [*i. e.*, of self-defense] transcends the limits thereof in respect to an assault made upon him by a passenger by the use of unnecessary force or violence, his principal is just as clearly liable for the injury done as the servant himself would be for the exercise of such exces-

to protect himself from bodily harm; but even then he cannot lawfully go further than is reasonably necessary for his defense, and the proper management of the carrier's business."⁴

The burden of justifying an assault rests upon the carrier.⁵ Whether the circumstances relied upon by the carrier were such as warranted the servant in resorting to the degree of force which he used in defending himself is a question to be determined by the jury, viewing the situation from the standpoint of the employee, though he must decide the matter in the first instance at the peril of himself and his master.⁶ In determining whether the servant's

sive force, when acting in his individual capacity, and not as a representative of the carrier. *O'Brien v. St. Louis Transit Co.* (1904) 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939; *Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830. To the extent of the excessive force and violence exerted, the conduct of the servant is necessarily wilful and without justification. Being unlawful, it imposes liability, and that liability falls upon the carrier because of its duty to protect the passenger from injury by its servant."

In *Chicago, R. I. & P. R. Co. v. Barrett* (1884) 16 Ill. App. 17, where it was held that the jury had been correctly instructed that if the defendant's conductor used excessive and unreasonable force in repelling an attack upon him by appellee, the company would be responsible for injuries occasioned by such excessive force, the court remarked: "If the act of the servant in committing a naked assault upon, or other wilful or malicious wrong to, one intrusted to his care and protection, be the act of the carrier, how can it logically or legally be said that the latter's justification is more extensive than that of the servant?"

Other cases which recognize the rule that the plea of self-defense by the servant will not avail the carrier if excessive force was used are cited in note 1, *supra*, and notes 4, 5, *infra*.

In *St. Louis Southwestern R. Co. v. Berger* (1898) 64 Ark. 613, 39 L.R.A. 784, 44 S. W. 809, Bunn, Ch. J., delivered a lengthy dissenting opinion, the essence of his position being that an assault made by a servant in self-defense is not in the line of his employment, and that "continuing his defense to the extent of using more and greater force

than is necessary to repel the assault and force his antagonist to desist" does not have "the effect of bringing him back into the line of his employment." The reasoning, however, is obviously of no force in any jurisdictions except those in which a carrier can escape liability by showing that the wilful tort of a servant which it is sought to impute to him was outside the scope of the servant's employment. By the majority of the court it was apparently taken for granted that Arkansas was not one of those jurisdictions at the date when the case was decided. It certainly is not now. See § 2410, *ante*.

⁴ *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 486, 487, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615.

⁵ *St. John v. Eastern R. Co.* (1861) 1 Allen, 544; *St. Louis Southwestern R. Co. v. Berger* (1898) 64 Ark. 613, 39 L.R.A. 784, 44 S. W. 809.

In *Birmingham R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701, an action for an assault by the defendant's conductor, charges which instructed the jury that the assault complained of was proper, if used in an honest and proper effort to eject plaintiff from the car, were held to be erroneous for the reason that the onus was upon the defendant to justify the assault, and that the conductor had no right to strike the plaintiff, in ejecting him from the car, unless it was necessary to defend himself from the assault as made upon him.

⁶ *Teel v. Coal & Coke R. Co.* (1909) 66 W. Va. 315, 66 S. E. 470. It was held that requested instructions which would have authorized the jury to find for the defendant if, in their opinion, the servant had used such force "as he believed" was necessary under the

conduct was wrongful on this point of view, it must be considered with reference to the standard of that high degree of care which, as the representative of the carrier, he is bound to exercise in order to avoid inflicting injury upon passengers.⁷

Another situation in which the defensive quality of the servant's act cannot be successfully pleaded is indicated by the cases in which the carriers have been held liable for assaults which were induced by previous attacks of passengers, but were committed after all danger from those attacks had ceased.⁸

b. Assault made in repelling an assault made by a passenger other than the aggrieved party.—In a case where the plaintiff, while alighting from a train, was wounded by a shot which a flagman had aimed at a disorderly passenger with whom he had had an altercation, it was held that the jury should have been instructed to find for the defendant if, in their opinion, the flagman had fired the shot in

circumstances, had been properly modified by inserting after the words "as he believed," the words, "and had reasonable grounds to believe." The effect of the insertion was to narrow the proposition by making the extent of rightful exercise of force depend upon actual and apparent necessity, and not the brakeman's opinion in that regard.

⁷ *Dallas Consol. Electric Street R. Co. v. Pettit* (1907) 47 Tex. Civ. App. 354, 105 S. W. 42; *International & G. N. R. Co. v. Washington* (1909) 54 Tex. Civ. App. 166, 117 S. W. 992.

⁸ In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, where a passenger and a brakeman had an altercation and a personal encounter over the removal of the passenger's dog from the car, and the brakeman afterwards assaulted the passenger with a poker, a verdict against the railway company was sustained. The court said: "If the servant is first assaulted, he may defend himself. If he is resisted in the performance of any duty, he may use force sufficient to overcome the resistance. But the assault being over, or the resistance ended, he cannot pursue and punish the wrongdoer. . . . Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger after the assault or the resistance is over. If he does, he makes the carrier as well as himself liable for

the injury. If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased resistance, and was returning to his seat with his back to the brakeman."

In *Galveston, H. & S. A. R. Co. v. La Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488, the plaintiff struck a conductor in the course of an altercation which had arisen between them. The conductor did not then resent the assault, but went into another car, procured a pistol, returned, and without further provocation, assaulted plaintiff. Held, that a verdict against the railway company was proper. The court said: "If the conductor committed the acts of violence complained of, then, in our opinion, the law of self-defense affords the true test of liability; and the plaintiff's entire cause of action could not be defeated by showing that he was guilty of provoking conduct which fell short of justifying the conductor in inflicting the injuries complained of."

the reasonable belief that this was necessary in order to protect himself or the other trainmen from death or great bodily harm at the hands of the disorderly passenger.⁹

c. Assault made in dealing with a disorderly passenger.—The servants in charge of a train or other vehicle are justified in expelling a disorderly passenger from the vehicle, or removing him to some part of it where his misbehavior will not cause annoyance to the servants themselves or the other passengers. For such expulsion or removal the carrier cannot be held liable if it was effected without the use of unreasonable force.¹⁰

d. Assault made by servant for purpose of protecting the carrier's property.—An action against a carrier in respect of an assault made by his servant upon a passenger cannot be maintained if it appears that the servant merely used such force as was necessary to protect the carrier's property against the passenger.¹¹

2454. —by antecedent provocative words or conduct on the passenger's part.—*a. Assault induced by passenger's conduct or words.*—The doctrine which prevailed in Georgia for several years was that no action in respect of an assault made upon a passenger by a servant of a carrier could be maintained against his employer if the evidence showed that the assault had been provoked by offensive and irritating words or conduct on the part of the passenger.¹ In the

⁹ *Illinois C. R. Co. v. Gunterman* (1909) 135 Ky. 436, 122 S. W. 514.

¹⁰ In *New Orleans & N. E. R. Co. v. Jones* (1891) 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, the court observed: "It is not every assault by an employee that gives to the passenger a right of action against the carrier. Suppose a passenger is guilty of grossly indecent language and conduct in the presence of lady passengers, and the conductor forcibly removes him from their presence, there is no misconduct in such removal; and if only necessary force is used, nothing which gives to the party any cause of action against the carrier. In such a case, the passenger, by his own misconduct, had broken the contract of carriage, and he has no cause of action for injuries which result to him in consequence thereof. He has voluntarily put himself in a position which casts upon the employee both the right and duty of using force."

In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, the court used the

following language: "It is also the duty of passengers to observe the rules and regulations of the company and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence. But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance."

See *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018, where the plaintiff was drunk and so disorderly as to justify his ejection.

¹¹ *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360.

¹ The doctrine was first applied in

latest case in which the supreme court of that state has discussed the effect of such evidence, the doctrine has been largely modified if

Peavy v. Georgia R. & Bkg. Co. (1888) 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70. The headnote written by the court is as follows: "If a disorderly passenger defies a conductor, draws a pistol, and thereby induces the conductor to arm in order to expel him from the train; and if, after expulsion, he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues,—the railroad company is not liable for the consequences, though the expelled passenger be wounded in the conflict, even if the conductor, excited by danger and irritated by insult, be not fully excusable for the shooting." The grounds upon which the decision proceeded were thus stated in the opinion delivered by Bleckley, Ch. J.: "But for his fault, the conductor would not have been brought into a state of excitement from danger and insult which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company; because the plaintiff was there upon the ground, stirring up excitement, and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune; and though the conductor might not be altogether excusable for the shooting (according to his own evidence, however, he was excusable), the company was in no fault for it, and it would be unjust for the plaintiff to recover of the company, when he boarded its train violating the law (as we can well infer) by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol and presenting it at him, and

violating the law by general disorder and misconduct throughout the transaction up to the moment he was shot."

In *Georgia R. & Bkg. Co. v. Richmond* (1896) 98 Ga. 495, 25 S. E. 565, where a baggage master assaulted a man who had gone to a station to attend to his baggage, the court, treating him as being entitled to the rights of a passenger, although not actually such at the time in question, laid it down that, "if the plaintiff, instead of treating the agent respectfully, used insulting or provoking language, which naturally resulted in a difficulty, the company should not be held responsible." It was held that the trial court judge erred in giving this charge without qualification: "Sneers, looks, or contemptuous gestures will not justify an assault by an agent of a railroad company upon one who had a ticket, and has become entitled under the contract to courteous treatment until the contract was fully carried out by the railroad company or its agents." This decision modified *pro tanto* *East Tennessee, V. & G. R. Co. v. Fleetwood* (1892) 90 Ga. 23, 15 S. E. 778, in which a similar instruction had been affirmed in an action for an assault by a conductor.

In *Georgia R. & Bkg. Co. v. Hopkins* (1899) 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965, a night watchman struck the plaintiff, who was abusing him because he had been ejected from a car for a sufficient cause. On the request of the defendant the trial judge charged: "If you believe that . . . and that as a result of the discovery of . . . [the plaintiff's] conduct words followed between . . . [him] and the watchman, and that the plaintiff used insulting and opprobrious language to the watchman which naturally enough resulted in a difficulty, the company should not be held responsible for alleged assault by the watchman." He also added: "I give you in charge in this connection, or with this added to it: that the assault by the watchman must not be disproportioned to the insult offered; it being still left a question of fact for you to determine whether the battery was disproportioned to the insult." It was held error to add

not virtually discarded.² But it has been applied, and, so far as

this qualification to the requested charge.

In *Central of Georgia R. Co. v. Motes* (1903) 117 Ga. 933, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, 14 Am. Neg. Rep. 13, where the company's servant in charge of a waiting room pulled the plaintiff off a bench where he was lying down in violation of a rule, the court laid down the law thus: "A passenger who displays a persistent determination to disregard such a regulation, and by his wrongful conduct so exasperates a servant of the company as to unfit him for properly performing the duty he owes his master with respect to his treatment of its patrons, cannot justly complain that the company's servant lost his temper and resorted to unnecessary force in compelling an observance of the regulation on the part of the passenger." In the *Mason Case* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, the court remarked that if this decision "meant that in an action for an assault or the use of unnecessary violence in the discharge of the duty of ejecting a person from a train or a station the company is relieved from liability if the plaintiff is somewhat aggravating, and merely failed to promptly regard the rules of the company, it made a long advance."

In *Macon R. & Light Co. v. Mason* (1905) 123 Ga. 773, 51 S. E. 569, 18 Am. Neg. Rep. 355, it was observed *obiter*: The "court is committed to the doctrine that if a passenger is himself responsible for exciting the anger of an agent or employee of a railway company, whereby he is for the time being unfitted for performing the exacting duties he owes to his employer with respect to his treatment of passengers, the company cannot be held accountable for improper conduct on the part of its servant."

The *Peavy Case*, *supra*, was followed in *Harrison v. Fink* (1890) 42 Fed. 787 (a case originating in the Georgia district), where it was held that a passenger cannot claim damages on account of the conductor drawing a pistol on him, and speaking of him as a coward to the other passengers, if the conductor's conduct was provoked and caused by the acts of the passenger.

² In *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225, the following statement of doctrine is set out in the headnote written by the court: "Where a suit was brought against a railroad company for an assault and battery committed by its conductor upon a passenger, if the conduct of the passenger was such as to justify the act of the conductor, the company would not be liable. If the conductor's act was not justified, but mitigated by provocative words or conduct of the passenger at the time, such mitigation would enure to the benefit of the company. But if the conductor committed an assault and battery upon the passenger, and the words and conduct of the passenger were such as to arouse the anger of the conductor, and to tend to provoke a difficulty, but not such as to justify the act of the conductor, this would not free the company from liability." The court thus commented on the cases cited in the preceding note: "It will be perceived that from certain expressions used in the *Peavy Case*, carried by other cases into the domain of substantive propositions of law suitable to be given in charge, and aided by *obiter dicta*, has grown the present theory that if a passenger excites the anger of the servant of a railroad company, even of a conductor to whom is intrusted the company's duty of protecting him, whereby the conductor is for the time being unfitted for the performance of his duties, though the conductor unjustifiably assaults him, the company cannot be held liable. Of course, if the conduct of the servant of the railroad was justifiable, neither the servant nor the master would be liable. But a rule which would free the carrier from liability, although holding its servant to whom it intrusted the performance of its contract of carriage not justifiable, presents, we think, an untenable doctrine. . . . In some jurisdictions opprobrious words will not justify a battery. In this state, on the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words or abusive language used by the prosecutor, or person assaulted or beaten, 'and such words and language may or

appears, is still accepted in some other jurisdictions.³ The various conceptions to which it has been referred are these:

(1) That under the circumstances supposed, the passenger him-

may not amount to a justification, according to the nature and extent of the battery, all of which will be determined by the jury.' If the jury find that the opprobrious words of the passenger or act by him amounting to an assault, would justify the servant, his conduct, so justified, would not furnish a ground for recovery against the master. But the rule works both ways. If the servant represents the master in his act, and the master is responsible for his tort, aggravation of the servant which will not justify him will not free the master from liability."

The court referred to the following decisions as lending countenance to the doctrine that the carrier could be freed from liability if the assailant had been "put out of tune" by the abusive language of the plaintiff: *Gasway v. Atlanta & W. P. R. Co.* (1877) 58 Ga. 216; *Western & A. R. Co. v. Turner* (1884) 72 Ga. 292, 53 Am. Rep. 842; *Christian v. Columbus & R. R. Co.* (1888) 79 Ga. 460, 7 S. E. 216, s. c. (1895) 97 Ga. 56, 25 S. E. 411; *Thompson v. Wright* (1899) 109 Ga. 466, 34 S. E. 560, 7 Am. Neg. Rep. 38; *Central of Georgia R. Co. v. Brown* (1901) 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989, 10 Am. Neg. Rep. 30.

In *Georgia R. & Electric Co. v. Rich* (1911) 9 Ga. App. 497, 71 S. E. 759, it was laid down that, where a railway conductor, while in charge of a car, strikes one passenger and knocks him against another, injuring the latter, it is no defense to an action by the injured passenger that the other passenger had used opprobrious language to the conductor.

³ In *Wise v. South Covington & C. R. Co.* (1896) 17 Ky. L. Rep. 1359, 34 S. W. 894 (for first appeal, see [1891] 91 Ky. 537, 16 S. W. 351), it was held that a passenger on a street car could not recover for abusive language addressed to him by the conductor, or for the act of the latter in knocking him down after he had left the car, where the offensive language was used and the blow struck in response to abuse and assault by the passenger.

In *Rohrback v. Pullman's Palace Car*

Co. (1909) 166 Fed. 797 (district of Pennsylvania), plaintiff, after purchasing a seat in defendant's parlor car, ordered a meal, and later objected that he was not being served in his turn. The porter politely informed him that ladies' orders were served first, whereupon the plaintiff started to the platform of the car to complain to the conductor. In doing so, he called the porter a "black bastard," whereupon the porter assaulted him. Held that the plaintiff provoked the assault, and should therefore have been nonsuited. The court observed that "there is nothing in justice or reason why the carrier should be liable when the passenger has, by his own misconduct, provoked a respectful and courteous servant to commit the assault by the use of such irritating and insulting language as in all human probability would produce that result. The whole evidence of the plaintiff shows that the porter was not at fault at all, but was endeavoring to perform his duty by treating the passengers in the car, as well the plaintiff as the others, with equal attention, and simply because the plaintiff was not permitted to have his own way in regard to his order as against what the porter conceived to be the rights of other passengers, of which he politely informed the plaintiff, the latter became angry and used the language stated. He was to blame entirely for the assault, and he cannot now hold the carrier liable."

In *Texas & N. O. R. Co. v. Taylor* (1903) 31 Tex. Civ. App. 617, 73 S. W. 1081, the court cites with approval the cases of *Peavy v. Georgia R. & Bkg. Co.* and *Harrison v. Fink*, note 1, *supra*.

In *Johnson v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 453, 90 N. W. 274, "an action against a railroad for an assault and battery inflicted by defendant's conductor upon a passenger, an instruction to the jury that plaintiff could not recover if he provoked the assault or was the aggressor was [held to be] sufficiently favorable to defendant."

See also the cases cited in notes 5, 6, 7, *infra*.

self is in fault, and cannot warrantably complain of the natural consequences of his misconduct.⁴ The position is clearly inconsistent with the fundamental juristic principle, *Injuria non excusat injuriam*.

(2) That "the duties of the carrier and the passenger are reciprocal. The carrier is bound to protect the passenger, and the passenger, in order to entitle himself to such protection, is bound to behave himself in a decent and orderly manner."⁵ This explanation

⁴ The Georgia cases cited in note 1, *supra*, were apparently based upon this broad ground. But it is not easy to extract any precise legal principle from the somewhat rhetorical language used by the judges.

⁵ *Scott v. Central Park, N. & E. River R. Co.* (1889) 53 Hun, 414, 6 N. Y. Supp. 382. There the evidence adduced for the defendant tended to show that the plaintiff, after getting upon the front platform of a street car, commenced an altercation with the driver, using language which was very abusive, insulting, and calculated to bring about a personal encounter,—a result which presently ensued. Held, that the trial judge had erroneously refused to charge the jury that, if they believed this evidence, the verdict must be for the defendant. The court said: "It is undoubtedly true that a common carrier of passengers undertakes to protect passengers from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passengers. But it has not as yet been held that, where a passenger by his own misbehavior, while being transported, has provoked a personal encounter between himself and one of the employees of the carrier, that the carrier is liable for the results. It may be true that the use of abusive language to the driver did not justify the assault as far as the driver is concerned, in the eyes of the criminal law; but there is no reason for holding that where a passenger, by his own improper and insulting behavior, while a passenger upon the road of the railway company, brings upon himself an assault, the carrier should be responsible. Carriers are to be held to the strictest responsibility. They must treat their passengers respectfully, and protect them so far as they reasonably can from injury or insult on the part of

their employees. But there is also a responsibility on the part of the passenger. He is bound to conduct himself in an orderly and decent manner, and if he forgets his obligations, and, by his indecent behavior and by the use of language which is morally certain to end in a personal encounter, he succeeds in his efforts to bring about such a result, certainly the carrier cannot be bound to protect the passenger under such circumstances from the natural and probable results of his own act. It is clear that the act of the driver was not in the course of his employment, and the defendant can only be held under the rule that, as the passenger must submit himself to the custody of the employees of the carrier, the carrier must be responsible even for the wilful acts of the employees which result in a trespass against the passenger. But the reason of such a rule can have no application to a case where the trespass is brought about by the improper behavior of the passenger which caused the assault of which he complains." Daniels, J., however, dissented on the ground that the "law is settled that words alone will not excuse a resort to personal violence." His opinion has been adopted in the later decisions of the supreme court which are cited in note 11, *infra*.

In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the court, referring to the contention that the obligation of a carrier to protect a passenger is absolute, remarked: "If any such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff to so demean himself towards the servant as not, by misbehavior, to provoke a personal quarrel between them." This case, it will be observed, was of earlier date than the *Peavy Case*, note 1, *supra*.

is open to the objection that even if it is conceded that the passenger's offensive words or conduct constitute a breach of an implied contract on his side, a resort to violence is not a legitimate method of obtaining redress for that breach.⁶ By committing an assault he merely sets one wrong against another; and that is "retaliation, not remedy."⁷

(3) That an assault induced by personal resentment is not within the scope of a servant's employment.⁸ This consideration furnishes a satisfactory basis for the doctrine, so far as regards jurisdictions in which the carrier's obligation to protect passengers against wilful torts extends only to those which are committed by his servants in the course of their ordinary duties with respect to the actual work of transportation. But obviously it cannot be of any force whatever in the view of those courts by which the theory of the absolute quality of a carrier's obligations has been adopted. See preceding subtitle.

From the foregoing remarks, it is apparent that two of the rational bases which have been suggested for the doctrine stated at the commencement of this section are clearly irreconcilable with general

⁶ In *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336, the court said: "It is the duty of the conductor and other employees upon a train of cars, to treat the passengers with civility, and to abstain from all unnecessary violence toward them. It is also the duty of passengers to observe the rules and regulations of the company, and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence. But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance, and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 618, 67 S. E. 1103, the court remarked that the passenger's "assault upon, or abuse of, the servant, may obviously excuse the carrier from performance of his contract. It may eject him from its train, but it is difficult to see how this option on its

part can excuse the beating of the passenger or the infliction of other injury upon him by way of punishment."

See also the extracts from the opinions in *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360, and *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, note 11, *infra*.

⁷ *Layne v. Chesapeake & O. R. Co.* note 6, *supra*.

⁸ In *Little Miami R. Co. v. Wetmore* (1869) 19 Ohio St. 110, 2 Am. Rep. 373, the evidence of the defendant railway company tended strongly to prove that the plaintiff, by his importunate conduct and abusive language towards a baggage master, provoked a personal quarrel between them, that the assault was the result of this quarrel and that the blow was inflicted by the servant as an act of personal resentment. The court took the position that "if these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master."

principles of jurisprudence, and that the third is of no validity when it is tested with relation to that theory of the carrier's liability which has already been adopted by a large number of the American courts, and which there is good reason to suppose will ultimately be accepted by all of them. A strong positive objection to that doctrine is indicated by the consideration that an assault induced by resentment at insulting words or irritating behavior is, in the eye of the law, a tortious act.⁹ In any jurisdiction in which the liability of a carrier is deemed to be absolute, it is submitted that this consideration must necessarily be treated as decisive in favor of the passenger's right of action against him.¹⁰ In several of the jurisdictions to which this description is applicable, that right has already been affirmed.¹¹

⁹ For the application of the rule in the civil and criminal cases, see Cooley, *Torts*, 3d ed. 289 (192); Wharton, *Crim. Law*, § 619.

¹⁰ This objection, apart from the others already noticed, may fairly be regarded as sufficient to establish the unsoundness of the Georgia, Michigan, and New York cases cited in the preceding notes.

¹¹ The effect of the most recent Georgia decisions is stated in note 2, *supra*.

In *Baltimore & O. R. Co. v. Barger* (1894) 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560, 8 Am. Neg. Cas. 360, the court thus discussed the correctness of a requested instruction to the effect that, if the jury believed the plaintiff used foul and abusive language to the conductor, which caused or provoked the assault complained of, and that in making said assault the conductor was not acting for the defendant and within the scope of his duties as conductor, but was carrying out a personal purpose and feeling, the defendant was not liable for such act of the conductor: "The theory of that prayer is that the plaintiff had by his conduct forfeited his right as a passenger, and the act of the conductor was merely a personal matter between him and the plaintiff, provoked by the latter, independent of and freed from the relation that had existed between the plaintiff and defendant as passenger and carrier. To such a doctrine we cannot subscribe, under the circumstances of this case. . . . The plaintiff was, at the time of the assault, a passenger on the train which was in charge of

this conductor, who was the agent of the company to see, as far as he reasonably could, that the plaintiff and other passengers were properly treated and carried to their respective points of destination. If the plaintiff persisted in misbehaving on the train, either by the use of foul and abusive language toward the conductor, or in any other way calculated to frighten or materially interfere with the comfort and safety of the other passengers, after being admonished by the conductor, the latter would have been justified in ejecting him from the train. The remedy in such case would be to eject the unruly passenger, not to assault him and then let his employer escape all liability because he, the conductor, was carrying out a 'personal purpose and feeling,' as stated in the prayer. A conductor of a train doubtless has his patience and forbearance severely tested at times, but he must not settle his own personal difficulties with the passengers whilst they are such, any more than he should permit others to do so, when he could avoid it."

In *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456, the court laid down the law as follows: A conductor "cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and, *a fortiori*, he cannot assault a passenger for abusive words, or in revenge or punishment, under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery, or in rightfully ejecting a pas-

In one case the supreme court of New York laid it down, *arguendo*, that "of course the passenger could not recover, if he used the pro-

senger who, by his conduct towards other passengers, has forfeited his right of carriage, the carrier is liable. The fault of the passenger, short of producing a necessity to strike in self-defense, will neither justify the conductor in striking, nor relieve the carrier from liability for his act."

In *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615, the court said: "The use of opprobrious and hot-tempered language by the plaintiff, even though it was justly provocative of anger, and, with his partial intoxication, might have warranted his ejection as a passenger, did not justify the use of physical force upon his person by the conductor, whatever may have been the motive by which he was prompted, and the defendant's duty had not been discharged until the plaintiff had a reasonable opportunity to pass unmolested from the car and to depart. The substantial error of the trial arose from the presumption that, under the circumstances, verbal provocation was the legal equivalent of justification; and, the special findings of the jury not having determined the rights of the parties if the assault was committed as described by the plaintiff, the judge could not properly order a verdict for the defendant. *Hurley v. Boston* (1909) 202 Mass. 68, 88 N. E. 586." After some general remarks regarding the carrier's duty, the court expressed its disapproval of the defense relied upon, *viz.*, "that because the plaintiff, while a passenger, insulted the conductor by the use of abusive language, he contributed to his own harm, or invited the punishment inflicted upon him, and thereafter, during transportation, the defendant was discharged from any further duty to protect him from an assault by its servant. If the plaintiff's words absolved the defendant, then where a passenger purposely behaves in an insulting manner toward a servant, the passenger no longer can claim the protection of the carrier, but is put in jeopardy of a retaliatory assault at any time before transportation has ended, if such be the pleasure of the servant."

In *Weber v. Brooklyn, Q. C. & Subur-*

ban R. Co. (1900) 47 App. Div. 306, 62 N. Y. Supp. 1, the supreme court of New York approved the dissenting opinion of Daniels, J., in *Scott v. Central Park, N. O. & E. River R. Co.* (1889) 53 Hun, 414, 6 N. Y. Supp. 382, and laid down the law as follows: "The conductor cannot rightfully assault the passenger merely because the passenger has insulted him, or otherwise provoked him by mere words, and if he does assault the passenger by reason of such provocation only, unaccompanied by any threats or acts of personal violence, the railroad company will be liable for the consequences of the assault, under the well-established rule which protects passengers against the misconduct of a carrier's servants." This decision was followed in *Baker v. Brooklyn Union Elev. R. Co.* (1911; App. Term) 130 N. Y. Supp. 690.

In *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139, it was held that if a conductor committed an assault upon the plaintiff, any prior conduct on the part of the plaintiff which would not in law justify the assault and battery could not avail the defendant as a defense to the action. This decision was followed in *Galveston, H. & S. A. R. Co. v. La Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488.

The headnote written by the court for *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, is as follows: "Provocation by a passenger, such as interference with employees in the exercise of their functions, abusive language, threats, and assaults upon them, although justifying expulsion from the train, does not bar recovery for injury by the exercise of more force than is actually or apparently necessary to repel the assault or prevent other injury."

In *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018, a disorderly passenger, after having been ejected from a railway car, moved his hand along his side to his hip pocket. Held, that this gesture did not justify the trainman in assaulting him, where such movement was accompanied by the statement, "I'll see you later."

For other cases which recognize the doctrine that a carrier is liable for an

voking language with the intent of bringing on the assault which followed." ¹² This statement has recently been cited with approval in another case decided by the same court. ¹³ But no specific authority was adduced on either occasion for the rule thus formulated, and the writer has not been able to find any such authority in the text-books. The soundness of the suggested qualification of the general rule which treats provocative words as being no excuse for an assault seems to be by no means as clear as the court assumed. As the "intent of bringing on an assault," or, at all events, a reckless disregard of consequences,—which may be regarded as the juristic equivalent of such intent,—is frequently, if not usually, predicable as a matter of fact in any case where one person deliberately provokes another by insulting language, it would seem that the admission of such a qualification would go far towards abrogating the rule itself. The doctrine relied upon in a Texas case, that provoking conduct of which the specific purpose is to bring on a difficulty is contributory negligence, is not likely to meet with much favor in other jurisdictions. ¹⁴

The rule adopted in most of the cases in which the point has been raised is that evidence as to provoking words or conduct on the passenger's part is admissible in mitigation of damages. ¹⁵ But the posi-

assault induced by abusive words or irritating conduct, see *Birmingham R. Light & P. Co. v. Mullen* (1903) 138 Ala. 614, 35 So. 701; *Coggins v. Chicago & A. R. Co.* (1886) 18 Ill. App. 620; *Hanson v. Urbana & C. Electric Street R. Co.* (1897) 75 Ill. App. 474; *Baltimore & O. S. W. R. Co. v. Davis* (1909) 44 Ind. App. 375, 89 N. E. 403; *Philadelphia, W. & B. R. Co. v. Larkin* (1877) 47 Md. 155, 28 Am. Rep. 442; *Coleman v. Yazoo & M. Valley R. Co.* (1907) 90 Miss. 629, 43 So. 473; *Haman v. Omaha Horse R. Co.* (1892) 35 Neb. 74, 52 N. W. 830; *Williams v. Gill* (1898) 122 N. C. 967, 29 S. E. 879; *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018; *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378.

A requested instruction that if the passenger in question brought on the altercation in which he was shot and killed by the conductor in charge of defendant's street car no recovery could be had against the carrier under Rev. Stat. 1899, § 2864, for the passenger's death, was held to have been properly refused in *O'Brien v. St. Louis Transit*

Co. (1908) 212 Mo. 59, 110 S. W. 705, 15 Ann. Cas. 86.

¹² *Weber v. Brooklyn, Q. C. & Suburban R. Co.* (1900) 47 App. Div. 306, 62 N. Y. Supp. 1.

¹³ *Baker v. Brooklyn Union Elev. R. Co.* (1911; App. Term) 130 N. Y. Supp. 690, where the question whether there was such intent was held to be for the jury.

¹⁴ *Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905.

¹⁵ *Jackson v. Old Colony Street R. Co.* (1910) 206 Mass. 477, 30 L.R.A.(N.S.) 1046, 92 N. E. 725, 19 Ann. Cas. 615; *Mason v. Nashville, C. & St. L. R. Co.* (1910) 135 Ga. 741, 33 L.R.A.(N.S.) 280, 70 S. E. 225; *Galveston, H. & S. A. R. Co. v. La Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488; *Houston & S. C. R. Co. v. Batchler* (1903) 32 Tex. Civ. App. 14, 73 S. W. 981; *Norfolk & W. R. Co. v. Brame* (1909) 109 Va. 422, 63 S. E. 1018; *McDade v. Norfolk & W. R. Co.* (1910) 67 W. Va. 582, 68 S. E. 378; *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103.

It is error to charge that, if the conduct of a plaintiff was such as to

tion that only punitive damages are subject to reduction on this ground has also been taken.¹⁶

b. Insolence of servant provoked by insolence of passenger.—In one case it was held that a passenger on a palace car had no right of action against the palace-car company for rudeness of its porter toward him which was induced by his own unreasonable and angry demands.¹⁷ On the other hand, it has been laid down that "an uncivil word by a passenger at the beginning of his journey will not justify the carrier's servants in treating him with insolence to the end of it,"¹⁸ and that an immodest remark addressed by a female passenger to a servant does not justify him in making an insulting proposition to her.¹⁹

2455. Pleading and practice.—*a. Forms of action.*—In jurisdictions where the liability of a carrier is treated as absolute, the remedy of a passenger "may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise."¹ The character of the action may be material with relation to any of the following matters:

(1) The party by whom the action should be brought when the injury results in the death of the passenger. In one case the court, treating the remedial right of the deceased passenger as being founded on contract, held that his administrator was entitled to maintain the action.²

(2) The question of damages. In one case we find this statement: "In actions of assumpsit, the damages are generally limited

exasperate a conductor into an assault, the jury were not entitled to take that conduct into consideration to mitigate compensatory damages; that such mitigation for such a reason could only be had where punitive damages were sought. *Freedman v. Metropolitan Street R. Co.* (1903) 89 App. Div. 486, 85 N. Y. Supp. 986.

¹⁶ *Mahoning Valley R. Co. v. De Pascale* (1904) 70 Ohio St. 179, 65 L.R.A. 860, 71 N. E. 633, 1 Ann. Cas. 896, 16 Am. Neg. Rep. 548.

¹⁷ *Pullman's Palace Car Co. v. Ehrman* (1888) 65 Miss. 383, 4 So. 113.

¹⁸ *Hanson v. European & N. A. R. Co.* (1873) 62 Me. 84, 16 Am. Rep. 404, 8 Am. Neg. Cas. 336.

¹⁹ *Strother v. Aberdeen & A. R. Co.* (1898) 123 N. C. 197, 31 S. E. 386.

¹ *Goddard v. Grand Trunk R. Co.*

(1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316; *Bryant v. Rich* (1870) 106 Mass. 180, 8 Am. Rep. 311, 8 Am. Neg. Cas. 392.

² *Winnegar v. Central Pass. R. Co.* (1887) 85 Ky. 547, 4 S. W. 237. The recovery was allowed for the physical and mental suffering of the decedent up to the time of his death. The court said: The action "is not to recover for the death, nor is it an action of assault and battery, but an action in the nature of an action on the case, for the injuries resulting from a breach of appellee's contract. The relation the parties occupy, the one to the other, is from the contract, and the failure to discharge the duty imposed by it may be a tort; but, nevertheless, it springs from the contract, and the action survives to the administrator."

to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages."³

(3) The question whether the right of recovery shall be determined with reference to the law of the state where the injury was received, or to the law of the state where the action is brought. In one case the former law was treated as controlling, on the ground that the action was *ex delicto*.⁴

(4) The question whether the action can be brought in a court of limited jurisdiction. It has been held that the municipal court of New York, in which no jurisdiction in respect of actions of tort is vested, has jurisdiction of an action of which the gravamen, as stated in the complaint, is that a railway passenger was, in violation of the contract of carriage, maltreated by the railway company through its agents and employees.⁵

³ *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39, 8 Am. Neg. Cas. 316.

⁴ *Pullman Palace Car Co. v. Lawrence* (1897) 74 Miss. 782, 22 So. 53, 2 Am. Neg. Rep. 586, where the decision was rendered with reference to the rule supposed to have been established by the Illinois cases. See § 2417, note 2, *ante*.

⁵ *Busch v. Interborough Rapid Transit Co.* (1907) 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460. The court said: "This action was brought to recover damages for defendant's failure to properly transport plaintiff over its road in the city of New York. The real, substantial element of damages is an alleged assault upon and maltreatment of plaintiff by one of defendant's employees after the former had passed through the gateway onto the platform of one of defendant's stations for the purpose of taking a train, and the sole question is whether the action is one of contract or of tort. This inquiry is of controlling importance, since the municipal court, where the cause originated, had jurisdiction of an action of the former character, and did not have jurisdiction of one of the latter kind. . . . Probably little or no doubt would have arisen as to the form of the complaint or the nature of the action if there had been alleged and proved some act constituting a familiar breach of contract; but the fact that this action was brought to recover damages largely caused by acts ordinarily treated as torts has cast a suspicion upon its char-

acter which, however natural, is not confirmed by legal analysis. It is no bar or answer to the claim of an action in contract that one in tort might have been, and ordinarily would be, brought for the acts really complained of. The dividing line between breaches of contract and torts is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties, whereas the tort ordinarily is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with a contract, and frequently the same facts will sustain either class of action. *Rich v. New York C. & H. R. R. Co.* (1882) 87 N. Y. 382, 390. And so, while it may be conceded that, independent of any express promise or agreement, the defendant would have been subject to duties and obligations in favor of plaintiff, the violation of which by the acts complained of in this case would have amounted to a tort, that is not at all decisive that this action was not and could not be brought in contract." It was held that as a judgment for plaintiff, entered upon the verdict of a jury, had been unanimously affirmed by the appellate division, it must be assumed that there was evidence to support the verdict, and that, in the absence of some objection thereto, it might

b. Allegata et probata.—The writer has found only two cases which bear upon the question whether a complaint which in effect alleges that a passenger was injured by the negligence of a carrier is supported by proof that the injuries in question resulted from assault committed by one of the carrier's agents.⁶ Those cases were both decided by the supreme court of New York, and as they are con-

also be presumed that such evidence was in accordance with, and in support of, the allegations of the complaint.

In *Hart v. Metropolitan Street R. Co.* (1901) 65 App. Div. 493, 72 N. Y. Supp. 797 (first appeal (1901) 34 Misc. 521, 60 N. Y. Supp. 906), where the pleadings were oral, the evidence showed that the plaintiff, with intent to become a passenger upon one of defendant's street cars, boarded the front platform thereof while it was in motion, and was seized by the gripman and thrown from the moving car into the street. Upon these facts it was held that the action should not be treated as one of assault, but rather as one brought to recover damages for the neglect of the defendant to discharge its obligation as a carrier of passengers. The court said: "Under the well-established rule of liability, the defendant cannot maintain that the present action is for a private assault; it undertook to protect its passengers, and the plaintiff having become a passenger, he has a right to look to the defendant for any damages which he may have suffered, and the assault of the individual becomes merely a part of the negligence of the defendant in the discharge of its duty to the plaintiff."

In *Hines v. Dry Dock, E. B. & B. R. Co.* (1902) 75 App. Div. 391, 78 N. Y. Supp. 170, an action to recover damages resulting from the assault of an employee, the complaint was oral and was "for personal injuries." It was held that the action was not to be regarded as one for assault, but rather for breach of contract caused by the misconduct of the defendant's servant.

The above decisions of the supreme court were cited with approval in the *Busch Case*, *supra*.

In *Baumstein v. New York City R. Co.* (1907) 56 Misc. 498, 107 N. Y. Supp. 23, it was held that the municipal court had jurisdiction of an action brought by a passenger on a street car

for an aggravated assault, followed by his arrest.

On the other hand, in *Block v. Nassau Electric R. Co.* (1910) 68 Misc. 320, 123 N. Y. Supp. 949, where suit was brought in that court against a street railway for an assault by its conductor, it was held to be error to instruct that plaintiff, even if he refused to pay fare, was entitled to recover if the conductor used unreasonable force in ejecting him. The reason assigned for the decision was that if he did not pay his fare he was a trespasser, and his action was not for breach of contract, but for assault.

⁶ *Willis v. Metropolitan Street R. Co.* (1902) 76 App. Div. 340, 78 N. Y. Supp. 478. The grounds upon which the dismissal of the complaint was held to have been improper were thus stated: "Under the provisions of § 723 of the Code of Civil Procedure, the court is admonished that, 'in every stage of the action, the court must disregard an error or defect in the pleadings or other proceedings which does not affect the substantial rights of the adverse party;' and 'where the amendment does not change substantially the claim or defense,' the court is authorized to conform the pleading or other proceeding to the facts proved. The facts proved in this case, or at least the evidence from which the jury might reach this conclusion, were that the plaintiff had succeeded in getting on board of the defendant's car, with the intention of becoming a passenger; and whether the action was one for negligence or for an assault, the liability of the defendant was the same; and the pleading sufficiently stated that the accident or injury to the plaintiff resulted from the negligent, careless, or reckless conduct of the defendant's servant while engaged in the transaction of the master's business; and the plaintiff was entitled to go to the jury upon the questions thus presented. If the plaintiff was lawfully upon the defendant's car, with the intention of becoming a pas-

ficting, the point must be regarded as being still open to discussion, so far as regards that state, until it has been definitely settled by the court of appeals.

c. Amendments of complaint.—The effect of the ruling in one case under this head is stated in the note.⁷

d. Suits in rem.—With reference to an Illinois statute, providing that steamboats navigating the rivers within and bordering upon that state shall be liable in an action *in rem* "for any damage or in-

senger, there was an implied contract on the part of the defendant to carry him safely, and an assault committed upon the plaintiff by the defendant's servant while in the discharge of the duty which the defendant owed to the plaintiff was in law a negligent act on the part of the defendant. . . . When the defendant permitted its servant to commit an assault upon the plaintiff, while a passenger, by which the latter was injured, it omitted a legal duty which it owed to the plaintiff, and was thus brought squarely within the rule above laid down. . . . The rule is well settled that, once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger. . . . The pleading may have been defective in technical language or in logical statement, but, as against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment. . . . We believe the weight of authority holds that a passenger upon the cars of a common carrier is entitled to be safely transported, and that any act on the part of the defendant's servants in carrying out this contract, whether carelessly done or done with personal malice on the part of the servant, which results in injury to the plaintiff, must charge the carrier with liability, and that the cause of action, whether for the assault or for the negligence, is properly maintainable against the carrier."

The conclusion arrived at in the above case was admitted by the court not to be in harmony with its earlier decision in *Block v. Third Ave. R. Co.* (1901) 60

App. Div. 191, 69 N. Y. Supp. 1107, where the complaint alleged that the injuries were caused "by reason of the carelessness, negligence, and neglect of the defendant, its servants or agents." Upon the trial it appeared that the injuries resulted from an assault committed by defendant's conductor. Held, that the court has no power, under § 723 of the Code of Civil Procedure, to amend the complaint so as to make it conform to the facts proved. The court argued thus: "If the facts proved had constituted merely an immaterial variance from those alleged in the complaint, no exception could have been taken to what was done; but the change in the complaint went further than to correct an immaterial variance. The scope of the original allegation in the complaint was that simply of a negligent act on the part of one of the defendant's servants. That meant simply that in the performance of the duty towards its passengers which it must devolve upon its servants, the defendant had failed; but, as proved, the act was not a failure to perform a duty which the defendant had placed upon upon its servants, but a wilful and unnecessary act done by a servant entirely outside of the duty with which the defendant had intrusted him, and one which the defendant had no reason to believe a servant would be guilty of, and which it was absolutely impossible for the defendant to prevent. This was an entire change in the scope of the action. The duty which the defendant failed to perform, as made out by the proof, and for which, if at all, the defendant was liable to the plaintiff, was an entirely different duty from that which was alleged in the complaint."

⁷ In *Connell v. New York, O. & W. R. Co.* (1909) 134 App. Div. 231, 118 N. Y. Supp. 944, a complaint alleged that the plaintiff, while a passenger on the

jury done by the captain or mate or other officer thereof, or by any person under the order or sanction of either of them, to any person who may be a passenger or hand on such steamboat," it was held that an action of trespass could be maintained against the steamboat for an assault and battery by the mate of the boat upon a passenger while such boat was navigating a river within or bordering upon that state.⁸

With reference to an Ohio statute of a similar tenor it was held that an action could not be maintained against the boat for an assault committed upon it outside of the state.⁹

2456. Duty of carrier to protect passengers against injuries from the wilful torts of other passengers.—*a. Doctrine prevailing in the United States.*—The question how far a carrier is responsible to a passenger for injuries caused by the wilful tort of another passenger, although, strictly speaking, it does not fall within the scope of this chapter, is so closely connected with the subject-matter of the preceding sections that some reference to it will be advisable. The doctrine which is now firmly established in the United States may be formulated thus: For any injury which a passenger sustains by reason of the tortious act of another passenger, the carrier may be held answerable, if his servants whose duty it was to protect the injured passenger could, by the exercise of that degree of care which the contract of carriage imposes upon them, have foreseen and prevented the act complained of.¹ The *rationale* of this doctrine is that a carrier

defendant's train was, when the train stopped at a certain station, without fault on her part, maliciously and violently assaulted and ejected from the train by the defendant. It was held that an amendment alleging that the injuries received by the plaintiff were permanent, and that the defendant failed "to protect the plaintiff from assault and violence," did not change the cause of action, as it was still limited to assault committed by the defendant's servant at the station mentioned. On the other hand, the court was of opinion that an amendment stating "that the defendant failed and neglected to protect the plaintiff from assault and violence caused by others while plaintiff was a passenger on said train," and providing that the answer be deemed amended so as to deny such allegation, was unauthorized, first, because it deprived the defendant of its right to answer or demur, and, second,

because it would allow the plaintiff to recover by reason of the defendant's failure to protect the plaintiff from assault of persons not its employees, at places upon its road other than the station mentioned.

⁸ *Loy v. The F. X. Aubury* (1862) 28 Ill. 412, 81 Am. Dec. 292 (act of February 16, 1867).

⁹ *The Champion v. Jantzen* (1847) 16 Ohio, 91.

¹ For cases in which affirmations of the duty of a carrier to protect passengers against the wilful torts of other passengers was coupled with general statements of doctrine with regard to his duty to protect passengers against the wilful torts of his servants, see *New Jersey S. B. Co. v. Brockett* (1886) 121 U. S. 645, 30 L. ed. 1050, 7 Sup. Ct. Rep. 1039; *Pendleton v. Kinsley* (1871) 3 Cliff. 416, Fed. Cas. No. 10,922; *Birmingham R. & Electric Co. v. Baird* (1900) 130 Ala. 334, 54 L.R.A.

is bound to convey his passengers safely, so far as that result can be accomplished by due diligence, and is consequently answerable for

752, 89 Am. St. Rep. 43, 30 So. 456; *Chicago & E. R. Co. v. Flewman* (1882) 103 Ill. 546, 42 Am. Rep. 33; *Missouri, K. & T. R. Co. v. Weaver* (1876) 16 Kan. 456; *Atchison, T. & S. F. R. Co. v. Henry* (1895) 55 Kan. 715, 29 L.R.A. 465, 41 Pac. 952, 8 Am. Neg. Cas. 280; *Goddard v. Grand Trunk R. Co.* (1869) 57 Me. 202, 2 Am. Rep. 39; *Quigley v. Central P. R. Co.* (1876) 11 Nev. 350, 2 Am. Rep. 757; *Haven v. Central R. Co.* (1898) 62 N. J. L. 282, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916, 5 Am. Neg. Rep. 197; *Gillespie v. Brooklyn Heights R. Co.* (1904) 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, 16 Am. Neg. Rep. 181; *Penny v. Atlantic Coast Line R. Co.* (1910) 153 N. C. 296, 32 L.R.A. (N.S.) 1209, 69 S. E. 238 (employee traveling while off duty was treated as a passenger); *Knowville Traction Co. v. Lane* (1899) 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; *Dillingham v. Anthony* (1889) 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; *Bess v. Chesapeake & O. R. Co.* (1891) 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234, 7 Am. Neg. Cas. 126.

For other cases in which the rule stated in the text has been applied or recognized, see *Flint v. Norwich & N. Y. Transp. Co.* (1868) 34 Conn. 554, Fed. Cas. No. 4,873 (assault); *Richmond & D. R. Co. v. Jefferson* (1892) 89 Ga. 554, 17 L.R.A. 571, 32 Am. St. Rep. 87, 16 S. E. 69 (doctrine held to be applicable to colored no less than to white passengers); *Evansville & I. R. Co. v. Darting* (1893) 6 Ind. App. 375, 33 N. E. 636, 8 Am. Neg. Cas. 198 (assault encouraged by conductor); *Spangler v. St. Joseph & G. I. R. Co.* (1903) 68 Kan. 46, 63 L.R.A. 634, 104 Am. St. Rep. 391, 74 Pac. 607, 15 Am. Neg. Rep. 299 (missile flung at train by persons who, to the conductor's knowledge, had misbehaved themselves while they were on the train, and threatened to revenge themselves upon certain passengers after they had reached their destination); *Louisville & N. R. Co. v. Finn* (1894) 16 Ky. L. Rep. 57 (assault by drunken man); *United R. & Electric Co. v. State* (1901) 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923 (failure to remove from street car drunken pas-

senger whose behavior is such as to threaten danger to other passengers); *Glennen v. Boston Elev. R. Co.* (1911) 207 Mass. 497, 32 L.R.A. (N.S.) 470, 93 N. E. 700 (female passenger with a small child in her arms was entitled to protection from being jostled, etc., by other passengers, commensurate with the impairment of her ability to care for herself, resulting from carrying the child); *Lucy v. Chicago G. W. R. Co.* (1896) 64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944 (insult and abuse by a drunken man); *New Orleans, St. L. & C. R. Co. v. Burke* (1876) 53 Miss. 200, 24 Am. Rep. 689 (conductor allowed passengers to use insulting words to plaintiff without any attempt to stop their misconduct); *Putnam v. Broadway & S. Ave. R. Co.* (1873) 55 N. Y. 108, 14 Am. Rep. 190 (liability denied on the ground that there had been nothing to indicate to the conductor that an assault might be committed); *Graham v. Manhattan R. Co.* (1896) 149 N. Y. 336, 43 N. E. 917, 9 Am. Neg. Cas. 648 (passenger jostled by crowd during quarrel between guard and drunken man); *Hendricks v. Sixth Ave. R. Co.* (1878) 12 Jones & S. 8 (conductor of street railway car introduced into it a drunken, quarrelsome, and indecently dressed passenger, who afterwards assaulted the plaintiff); *Penny v. Atlantic Coast Line R. Co.* (1903) 133 N. C. 221, 63 L.R.A. 497, 45 S. E. 563 (passenger injured while alighting by reason of failure to warn him that two other passengers had engaged in an altercation just after leaving the train); *Pittsburg & C. R. Co. v. Pillow* (1874) 76 Pa. 510, 18 Am. Rep. 424 (passenger on train injured through the quarrel of two drunken men who should not have been allowed to be on the cars, or, if allowed, should have been guarded).

The subject is dealt with in Elliott, *Railroads*, § 1639; Hutchinson, *Carr.* 3d ed. §§ 980 *et seq.*

The duty of a carrier to protect a passenger against the negligent acts of other passengers was affirmed in *Simmons v. New Bedford, V. & N. S. B. Co.* (1867) 97 Mass. 361, 93 Am. Dec. 99.

the manner in which his obligation in this regard is performed by the servant to whom its execution is delegated.² Liability upon this ground cannot ordinarily be predicated unless the evidence shows either that the tort alleged was committed in the presence of the carrier's servants, or that, before the time when the passenger was injured, they had notice, actual or constructive, that it was likely to be committed.³ But a more stringent obligation is imposed by a statute of which the effect is to render unlawful the particular situation which existed at the time when the given injury was sustained.⁴

² *Pittsburgh, Ft. W. & C. R. Co. v. Hinds* (1866) 53 Pa. 512, 91 Am. Dec. 224, 8 Am. Neg. Cas. 602 (conductor did not interfere to stop fight between fellow passengers of plaintiff); *Culberson v. Empire Coal Co.* (1908) 156 Ala. 416, 47 So. 237 (trainmen did not interfere to prevent assault upon plaintiff by another passenger); *Sherley v. Billings* (1871) 8 Bush, 147, 8 Am. Rep. 451 (assault).

In *New Orleans, St. L. & C. R. Co. v. Burke* (1876) 53 Miss. 200, 24 Am. Rep. 689 (assault by railway servants traveling, while off duty, as passengers), the court made the following remarks: "If it be asked, then, what principle is it that imposes upon a railroad company the duty of preserving good order on its trains, and makes it liable for all injuries sustained by reason of a failure to discharge this duty, we answer, that it springs out of the obligation resting upon it to use every power with which it is invested to transport the passenger safely to his destination. . . . We conclude, then, that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and, if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power, when called upon so to do in a proper case by the other passengers; that a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty; and, upon the maxim *Respondeat superior*, renders the corporation liable."

³ *Wright v. Chicago, B. & Q. R. Co.* (1893) 4 Colo. App. 102, 35 Pac. 196, 8 Am. Neg. Cas. 89 (liability denied where trainmen were at their posts and could not hear the plaintiff's call for

help); *Sira v. Wabash R. Co.* (1893) 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905 (liability denied where a female passenger, after alighting from a train to wait for another one, accepted the offer of a man who had traveled on the same train to escort her to a hotel, and was there abused and ravished by him); *Britton v. Atlanta & C. Air-Line R. Co.* (1883) 88 N. C. 536, 43 Am. Rep. 749 (liability affirmed where notice of probability of assault was shown); *Ferry Cos. v. White* (1897) 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583 (liability affirmed where officers of steamboat had reason to apprehend careless use of loaded gun by passenger); *Prokop v. Gulf, C. & S. F. R. Co.* (1904) 34 Tex. Civ. App. 520, 79 S. W. 101 (writ of error refused by supreme court) (liability affirmed where woman who had entered a station to take passage on a train was assaulted in the waiting room, which the employees had failed to light); *Segal v. St. Louis Southwestern R. Co.* (1904) 35 Tex. Civ. App. 517, 80 S. W. 233 (liability denied where a negro assaulted a woman in a well lighted car, while the trainmen were temporarily absent at their supper).

⁴ The qualification of the general rule is illustrated by the cases in which carriers have been held liable on the ground that the passenger who inflicted the injury would not have been in the same railway car as the one who was injured if a statute prescribing that white and colored passengers should be segregated had been duly enforced by the trainmen. With reference to the Kentucky enactment of this tenor (Ky. Stat. § 799, Russell's Stat. § 5347), it was held in *Quinn v. Louisville & N. R. Co.* (1895) 98 Ky. 231, 32 S. W. 742, that the jury should have been instruct-

b. Doctrine prevailing in England and the British Possessions.—

By the English Queen's bench division the right of action was in one instance denied under circumstances which, in the United States, would undoubtedly have been regarded as entitling the injured pas-

ed that a cause of action in favor of a negro woman insulted by the language of a drunken white passenger who was riding, with the knowledge of the conductor, in the coach set apart to negroes, was not defeated by the ignorance of the conductor that the passenger intended to misbehave himself.

In *Wood v. Louisville & N. R. Co.* (1897) 101 Ky. 703, 42 S. W. 349, a case involving substantially the same facts as the one just referred to, it was held to be error to instruct the jury that the defendant was not liable for any annoyance and insults sustained by a passenger, of which its employees had no knowledge, and which it had used reasonable care to prevent, and that the correct instruction would have been that if those in charge of the train permitted white men to remain in the compartment set aside for colored people, the company was responsible for their conduct so long as they should remain there, and was liable for the annoyance and insults sustained by the colored passengers as a result thereof, although the employees did not know what was taking place.

In *Louisville & N. R. Co. v. Renfro* (1911) 142 Ky. 590, 33 L.R.A.(N.S.) 133, 135 S. W. 266, the court, after referring to the above cases, proceeded thus: "Under the principles announced in these cases, which we approve, there could be no doubt if Jones had been assigned to or permitted to be or remain in the colored compartment by or with the consent of the conductor that the railroad company would be liable to a passenger in the colored compartment for any misconduct or violence of Jones. But there is no evidence that the conductor, who was in charge of the train, knew or had any information that Jones was in or intended to go in the colored compartment until after the difficulty. Jones was not in this compartment when the conductor passed through it, and at the time he went in, the conductor was in another part of the train, collecting tickets and fares. It therefore cannot be said that the conductor was in any respect neglectful of

his duties under the statute. . . . Unless the passenger who is in the coach or compartment set apart for the other race commits some act of violence or is guilty of rude, insulting, or abusive conduct that is calculated to humiliate or wound the feelings of passengers rightfully occupying the coach or compartment, no one of these passengers will have any cause of action against the company for the failure of the conductor to observe the law. . . . As it was the purpose of this statute to only hold responsible, and punish for a failure to perform the prescribed duty, the person in charge of the train, whether he be called a conductor or manager, and as no other person except the one in control of the train is charged with the duty of enforcing the law, or punished for his failure to do so, the company cannot be held responsible in a civil action for any act or omission of duty in respect to the enforcement of this law, unless it is committed by the person in charge of the train; to wit, the conductor or manager. But we are further of the opinion that if a brakeman, porter, or other employee connected with the passenger department of the train in the performance of duties that relate to the comfort, convenience, or safety of the passengers, knows or has information that a passenger is riding in a car or compartment set apart for another race, that he should, as soon as practicable and within a reasonable time, notify the conductor of this fact, and that the conductor, upon receiving the information, should, as soon as practicable and within a reasonable time, remove the offending passenger. Brakemen and porters are servants of the company under the control of the conductor, and while they are not charged with the enforcement of the law, or personally responsible for a failure to execute it, it is nevertheless their duty as servants of the company and assistants of the conductor to use all reasonable means to secure obedience to the statute; and when one of these subordinate employees knows or has information that this statute is being violated, and

senger to recover.⁵ But the validity of that decision as a precedent is quite doubtful. It has been commented upon both favorably and unfavorably by the members of the House of Lords.⁶ But the point actually determined in the case in which those comments were made was merely that, even if it were conceded that a duty on a carrier's part to protect his passengers against threatened ill-treatment by other passengers may properly be predicable in respect of some situations,

fails as soon as practicable and within a reasonable time to notify the conductor of the fact, the company should be held responsible upon the ground that through its employees it is consenting to or acquiescing in a violation of the law."

⁵ *Pounder v. North Eastern R. Co.* [1892] 1 Q. B. 385. There it was proved that the plaintiff had been employed in the eviction of pitmen from their houses, and had thereby incurred the ill-will of the pitmen in the neighborhood in which he was traveling; but that when he took his ticket, the defendant's servant had no notice that he was exposed to greater danger than one of the ordinary traveling public; that before the train started he was threatened, in the hearing of some of the defendants' servants, with violence by a number of pitmen at the station, and got into the guard's van for safety, but was removed and placed in a third-class carriage by the defendants' servants, who at this time knew that he had been engaged in the evictions and feared violence from the pitmen; that pitmen crowded into the compartment in which he was, thereby greatly overcrowding it; that the defendants' servants, when applied to by him, did nothing towards attempting to get the pitmen out, or to get the plaintiff a seat in another carriage; that he was assaulted and injured by the pitmen during the journey to the first station at which the train stopped, and they repeated the assaults upon him; that this happened at each station at which the train stopped, and at each station he complained of the assaults to the guard, who did nothing to secure his safety. Held, that there was no evidence of a breach by the defendants of any duty to the plaintiff arising out of the contract of carriage, and therefore that they were not liable in

the action. The position of the court is indicated by the following remarks of Mathew, J.: "It was agreed on all hands in the course of the argument what the obligation of a railway company in such a case is. The railway company are bound to take reasonable care for the safety of their passengers. The controversy was as to how that reasonable care was to be measured; and I am clearly of opinion that it can only be ascertained by reference to the ordinary incidents of a railway journey, and by reference to what must be taken to have been in the contemplation of the parties when the contract of carriage was entered into."

⁶ In *Cobb v. Great Western R. Co.* [1894] A. C. 419, Lord Selborne remarked: "For my own part, if I thought it necessary in the present case to consider the correctness of that decision, I doubt whether I should be prepared to follow it. . . . I am unable at present to see a distinction satisfactory to my own mind between such a case and that which the Master of the Rolls justly distinguished from the present, when he said that (in this case) it 'was not alleged that the plaintiff was being ill-used or assaulted in the train, and that, the fact being made known to the defendant's servants, they did not interfere to prevent it.'" Lord Watson declined to express any definite opinion concerning the *Pounder Case*, which he regarded as involving the "delicate question whether any, and if so what, duty a railway company owes to a passenger who is so obnoxious to other persons using the railway that he runs the obvious risk of being assaulted by them." The observations of Lord Macnaghten and Lord Shand were also of a noncommittal character; but Lord Morris was disposed to agree with the decision rendered.

no breach of that duty was shown by the facts alleged.⁷ The decision referred to at the commencement of this subsection seems to be essentially inconsistent with a judgment of the Privy Council,⁸ and its authority has been explicitly repudiated in Canada.⁹ It has also been

⁷In *Cobb v. Great Western R. Co.* *supra*, the statement of claim alleged in substance that the plaintiff, while a passenger in a train of the defendant company, which was then stopping at a railway station, was robbed by a gang of men who entered the carriage where he was then seated; that the plaintiff forthwith complained of the robbery to the station master, but he refused to detain the train to permit the plaintiff to give the men into custody and have them searched, and immediately, upon the plaintiff's complaint being made to him, gave the signal for the train to leave, and it started, whereby the plaintiff was prevented from having the men searched and his property recovered; that there was, in and about the station, as the station master well knew, a large force of police ready and willing to effect the arrest for the plaintiff and to search those arrested, but they were prevented from doing so by the action of the station master in starting the train; that the plaintiff's money was still in the carriage when the plaintiff made his complaint, and might and would then have been recovered had the station master afforded time for the necessary search. Also that the defendant company was negligent in permitting the carriage to be overcrowded and so facilitating the hustling and robbing of the plaintiff. The plaintiff claimed as damages the amount of money of which he had been robbed. Held, affirming [1893] 1 Q. B. (C. A.) 459, 62 L. J. Q. B. N. S. 335, 4 Reports, 283, 68 L. T. N. S. 483, 41 Week. Rep. 275, 57 J. P. 437, that the statement of claim disclosed no breach of duty on the part of the defendant company, and no cause of action. After referring to the *Pounder Case*, *supra*, Lord Selborne said: "The present case is quite different; the plaintiff's complaint was made, not before, but after, he had been robbed. It is not alleged that there was any failure to 'protect him in person and property' down to the time he made that complaint, unless the mere fact of 'permitting the carriage to be over-

crowded' was such a failure. As to this, I do not think it necessary to say more than that, on the plaintiff's pleading, it is not shewn that the overcrowding of the carriage did in fact conduce in any way, directly or indirectly, to the robbery; and on the assumption that, under some possible circumstances, this might have been actionable negligence, it would, in my judgment, be indispensable, for that purpose, to state and prove some actual connection between the overcrowding and the loss. It is not, in my opinion, enough to suggest (as the plaintiff does) that to suffer such overcrowding was to 'facilitate the hustling and robbing of the plaintiff.' As the case is stated by him, nothing turns upon the fact that the robbery was committed by a 'gang' of more than nine persons."

⁸In *East Indian R. Co. v. Kalidas Mukerjee* [1901] A. C. 396, 17 Times L. R. 284, 70 L. J. P. C. N. S. 63, 84 L. T. N. S. 210, where the plaintiff's son had been killed by the explosion of fireworks brought into a railway carriage by two other passengers, the Privy Council (affirming the judgment of an Indian court) took the position that, in order to recover under the circumstances shown, it was incumbent on the plaintiff to prove that the railway company had been guilty of negligence in permitting the fireworks to be brought into the carriage. In this instance the burden of proving negligence had not been discharged, because no evidence had been advanced which showed that any of the company's servants knew, or had any opportunity of knowing or inquiring, what the parcels in question contained, or that their appearance was such as to suggest the existence of danger. It was declared that a railway company is not liable as a common carrier of passengers; that its obligation is not to carry safely, but to carry with reasonable care and diligence.

⁹*Canadian P. R. Co. v. Blain* (1903) 34 Can. S. C. 74, affirming (1903) 5 Ont. L. Rep. 334.

assailed with great force of argument by a well-known English jurist.¹⁰

¹⁰ Mr Beven in the Law Magazine (Eng.) Vol. 18, p. 49. The learned author pointed out that the conclusion arrived at was wholly at variance with the doctrine applied by the American courts, and that the passage quoted in note 5, *supra*, from the judgment of Mathew, J., did not propound the principle upon which the liability of the defendant really depended; the actual question for determination being merely whether the railway company was bound to protect the plaintiff from a given danger to which he was, to its knowledge, exposed. To the present writer the reasoning in this article seems to be conclusive against the soundness of the decision criticized.

CHAPTER CIV.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER FOR INJURIES OCCASIONED BY THE WILFUL TORTS OF HIS SERVANTS TO THIRD PERSONS STANDING IN A CONTRACTUAL RELATIONSHIP TO HIM. CONTRACTS OTHER THAN THAT OF CARRIAGE.

A. ACTS INJURIOUS TO THE PERSON.

2457. Assaults committed by servants of innkeepers.

2458. —by servants employed at restaurants, public houses, saloons, etc.

2458a. —by servants of canal companies.

2459. —by servants employed at places of amusement.

B. ACTS INJURIOUS TO PROPERTY.

2460. Liability of bailees.

2461. Liability of a contractor for his servant's misfeasance in respect to the thing stipulated.

A. ACTS INJURIOUS TO THE PERSON.

2457. Assaults committed by servants of innkeepers.—In the leading English case on the subject it was observed that, “if the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his movables, which he brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person.”¹ These words can only mean that, in the view of the court, the common law did not impose any liability upon an innkeeper in respect of safeguarding his guests against maltreatment, either by his own servants or other guests or strangers. This doctrine has, by the subsequent development of the principle, *respondeat superior*, been so far modified that an innkeeper, like any other employer, is now treated as being answerable for any injuries which his guests may sustain from acts of violence committed by his servants within the scope of their duties. According to some of the modern decisions his liability goes no further than this.²

¹ *Calye's Case* (1584) 8 Coke, 32a.

² In the following cases the liability of innkeepers for the assaults in question was explicitly affirmed on the ground that the torts were committed while the servants were acting within the scope of their employment: *Wade v. Thayer* (1871) 40 Cal. 578 (assault committed by a clerk and porter, while they were attempting to eject a guest

The acceptance of this view involves a rejection of the doctrine that the relation of an innkeeper to his guests and the relation of a

from the defendant's hotel); *Overstreet v. Moser* (1901) 88 Mo. App. 72 (assault committed by watchman while engaged in preventing the plaintiff from going to a certain part of defendant's hotel); *Morris Hotel Co. v. Henley* (1906) 145 Ala. 678, 40 So. 52 (assault committed for the purpose of preventing the plaintiff from entering a certain room).

In *Curtis v. Dinneen* (1886) 4 Dak. 245, 30 N. W. 148, where a man employed as a servant by his wife, an innkeeper, committed an assault upon a guest while they were engaged in a personal altercation, it was held that she could not be held liable under the principle, *respondeat superior*. For the other point decided in this case, see § 2222, *c. ante*.

In *Rahmel v. Lehndorff* (1904) 142 Cal. 681, 65 L.R.A. 88, 100 Am. St. Rep. 154, 76 Pac. 659, where the defendant was held not liable to a guest for an assault made by a waiter in the course of a personal altercation, the court thus stated its position: "An innkeeper is, no doubt, guilty of negligence if he admits to his hotel or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities who will probably assault or otherwise maltreat his guests, and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. And if, as in the Philadelphia Case [*Rommel v. Schambacher* (1887) 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779], he stands by while a guest is exposed to the violence of a person who has been made dangerous by his fault, and sees an injury inflicted without any effort to prevent it, he may be regarded as *particeps criminis*. This case, however, presents no such features; there is neither allegation nor finding that the defendant was negligent in employing or retaining the waiter who committed the assault. So that there is no ground upon which this judgment can be sustained, unless we are prepared to hold that to the same extent that a common carrier is

an insurer of his passengers, an innkeeper is an insurer of his guests against the torts of his servants. We cannot discover any safe ground for such a conclusion. No statute of California imposes such a rule, and no evidence is to be found in the reports of decided cases that such was the rule at common law."

In *Clancy v. Barker* (1904) 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, a boy, while a guest with his mother and father at defendant's hotel, was attracted by curiosity to a room not occupied by guests, where a bell boy and an elevator boy were off duty. The bell boy warned him not to touch anything, and at the same time pointed a pistol at him. The weapon was accidentally discharged and wounded him. The evidence was held to be inconsistent with the inference that the wrongful act was done by the tort-feasor in the course of his duties. The theory that the defendant might be held responsible as an insurer of the safety of his guests was rejected on grounds thus stated by Sanborn, J., in the opinion delivered for the majority of the court (dissenting, Thayer, J.): "The argument in support of this contention is that common carriers are liable for the negligent or wilful acts of their servants to whom they intrust the care, custody, and control of the passengers they transport, and that the liability of innkeepers to their guests is similar to that of carriers to their passengers. There are many reasons, however, why this argument is not persuasive, and why it fails to demonstrate that an innkeeper insures the safety of the persons of his guests against the injuries inflicted by his servants when they are not engaged in the discharge of their duties as employees. While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar; and while that proposition may be conceded,—it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of

carrier to his passengers are so closely similar in these essential incidents, that an innkeeper may warrantably be deemed to be sub-

its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation fraught with no extraordinary danger. *Sandys v. Florence* (1878) 47 L. J. C. P. N. S. 598, 600. It no more follows, from the similarity of the liability of the carrier to that of the innkeeper, that the latter is liable for the wilful or negligent acts of its servants beyond the scope of their employment, than it does that the latter is liable for a failure to exercise the highest possible care to make his hotel and its operation safe for its guests, because the carrier must exercise that degree of care in the management of its railroad, engines, and trains. Again, there is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relations of the parties to these contracts. In the former, the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. . . . The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth, and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master, and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wil-

ful act of such servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he should occupy it; but they leave him free to use or to fail to use it, and all the other means of entertainment proffered, when and as he chooses, and to retain the uncontrolled dominion of his person and of his movements. The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper, in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety. The servants of the innkeeper are not placed in charge of the person of the guest, to direct, guide, and control his location and action, nor are they employed to perform any contract to insure his safety; but they are engaged in the execution of the agreement of the master to exercise ordinary care for the comfort and safety of the visitor. The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts. Moreover, the authorities in the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, upon which counsel for the plaintiff seems to rely, when carefully examined, are found to be cases in which the servants were acting within

ject as regards his guests to an absolute obligation of the same character and scope as that which, in the view of most of the American courts, is imposed upon a carrier. See preceding chapter. But the reasoning by which the rejection is supposed to be justified is scarcely satisfactory. It is no doubt possible to draw various distinctions between the circumstances of a guest and of a passenger, and in one of the cases already referred to, the points of contract have been elaborated with much ingenuity.³ But it may well be doubted whether these distinctions are sufficiently important to furnish a foundation for a different standard of liability. There is much difficulty in admitting that they require a court to return a negative answer to the question which, in the final analysis, is the only one to be determined in this connection; *viz.*, whether the duty which, as is conceded by all the authorities, lies upon innkeepers to treat their guests properly, is absolute in its quality. With relation to that question, it would rather seem that the analogy of the cases in which a similar duty is predicated in regard to carriers may reasonably be considered as a factor which is strongly persuasive, if not conclusive.

The position that a guest is entitled to hold an innkeeper liable for the misconduct of his servant, even though it may be outside the

the course or scope of their employment, and they do not rest upon the proposition that the defendants in those cases were liable for the wilful or negligent acts of their employees beyond that scope. . . . When all these authorities, and others cited by counsel for the plaintiff, are carefully considered, it clearly appears that the controlling reasons why common carriers have been held liable for the wilful or negligent acts of their servants in these cases are: (1) That they owe to their passengers the highest degree of care; and (2) that during the transportation they intrust the entire care, custody, and control of their trains, steamboats, and passengers to these servants, and the passengers yield obedience and control of their movements to these servants, under conditions of peril and subordination in which the passengers are confined and helpless, and the servants in charge of the train are practically the vice principals of the defendants. *Bass v. Chicago & N. W. R. Co.* (1874) 36 Wis. 450, 463, 17 Am. Rep. 495. There are no such reasons for the existence of the liability of innkeepers for the wilful or negligent acts of their servants beyond

the scope of their employment, and the argument of counsel in support of such an extension by analogy with the liability of common carriers fails (1) because innkeepers are not liable to their guests for extraordinary care, while carriers are liable to their passengers for the highest degree of care; (2) because innkeepers do not intrust to their servants the absolute control and dominion of their hotels and of the persons of their guests, nor do the latter surrender themselves to the dominion and direction of such servants; and (3) because the wilful and negligent acts of their servants, for which carriers have been held liable, were committed in the discharge of the duties which they were employed to perform, while those of the servants of innkeepers, now under consideration, were done outside the actual and the apparent scope of their employment." The court refused to follow the decision of the supreme court of Nebraska, cited in the following note.

³ See the extract from the opinion of Sanborn, J., in the *Clancy Case*, note 2, *supra*.

scope of his employment, has been categorically taken in Nebraska.⁴ A similar theory is reflected in the language used in a recent New

⁴ In *Clancy v. Barker* (1904) 71 Neb. 83, 69 L.R.A. 642, 115 Am. St. Rep. 559, 98 N. W. 440, 8 Ann. Cas. 682, which was an action brought by the father of the plaintiff in the case of the same title which is cited in note 2, *supra*, the hotel keeper was held to be liable. Albert, J., in the opinion delivered for the majority of the court, said: "The defendants insist that, the plaintiff having failed to allege that the servant wilfully or maliciously inflicted the injury, it was incumbent on him to show that the injuries were the result of negligence on the part of the servant in the performance of some duty for which he was employed, or in the discharge of some duty which the defendants owed the plaintiff. We think they overlooked the theory upon which this action was brought and prosecuted. The plaintiff, by his petition and evidence, obviously intended to commit himself unreservedly to the theory that his cause of action is *ex contractu*. A contract is alleged in the petition. The wrongful acts of the servant, which resulted in injury to the boy, are alleged not for the purpose of stating a cause of action *ex delicto*, but for the purpose of showing a breach of contract and consequent damages." After referring to some of the decisions relating to the obligation of a carrier to protect his passengers, the learned judge proceeded thus: "An examination of the foregoing cases will show, we think, that the reasoning applies with equal force to a hotel keeper, as regards his duties to his guests. Those duties spring from the implied terms of his contract, and a failure to discharge them, and while it may in some instances amount to a tort, amounts in every instance to a breach of contract. If, then, the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of, obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule which requires that a guest at a hotel be treated with due consideration for his comfort and safety would be of little value if limit-

ed to the proprietor himself. As a rule, he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as guests; and, if they be not thus treated, there is a breach of the implied contract, whether the lack of such treatment is the result of some act or omission of the proprietor himself, or of his servant or servants. Neither do we deem it material whether the servant at the time of the injury was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor, and an inmate of the hotel. His duty as to the treatment to be accorded the guests of the hotel was a continuing one, and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty." On a rehearing of this case ([1904] 71 Neb. 91, 69 L.R.A. 648, 115 Am. St. Rep. 565, 103 N. W. 446, 8 Ann. Cas. 684), the court adhered to its opinion and declined to follow the judgment which had been delivered by the Federal court of appeals since the first hearing. Sedgwick, J., said: "Whether the relation that exists between a keeper of a hotel and his guests makes the former liable for any misconduct of his employees by which his guests are injured while they are in the hotel and are in his care is a more difficult question. It is admitted that common carriers under such circumstances are liable. It is said that the reason for this is that the passenger places himself in the care of the employees of the carrier, and is continually in their care, so that whatever they do while the passenger is being transported is within the scope of their employment. The hotel keeper is also bound to bestow reasonable care for the safety and comfort of his guests. He is not an insurer of his guests; but neither is the carrier an insurer of his passengers. The carrier, of course, is bound to use extraordinary care—as is

York case; but the wrongful act under consideration was clearly done in the course of the tort-feasor's duties.⁵ By the supreme court of

sometimes said, the utmost care—for the safety of his passengers. The business engaged in is a dangerous one, and the care should be in proportion to the danger that exists. In this respect there is a difference between the two situations, but both perform public duties, and are bound to serve any individual who requires their service and suitably applies for it. The hotel keeper offers accommodations for strangers, who are not acquainted with his employees, and who have no voice in their selection. He undertakes to provide them with suitable accommodations, and with at least a certain degree of care for their comfort and safety. He has some control over their persons and conduct. He must not allow such conduct on their part as will interfere with the reasonable hospitality which he owes to other guests. It may be that the carrier has greater control over the persons and conduct of passengers, but this idea seems to be exaggerated in some of the opinions. In what sense does the porter of a sleeping car have charge of the occupants of the car, and have control of their conduct and behavior? Surely, if it is different in degree from the control that the hotel keeper has over his guests, it is not much different in kind. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so, and is under obligation to select such employees as will look after the safety and comfort of his guests, and will not commit acts of violence against them, so far as is reasonably within his power. It would seem that to relieve him from liability for injuries done to his guests by his employee upon the sole ground that the employee was not then in the active discharge of some specific duty in connection with his employment, and hold the carrier responsible under similar condition, is making a fine distinction. The liability of a common carrier under such circumstances is a doctrine of modern growth. There does not appear to be reason for establishing such doctrine that would not equally apply, under modern conditions, to the relations between an innkeeper and his guests."

⁵ In *De Wolf v. Ford* (1908) 193 N.

Y. 397, 400, 401, 21 L.R.A.(N.S.) 860, 127 Am. St. Rep. 969, 86 N. E. 527, reversing (1907) 119 App. Div. 808, 104 N. Y. Supp. 876, where the defendant's servant forcibly entered a woman's room, subjected her to the mortification of exposing her person in scant attire, and to the ignominy of being accused of immoral conduct, and finally ordered her and her visitor to leave the house, the dismissal of the complaint by the lower court was held to have been error, for reasons thus stated: "If the defendants, in these circumstances, are not to be held responsible, it must be upon the theory that they owed no duty to the plaintiff in respect of her convenience, privacy, safety, and comfort while she was their guest, and that an innkeeper is immune from liability for any maltreatment which he or his servants may inflict upon a guest be it ever so wilful or flagrant. We think it may safely be asserted that this has never been the law, and that no principle so repugnant to common decency and justice can ever find lodgment in any enlightened system of jurisprudence. . . . One of the things which a guest for hire at a public inn has the right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract, whether it is express or implied. This right of the guest necessarily implies an obligation on the part of the innkeeper that neither he nor his servants will abuse or insult the guest, or indulge in any conduct or speech that may unnecessarily bring upon him physical discomfort or distress of mind. The innkeeper, it is true, is not an insurer of the safety, convenience, or comfort of the guest. But the former is bound to exercise reasonable care that neither he nor his servants shall by uncivil, harsh, or cruel treatment destroy or minimize the comfort, convenience, and peace which the latter would ordinarily enjoy if the inn were properly conducted, due allowance being always made for the grade of the inn and the character of the accommodation which it is designed to afford. Upon the facts of record, considered in the light of this very general statement of the rules which govern the relation of

Pennsylvania, also, language has been used which indicates that it may, when a case involving the point is presented, take the position that an innkeeper's obligations are absolute.⁶

It may not be amiss to advert briefly to one particular aspect of the matter which has apparently not yet been adverted to by any judge. The significance to be ascribed to the analogy furnished by a carrier's duty must be estimated by a proper regard to the consideration that the doctrine which affirms that duty to be absolute is one of recent growth, and that it has not yet been adopted outside the

innkeeper and guest, it is clear that the defendants were guilty of a most flagrant breach of duty towards the plaintiff. As a guest for hire in the inn of the defendants, the plaintiff was entitled to the exclusive and peaceable possession of the room assigned to her, subject only to such proper intrusions by the defendants and their servants as may have been necessary in the regular and orderly conduct of the inn, or under some commanding emergency. Had such an emergency arisen, calling for immediate and unpremeditated action on the part of the defendants or their servants, in conserving the safety or protection of the plaintiff or of other guests, or of the building in which they were housed, the usual rules of decency, propriety, convenience, or comfort might have been disregarded without subjecting the defendants to liability for mistake of judgment or delinquency in conduct; but for all other purposes their occasional or regular entries into the plaintiff's room were subject to the fundamental consideration that it was for the time being her room, and that she was entitled to respectful and considerate treatment at their hands. Such treatment necessarily implied an observance by the defendants of the proprieties as to the time and manner of entering the plaintiff's room, and of civil deportment towards her when such an entry was either necessary or proper. . . . The majority opinion handed down by the appellate division, in which the dismissal of the complaint was sustained, seems to be based upon the theory that under the common law the innkeeper is not responsible for the safety of his guest for hire, and as authority for that view it cites *Calve's Case* (1584) 8 Coke, 32a. All that appears to have

been decided in that case is that the innkeeper is under an absolute duty to safely keep the chattels brought to the inn and intrusted him by his guest. There is a *dictum* in the opinion to the effect that if the guest be beaten in the inn, the innkeeper shall not answer for it; but under no reasonable construction could that language be held to mean that an innkeeper and his servants might assault a guest and yet not be liable. There may doubtless be many conditions under which a guest at an inn may be assaulted or insulted by another guest or by an outsider without subjecting the innkeeper to liability, but if it ever was thought to be the law that an innkeeper and his servants have the right to wilfully assault, abuse, or maltreat a guest, we think the time has arrived when it may very properly and safely be changed to accord with a more modern conception of the relation of innkeeper and guest. We think it would be startling, to say the least, to announce it as the law of this state that an innkeeper and his male servants may invade the room of a female guest at any hour of the day or night without her consent, in utter disregard of every law of decency and modesty, and that the necessity for such an extraordinary right lies in the rule that an innkeeper must be permitted to control every part of his inn for the protection of all his guests. Such a doctrine, so far from holding an innkeeper to a reasonable responsibility in the quasi public business which he is permitted to carry on, would clothe him with dangerous prerogatives permitted to no other class of men."

⁶ See *Rommel v. Schambacher* (1887) 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, cited in § 2458, note 2, *post*.

United States. Consequently, in that country at least, no decisive weight should be ascribed to a circumstance upon which stress has sometimes been laid; *viz.*, that no authority for imputing an absolute liability to innkeepers in respect of the behavior of their servants is to be found in the older books or in the recent English reports.⁷ Since the impossibility of producing from those sources any authority for the theory that a carrier is an insurer in respect of the wrongful acts of his servants has not prevented the American courts from adopting it, the lack of precedents for a similar theory with regard to innkeepers does not constitute any real objection to its acceptance by those courts.

2458. —by servants employed at restaurants, public houses, saloons, etc.—The preponderance of authority is decidedly in favor of the doctrine that the right to hold a master liable for the wilful misconduct of a servant working at a place of this description is conditioned upon the ability of the injured person to show that the misconduct was incidental to the performance of a duty assigned to the tortfeasor.¹ But the theory has also been propounded that a keeper of

⁷This element was referred to in *Rahmel v. Lehndorff* and *Clancy v. Barker*, cited in note 2, *supra*, and also in the reversed judgment of the New York supreme court in *DeWolf v. Ford*, cited in note 5, *supra*.

¹In *Collins v. Wise* (1906) 190 Mass. 206, 207, 76 N. E. 657, where a bartender assaulted a man who had bought a drink and used a closet, the court remarked that "the plaintiff's evidence did tend strongly to indicate that Sullivan made the assault, not for the purpose of protecting the defendants' property, but merely to punish the plaintiff for having previously defiled the closet; in which case it would be difficult to hold the defendant liable for his act." But the conclusion was arrived at that, "upon the defendants' evidence, the jury were justified in finding that Sullivan was acting within the scope of his employment and for the purpose of protecting their property in his charge. He testified that the plaintiff attempted to take the key from him by force, and that he resisted this attempt; and the jury well might have found that the force which he used exceeded what was necessary for this purpose."

In *Goodwin v. Greenwood* (1906) 16 Okla. 489, 85 Pac. 1115, an action was held to be maintainable by a person

who had been assaulted by the servant of the keeper of a restaurant because he failed to pay the amount which the servant considered that he ought to pay for the food supplied to him. The court approved an instruction that defendant was not liable, if the assault was made without his knowledge and consent, after the relation of landlord and guest terminated, unless the servant had express authority to eject persons, or the defendant by reasonable diligence could have prevented the assault.

In *Peter Anderson & Co. v. Diaz* (1906) 77 Ark. 606, 4 L.R.A.(N.S.) 649, 113 Am. St. Rep. 180, 92 S. W. 861, where the defendant's bartender assisted one customer in pouring alcohol over the foot of another who was drunk, and in setting it on fire, it was held that the injured person was not entitled to recover damages. The court said: "Appellee mistakes the law in saying 'that there is no distinction between the duty that the proprietors of a saloon owe their patrons,' and that which a common carrier owes its passengers, or an innkeeper his guests. There is a difference as wide as the poles. The saloon-keeper does not hold himself out to 'he public as the protector of those who may be patrons of his saloon. His business rather adver-

tises him the other way. But the common carrier and the innkeeper hold themselves forth as providing for the comfort and safety of all who may seek their services,—a 'refuge through their portals.' It is strictly their duty and their business to exercise the proper care to look after and to protect their passengers and guests from insult and injury. *Britton v. Atlanta & C. R. Co.* (1883) 88 N. C. 536, 43 Am. Rep. 749. Not so with the saloon-keeper." It was also held that the statute requiring saloon-keepers to give a bond conditioned to pay all damages that may be occasioned by reason of liquor sold at a saloon (Kirby's Dig. § 5124) did not impose a liability upon the defendant for injuries caused by such an act as the one complained of.

In *Tuay v. Salvin* (1905) 109 App. Div. 258, 95 N. Y. Supp. 653, it was held that, if a servant of the defendant saloon-keeper, "while acting in the scope of his authority, served a drugged drink to his master's customer in response to an order for a beverage which the master had on sale, the latter might be held responsible in damages for any personal injury to the customer which is the natural and probable consequence of this wrongful act." But a new trial was ordered on the ground that the evidence on the record did not show that the defendant was in fact the proprietor.

In *Chase v. Knabel* (1907) 46 Wash. 484, 12 L.R.A. (N.S.) 1155, 90 Pac. 642, the liability of the keeper of a restaurant for an assault committed by a waiter upon the plaintiff while he was talking to a lady at one of the tables was thus discussed by the court: "It is doubtless the duty of a restaurant keeper to accord protection to lady patrons from insult or annoyances while they are in his restaurant. If such a lady customer is insulted or annoyed, it is doubtless the duty of the proprietor or his waiters or servants to put a stop to such annoyance, and, if necessary, to eject the person guilty of the offense; and in so doing they may use all necessary force, being liable, however, in damages for injuries occasioned by the use of unnecessary force and violence. On the other hand, if the assault and battery made upon plaintiff was occasioned by reason of ill-will, jealousy, hatred, or other ill feeling on the part of the waiter or waiters, inde-

pendent of their duty as agents of the proprietor toward the lady in question, then the proprietor would not be holden in damages. In this case the trial court, under proper instructions, submitted to the jury the question of whether or not these waiters were acting within the scope of their employment as agents of the proprietor, and as to whether or not they used undue force and violence in case they were acting in such capacity, and as to whether respondent was denied the rights guaranteed to him by the Constitution and civil-rights statutes. The jury, under these instructions, must have found that the waiters were acting within the scope of their employment as servants of appellant, and that they did not accord plaintiff the privileges guaranteed to him under the civil-rights laws, or that they improperly assaulted and ejected him from the premises, or used unnecessary force and violence in so doing." The verdict for the plaintiff was set aside solely on the ground that, as there was no evidence to sustain the second cause of action, it was error to submit any question concerning it to the jury.

In *Bergman v. Hendrickson* (1900) 106 Wis. 434, 80 Am. St. Rep. 47, 82 N. W. 304, plaintiff, after purchasing liquor at defendant's saloon, refused to pay. During an altercation which ensued, the bartender assaulted plaintiff and he fell to the floor, injuring his thumb. The bartender testified that plaintiff, in the course of the altercation, threw up his arms in a threatening attitude, and called him a vile name, and that thereupon, in indignation, without thought of compelling payment, he assaulted plaintiff. On a former trial he had testified the assault was made to compel payment, without any mention of the threatening motion or epithet, and had stated his narrative was complete. Held (1) that it was proper to submit to the jury the question of the bartender's motive, since his appearance, his manner of giving his testimony, and his former testimony might have justified the jury in disbelieving his statements; (2) that, if the assault was committed for the purpose of compelling payment, the servant was acting within the scope of his employment, and hence the master was liable for plaintiff's injuries, though he may have never authorized such method of collection, or may have expressly pro-

a saloon owes to a guest an absolute duty to protect him against the wrongful acts of his servants or of other guests.²

hibited it; and (3) that, though plaintiff conducted himself in such a manner to bring on a personal altercation with the bartender, and the assault was in part the result of such conduct, defendant was liable for the assault committed in the scope of the bartender's employment.

For other cases in which the same criterion was applied, see *Gillespie v. Hunter* (1898) 25 Sc. Sess. Cas. 4th series, 916, 35 Scot. L. R. 714, 6 Scot. L. T. 23 (action not maintainable, where the manager of defendant's public house quarreled with a customer over a matter of politics, and then ejected him from the premises); *Cofield v. McCabe* (1894) 58 Minn. 218, 59 N. W. 1005 (action not maintainable where defendant's bartender called a disorderly customer into a back room and there assaulted him); *Merrill v. Coates* (1907) 101 Minn. 43, 111 N. W. 836 (action held to be maintainable on the ground that the evidence justified the jury in finding that defendant's bartender assaulted deceased to injure him, and thus make it easier and less dangerous to eject him from the saloon, and not to revenge a personal insult); *Brazil v. Peterson* (1890) 44 Minn. 212, 46 N. W. 331 (saloon-keeper held liable where his bartender ejected an intoxicated customer in a reckless manner).

² In *Curran v. Olson* (1903) 88 Minn. 307, 60 L.R.A. 733, 97 Am. St. Rep. 517, 92 N. W. 1124, the evidence tended to show that the plaintiff fell asleep in his chair while he was a guest at the defendant's saloon; that a cook in a neighboring restaurant which belonged to a third party came into the saloon, got alcohol from the bartender in charge of the room, poured it upon the left foot of the plaintiff, and set it on fire; and that the bartender knew, or might have known by the exercise of the slightest care, what the alcohol was to be used for, and could have prevented the injury to the plaintiff. Neither of the defendants was present at the time. Held that an action might be maintained against the defendants, because they were "bound to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly per-

mitted to be in and about their saloon. If they delegated this duty to their bartender, they are responsible for his negligence in the premises." It will be observed, however, that this decision, in so far as it is an authority for treating a saloon-keeper as liable for the tort of his servants, irrespective of whether they are or are not within the scope of his employment, is essentially inconsistent with another Minnesota case, *Cofield v. McCabe* (1894) 58 Minn. 218, 59 N. W. 1005, note 1, *supra*, which strange to say, was not referred to by the court.

In *Beilke v. Carroll* (1909) 51 Wash. 395, 22 L.R.A.(N.S.) 527, 130 Am. St. Rep. 1103, 98 Pac. 1119, the plaintiff, after purchasing and drinking beer in the defendant's saloon, entered an adjoining room and fell asleep. While he was asleep the bartender poured alcohol in plaintiff's shoe and set fire to it. Held, that defendants were liable for his misconduct. The court reasoned thus: "If respondents had been present upon the saloon premises and in the immediate charge thereof at the time, perhaps the doctrine that the employer cannot be made liable for the act of his servant committed wholly without the scope of the duties of the employment might have applied. However, under the circumstances shown by the facts in this case, the employee became at the time more than a mere ordinary servant acting under the immediate instructions of the master. The master had left the place in entire charge of this servant, late at night, while it was yet open to the public and while patrons were still invited to enter to transact business and to receive the customary treatment accorded to customers. The master cannot start a saloon to going, and then go off and leave it to take care of itself. In contemplation of law, he must either be present in person, or by someone who represents him, and who for the time being stands in his shoes and acts in his behalf. The policy of the state toward the saloon business is such that the owner of a saloon cannot be permitted to absent himself from his place of business, and then escape liability to the customers of his saloon for injuries received in the

2458a. —by servants of canal companies.—In a case where the lock-tender of a canal, whose duty it was to open and close the locks and receive tolls, assaulted a boatman upon the ground of his not having paid his toll, it was held that the canal company was not liable.¹ This decision, however, was rendered with reference to the doctrine, now discarded (see §§ 2239 *et seq.*, *ante*), under which the wilful acts of a servant were treated as not being imputable to his master. On such evidence as that stated in the report an action would apparently be maintainable at the present day, in most jurisdictions at all events.

2459. —by servants employed at places of amusement.—It is clear that a person controlling a public place of amusement must at least answer for any unjustifiable act of violence that his servants may commit while engaged in the performance of duties imposed upon

manner that appellant was injured, merely because the owner is not present, has not personal knowledge of the act, and does not actually consent thereto. The business of selling intoxicating liquors in this state is placed upon many restraints by law, among which are the requirements that the vendor must procure a license and must give a bond conditioned to keep an orderly house. Here was a customer who, as shown by the evidence he submitted,—and there was no other testimony,—quietly entered the saloon at a late hour of the night, bought and drank a glass of beer, unobtrusively and peaceably sat down in a chair provided for that purpose for customers, and simply fell asleep. Under such circumstances he had a right to rely upon the belief that he was in an orderly house and would receive the protection of such an one. He had a right to rely upon the belief that the master was either present in person or by a responsible and delegated representative, keeping a careful lookout that the doings in the house should in all respects be orderly. The act in question cannot be called an orderly one. It was essentially an extremely disorderly one, and was committed directly by the person then in charge of the place. Under such circumstances, we think it should be held that the employee in charge was the employer's delegated representative for that purpose, and that inasmuch as the employers were charged by law with the duty

of preventing disorderly conduct in their place of business, they must be liable when the act was actually committed by the person whom they had placed in control." The court relied on *Curran v. Olson*, *supra*, and disapproved *Peter Anderson & Co. v. Diaz*, note, 1, *supra*.

In *Rommel v. Schambacher* (1887) 120 Pa. 579, 6 Am. St. Rep. 732, 11 Atl. 779, where the facts showed personal negligence on the part of a saloon-keeper in not having restrained one guest from injuring another, the court remarked, *arguendo*, that it is a plain matter of common law that, "where one enters a saloon or tavern opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor." The authority relied on was a case of carrier and passenger, so that the court apparently assumed that duty of protection which arises out of the relation was similar in scope and character to the duty which is owed by an innkeeper to his guests.

¹ *Ware v. Barataria & L. Canal Co.* (1840) 15 La. 169, 35 Am. Dec. 189, the court relied upon the principle that, "when an agent, losing sight of the object for which he is employed, commits wrongs, and thereby causes damage, the principal is no more answerable than any other stranger."

them, in respect of such matters as keeping order among the visitors,¹ or of admitting or ejecting them.² But there is also some authority for the doctrine that the responsibility of such a person with regard to the conduct of his servants is absolute, and therefore predicable, irrespective of whether the misfeasance complained of was or was not within the scope of the wrongdoer's employment.³

¹ *Epstein v. Gordon* (1909) 114 N. Y. Supp. 438.

² In *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the owner of a theater was held to be liable for an assault committed by the doorkeeper in ejecting a person who had a dispute with the ticket agent about the purchase of a ticket. The ejection was carried out in pursuance of a direction given by the ticket agent to have the plaintiff arrested, and the whole transaction was tacitly approved by defendant's special agent, who was looking on. One of the grounds of the decision is indicated by the following passage in the opinion of the court: "In such case, where the duty of a servant was to preserve order in the theater, and to remove offensive patrons or guests, the servant must, of necessity, be the judge as to whether the conduct of a person is such as to require his removal; and if the servant makes a mistake and unjustly attacks and injures an inoffensive patron, the master must respond, and the fact that such servant was also a special policeman can avail the master nothing." As to the other phase of this case, see following note.

In *Drew v. Peer* (1880) 93 Pa. 234, where one P. and his wife who had purchased tickets and entered a theater, were ejected because of their being colored persons, the following instruction was approved: "If the ticket agent had called upon anyone in the crowd 'to put the nigger out,' and some ruffian had done so, the defendant would be liable."

In *Oakland City Agri. & Industrial Soc. v. Bingham* (1891) 4 Ind. App. 545, 31 N. E. 383, it was held that, if the defendant's gate keeper had, in the exercise of his judgment, wrongfully ejected the plaintiff from the ground, or if a fancied violation of some rule of demeanor so excited his anger that he inflicted a malicious injury in attempt-

ing to enforce its observance, recovery might be had.

In *Alton R. & Illuminating Co. v. Cox* (1899) 84 Ill. App. 202, a servant employed in a public park, who had been instructed not to allow anyone to enter it, threw a stone at persons whom he had shortly before ordered out of the park. Held, that the owner was liable, the tortious act complained of being inseparable from that of ejecting plaintiff.

In *Fowler v. Holmes* (1886; Brooklyn City Ct.) 24 N. Y. S. R. 299, 3 N. Y. Supp. 816, evidence that an employee of a theater company was taking up tickets at the time he committed an assault upon a patron after some words resulting from the latter's refusal to get in line was held to be sufficient to require a submission to the jury of the question whether the employee was acting within the scope of his employment when he made the assault.

³ In *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1 (for facts see last note), the second reason relied upon by the court for holding the action to be maintainable was thus stated: "Common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them."

In *Indianapolis Street R. Co. v. Dawson* (1903) 31 Ind. App. 605, 68 N. E. 909, a street railway company, after it had ascertained that certain persons had conspired to assault and insult colored people who should visit a pleasure park which it owned near a city, transported thither the plaintiff, a colored man,

In one case, where the assault in question was committed by the servant of the proprietor of a billiard room, the right of recovery was denied on the special ground that the tortious act was induced by personal resentment.⁴

B. ACTS INJURIOUS TO PROPERTY.

2460. Liability of bailees.—Some of the cases under this head were decided with reference to the general doctrine which formerly prevailed in England and the United States, but which has now been definitely abandoned in nearly all jurisdictions (see §§ 2239 *et seq.*, *ante*), viz., that a master could not be held liable for the wilful act of a servant except upon the ground of his having authorized or ratified it.¹

without warning of his danger. When he arrived at the park, the plaintiff was assaulted by the conspirators, no attempt being made by the railway employees then present to afford him protection. The company was held to be liable on the ground that, "when one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the place reasonably safe for the visit."

The precedents cited in support of this proposition all have reference to the duty of the occupant of premises with regard to the condition of premises themselves. They are, therefore, not really in point; but the court also relied upon the analogy of the cases which predicate an absolute duty on the part of a carrier to protect his passenger.

See also *Brooks v. Jennings County Agri. Joint-Stock Assn.* (1905) 35 Ind. App. 221, 73 N. E. 951, where the defendant was held liable for an assault committed by its gate keeper upon a patron.

⁴*Linck v. Matheson* (1911) 63 Wash. 593, 116 Pac. 282 (servant had quarreled a few days previously about payment for a game).

¹In *Harris v. Nicholas* (1817) 5 Munf. 483, where the defendant was held not to be liable for the death of a hired slave which resulted from a cruel whipping administered by his overseer, the

decision proceeded upon the ground that the act of the overseer "was neither authorized by the defendant, nor committed in the usual course of his duty as servant, but was a wilful and unauthorized trespass." Having regard to the position taken in the more recent cases regarding the liability of a master for the wilful acts of a servant, this ruling would clearly be treated as a bad law by any modern court.

In *Puryear v. Thompson* (1844) 5 Humph. 397, an action to recover for the value of a negro slave hired by the plaintiff to the defendant, who was killed by the defendant's overseer while inflicting punishment upon the negro by the master's direction, the trial judge charged the jury that, while the hirer of the slave had a right to chastise him, he was bound to use ordinary care and diligence in the infliction of such chastisement, and that his responsibility was the same whether he inflicted the punishment himself or trusted his overseer to inflict it; that, if a hirer ordered his servant or overseer to punish a slave until he be humbled, and then put him to work as was done in this case, and the overseer was to decide when the slave was humbled, although the master might have indicated by handing a cowhide to the overseer, that the cowhide was to be the instrument of correction, yet that, if the overseer began the punishment with the cowhide, and, in its progress, suffered his passions to get the better of his judgment, and even laid aside the in-

The nonliability of a railway company for the loss of goods resulting from the act of an employee in setting fire to the warehouse where they were stored, for the purpose of destroying the evidence of thefts committed by him, has been affirmed on the ground that the act was outside the line of his employment.²

2461. Liability of a contractor for his servant's misfeasance in respect to the thing stipulated.—In a case where a person undertook to sup-

strument intended by the master, and used another instrument which may produce death, still the hirer would be answerable to the owner for the value of the slave. Commenting on these instructions, the court said: A master "is not liable for his servant's torts or wilful acts done without his authority. . . . And it can make no difference whether such wilful act of the servant be done while he is in the performance of some lawful service required by the master, or be entirely disconnected with such service. . . . In the case before us, if the overseer, in pursuance of the defendant's directions, intended only to chastise the negro until he should be humbled, and, in the attainment of that object, so negligently and recklessly inflicted blows, and so used instruments of punishment, as to take the life of the negro, the defendant below was liable for the injury. But if he abandoned the purpose to chastise until the negro should be humbled, and employed instruments of torture to gratify his malice, intending to kill the negro, in such case the defendant would not be liable." The instructions given to the jury were held to be insufficient because they did not place these propositions before the jury in such a manner as to leave them free to determine whether the overseer had intended to take the slave's life, or merely been negligent and reckless in respect of the means adopted for chastising him. This decision is open to the same criticism as the one last cited. It contravenes the well-established rule stated at the commencement of § 2288, *ante*.

In *McCoy v. McKowen* (1853) 20 Miss. 487, 59 Am. Dec. 264, it appeared that the defendant's overseer had been sent one morning to rouse a female slave whom the defendant had hired from the plaintiff, that an altercation ensued, and that the slave was fatally wounded by the overseer. The grounds of the

decision were thus stated: "There is no evidence whatever to show that these wounds were inflicted by the direction or sanction of McCoy, or that he expected any difficulty or necessity for violent measures when the overseer was sent by him to arouse the slave. For all that appears, the violence of the overseer was entirely unauthorized by McCoy, and the result of the overseer's imprudence. Nor does it appear that McCoy was apprised of the wounds on the head when the woman came to him for protection. The jury must have thought the beating, by the wounds on the head, unnecessary in the exercise of the overseer's rightful authority; for if it had been necessary, as in self-defense, from the violence of the woman, his conduct would have been justifiable. Their conclusion, then, must have been that the beating was unnecessary, wilful, and malicious." It is clear that, in the present state of the law, the considerations thus relied upon would not be regarded as sufficient to absolve a master. The sole question for the jury to answer would be whether the assault was committed by the overseer for the purpose of coercing the slave to do her duty.

The cases regarding the liability of hirers of slaves for injuries caused by the negligence of the hirers' servants in respect of the chastisement are discussed in § 2343, note 1 (d), *ante*.

In *Church v. Mansfield* (1850) 20 Conn. 284, the court, while discussing the liability of a blacksmith for the misconduct of his servant in respect of a horse sent to be shod, remarked *arguendo*: "But if, while the horse is standing at the door, the servant, without the knowledge of the master, beat the horse, and thereby injured him, the servant alone will be responsible for his acts."

² *Collins v. Alabama G. S. R. Co.* (1894) 104 Ala. 390, 16 So. 140.

ply pure milk to the proprietor of a cheese and butter factory, it was held that the damages occasioned to the vendee by the act of vender's servant in putting foul water into some of the milk delivered by him was imputable to his master, although he did the act for the purpose of gratifying his malice towards his master. The court relied on the principle "that if the act of the servant which has occasioned the mischief is within the scope of the employment, the fact that it was maliciously done does not affect the question of the master's liability under a proper rule of damages."¹ In another case, where the defendant's servants destroyed the plaintiff's property which they were handling in pursuance of an arrangement between the plaintiff and defendant, it was held that the jury had been improperly instructed that, if the servants' acts were committed in a spirit of wanton mischief, or out of spite towards the plaintiff, because of his being a rival to their employer, the defendant was nevertheless responsible.²

¹In *Stranahan Bros. Catering Co. v. Coit* (1896) 55 Ohio St. 398, 4 L.R.A. (N.S.) 506, 45 N. E. 634, the court, after quoting the statement in Wharton on Agency, § 487, that a "principal who contracts to do a particular thing is liable for agents' torts which prevent the performance of the contract," continued thus: "Coming now to the case at bar, were the acts of Miller, which caused the injury, in law the acts of his employer? That is, were they within the scope of his duties, or were they outside and beyond? And here we must not mistake the acts which caused the damage. At first blush it might seem that these acts were the watering of the milk, and those were not within any authority of the master. But not so. The putting of the water in the milk would have been quite innocuous, so far as plaintiff is concerned, had the compound not been delivered to the factory. It was the delivery there which produced the harm. In those acts of delivery Miller stood for and represented his master. Clearly those deliveries were done in the course of his employment, 'in the execution of the service for which he was engaged by the master.' Under such conditions, why should the master not be liable? He had contracted to deliver pure milk, and in trusting that duty to his servant, why had he not, applying the principle announced by Judge Story [Agency, § 452] held out that servant as fit to be trusted, and warranted his fidelity and good con-

duct in all matters connected with the performance of that contract? Why, in reason, should the loss occasioned by the rascality of the defendant's servant be thrown on the plaintiff? The latter had no voice in his selection; no control over his conduct. Does the servant's motive change the nature of the damages?"

²*Deihl v. Ottenville* (1884) 14 Lea, 191. There the plaintiff and defendant were both engaged in bottling beer, etc., at N. for retail traders of the city, as well as other customers within and beyond the limits of the state. The bottles and boxes of both were returned by their customers outside of the city by railroads or steamboats, without charge, and within its limits by their wagons respectively. It was agreed between them that, as the boxes and bottles of one was often by mistake sent to the other, the party who should receive boxes and bottles belonging to the other was to wash the bottles and return them with their boxes, ready to be refilled, to the true owner. The court said: "While it is reasonable that a master should be held liable to third persons for damage done by his servant's negligence in the performance of service to which the master had assigned him, yet the master ought not to be held responsible for such wrongful conduct of the servant as he had neither directed him to do, nor could be supposed to have authorized or expected the servant to do."

CHAPTER CV.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER FOR WRONGFUL ARREST, FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION.

2462. Introductory statement.

A. LIABILITY IN RESPECT OF THE ACTS OF ORDINARY EMPLOYEES.

2463. Generally.

2464. Purpose or motive of the act complained of.

2465. Time when the proceedings were taken.

2466. Necessity for immediate action in the master's interest.

2467. Power of employer to authorize the act which caused the injury.
complained of.

2468. Functions discharged by the tort-feasor. Generally.

2469. Extent of authority ascribed by reason of their position to managing employees.

2470. —to subordinate employees.

2471. Same subject. Illustrative decisions as to the authority of subordinate employees of railway companies.

a. Station masters or agents.

b. Ticket clerks.

c. Ticket collectors.

d. Gatekeepers.

e. Platform men.

f. Employees working on railway trains.

g. Foremen of porters at stations.

h. Foremen of railway yards.

i. Trackmen on railways.

j. Conductors of street railways.

k. Drivers of street cars.

l. Other employees on street railways.

m. Land agents of railway companies.

n. Detectives.

2472. —of other classes of employees.

u. Treasurers.

b. Secretaries.

c. Clerks.

d. Ushers and floorwalkers in mercantile establishments.

e. Employees authorized to demand and receive money owed to their employers.

- f. Watchmen.
- g. Doorkeepers.
- h. Starters of elevators in buildings.
- i. Vendors of tickets at public resorts.
- j. Ushers at theaters.
- k. Toll gatherers.
- l. Employees engaged in construction work.
- m. Employees in markets.
- n. Detectives.

2472a. Liability considered with reference to the duty of carriers to protect passengers.

B. LIABILITY IN RESPECT OF THE ACTS OF CONSTABLES AND EMPLOYEES INVESTED WITH THE POWERS OF CONSTABLES.

2473. Scope of subtitle.

2473a. Employees empowered to make arrests on certain specific grounds only.

2474. Constables called in for a particular emergency by the servants of the defendant.

2475. Persons appointed to discharge regularly the functions of special constables in certain places. English and colonial decisions.

2476. Same subject. American decisions.

2477. Same subject. American decisions further discussed.

2478. Same subject. American decisions further discussed.

2479. Responsibility as affected by the illegality of the appointment of the officer in question.

2480. —by the locality of the tort complained of.

2481. —by special provisions respecting the liability of persons applying for the appointment of constable.

2482. —by the fact that the relation between the defendant and the person injured was that of carrier and passenger.

2462. Introductory statement.—In the last four of the chapters relating to wilful torts, the cases in which a contractual relationship existed between the defendants and the injured parties have been entirely segregated from those which do not involve any such relationship. In the present chapter all the decisions relating to the vicarious liability of a master for the torts specified in the above heading will be reviewed together irrespective of whether the factor of a contractual relationship was or was not involved. The collection of authorities has also been enlarged by the inclusion of a few cases in which the actions were brought by servants of the defendants.

A. LIABILITY IN RESPECT OF THE ACTS OF ORDINARY EMPLOYEES.

2463. Generally.—In an action for wrongful arrest, false imprisonment, or malicious prosecution, by a servant of the defendant, the
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primary question, whether the act complained of was wrongful in such a sense as to constitute a good cause of action, is, of course, ascertained upon the same footing as in a case where the element of a vicarious liability is not involved.¹ If this point is settled in the plaintiff's favor, the right of recovery will depend upon the answer to the further question, whether, under the given circumstances, the act complained of was within the scope of the tortfeasor's authority.² Such authority may doubtless be inferred, with regard to a mere ar-

¹For information concerning this phase of the subject the reader is referred to general treatises on the law of torts.

In *Maxwell v. Caledonian R. Co.* (1898) 25 Sc. Sess. Cas. 4th series 550, averments showing that a railway ticket collector had, in effecting the detention of a passenger under circumstances which warranted his arrest, employed excessive violence, were held to set forth a good cause of action.

In *St. Louis, I. M. & S. R. Co. v. Hudson* (1910) 95 Ark. 506, 130 S. W. 534, an action for false arrest purporting to have been made by a conductor, under the act, March 2, 1909, § 3, authorizing railway conductors to arrest intoxicated persons on their trains, the questions whether or not the passenger was intoxicated, and whether the conductor acted with ordinary care and in good faith, were held to be for the jury. An instruction that, though the conductor was judge as to whether plaintiff was intoxicated, the company would be liable if he was mistaken, was held to be erroneous, on the ground that the effect of such a doctrine would be to render the defendant liable for any mistake of the conductor in making the arrest, even though he might have acted in good faith and with ordinary care.

For other cases turning upon the justifiability of the arrests in question, see *Whitman v. Atchison, T. & S. F. R. Co.* (1911) 85 Kan. 150, 34 L.R.A. (N.S.) 1029, 116 Pac. 234; *Baltimore & O. R. Co. v. Cain* (1895) 81 Md. 87, 28 L.R.A. 688, 31 Atl. 801 (action for false imprisonment not maintainable by a person who, while a passenger on defendant's train, had been intoxicated and guilty of a flagrant and continuous breach of the peace, and had, upon the arrival of the train at a station, been arrested at the request of the conductor, without a warrant, by a police officer,

and taken before a magistrate and fined); *Hubbard v. Montreal* (1905) Rap. Jud. Quebec 28 C. S. 221 (defendant city not liable for the arrest of the plaintiff, the constable who made the arrest having acted in good faith and with reasonable and probable cause); *Newman v. New York, L. E. & W. R. Co.* (1889) 54 Hun, 335, 7 N. Y. Supp. 560 (railroad company not liable for the false arrest by a detective in its employ, of a passenger in its station, where the latter's appearance and behavior justified the belief that he had committed, or was about to commit, a felony).

By § 51 of the English tramways act, 1870, any person traveling in any carriage on any tramway, who avoids or attempts to avoid payment of his fare, or any person who, having paid his fare for a certain distance, knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, shall for such offense be liable to a penalty not exceeding 40s.; and by § 56, all tolls, penalties, and charges under the act may be recovered and enforced under 11 & 12 Vict. chap. 43, and any act amending the same. Held, that proceedings taken under § 51 were proceedings in respect of a criminal offense, so that an action for malicious prosecution would lie against the persons taking them. *Rayson v. South London Tramways Co.* [1893] 2 Q. B. 304, 62 L. J. Q. B. N. S. 593, 4 Reports, 522, 69 L. T. N. S. 491, 42 Week. Rep. 21, 17 Cox, C. C. 691, 58 J. P. 20.

²That the authority of an employee of a corporation to make an arrest need not be under seal was laid down in *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297; *Goff v. Great Northern R. Co.* (1861) 3 El. & El. 672, 30 L. J. Q. B. N. S. 148, 7 Jur. N. S. 286, 3 L. T. N. S. 850. This doc-

rest, in a much larger number of situations than with regard to the more deliberate proceeding of the institution of a criminal action. But as the reports contain no definite information respecting the distinction thus suggested, the writer has deemed it inadvisable to make it a basis for the classification of the cases.³

The general principle, as formulated by Blackburn, J., is that "there is an implied authority to do all those things that are necessary for the protection of the property intrusted to a person, or for fulfilling the duty which the person has to perform."⁴ The several factors which have been considered by the courts in determining the liability of the master by this standard are the following:

- (1) The purpose or motive of the act complained of.
- (2) The time at which that act was done relatively to the commission, actual or supposed, of the crime with which the aggrieved party was charged.
- (3) The existence or nonexistence of a special exigency necessitating immediate action for the purpose of safeguarding the employer's interests.⁵

trine is important only in jurisdictions where the general rule is that corporate contracts must be authenticated by a seal. See §§ 130 *et seq.*, *ante*.

³ The distinction is vaguely hinted at in the remark made in one case, to the effect that "the arrest, still less the prosecution, of offenders," was not within the powers of the tort-feasor. *Bank of New South Wales v. Owston* (1879) L. R. 4 App. Cas. 270, 48 L. J. P. C. N. S. 25, 40 L. T. N. S. 500, 14 Cox, C. C. 267, 25 Eng. Rul. Cas. 124.

⁴ *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65. The court refused to accept the broader doctrine suggested by counsel, that "every servant who is intrusted with the property of his master has an implied authority to put the law in motion with reference to any offense that may be committed in connection with that property." (See judgment of Hannen, J.)

In *Jones v. Duck*, a decision of the English court of appeal, which is reported only in the Times, March 16, 1900, A. L. Smith, L. J., said: "The cases showed that a servant had an implied authority to give a person into custody, if it was necessary to do so in order to protect the master's property." [This statement was quoted by Kennedy, J., in *Hanson v. Waller* [1901] 1 K. B. 390

and by O'Brien, L. Ch. J., in *Cullimore v. Savage South Africa Co.* [1903] 2 I. R. 589.]

"It must be assumed that by the employment the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property, to protect it against thieves and marauders; and that the servant owes the duty to so to protect it to his employer." *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448. See also the cases cited in § 2466, *post*.

⁵ In *Cullimore v. Savage South Africa Co.* [1903] 2 I. R. (C. A.) 589, 636, the following remarks were made by Fitz-Gibbon, L. J.: "I cannot attempt any definition of the condition which will justify the inference of authority which will make employers responsible for an arrest of a servant. . . . The time of the arrest, the opportunity of consulting a superior, and the probability of advancing the master's interest, are most material circumstances, and are cogent evidence upon the question of the scope of employment; but they are nothing more. Everything connected with the employment, its terms, its duties, and the circumstances under which they must be performed, the exigency of emergency upon which the arrest is

(4) The extent of the master's powers in relation to the subject-matter.

(5) The nature of the functions and duties discharged by the tort-feasor in the course of his employment.

In the reports language is occasionally found which enounces, more or less explicitly, the doctrine that an action cannot be maintained unless it is shown that the tort-feasor was acting under authority expressly conferred. In so far as they may be construed as embodying such a doctrine, these statements are manifestly incorrect. Cases of this type constitute no exception to the general rule of the law of agency, which, for the purpose of determining a principal's liability *ex contractu* or *ex delicto*, treats implied, as being equivalent to express, authority.⁶

made, and the manner of making it,—these and the like are all legitimate subjects of consideration; but in every case the question, in law and fact, is one of agency, and comes to this, is the act of the servant the act of his master?"

⁶ See the passage quoted in the text from the judgment of Blackburn, J., in *Allen v. London & S. W. R. Co.* (note 4, *supra*.)

"The act of the agent becomes that of the principal only when expressly authorized; or when his authority to act may fairly be inferred from the nature and scope of the employment." *Markley v. Snow* (1904) 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999. In another place the court observed: "The liability of the principal for the act of his agent in instituting an unfounded prosecution is governed by the general principles of agency, and where there is no express authority, and there has been no subsequent ratification of the act, the ultimate test is whether the agent acted within the scope of his implied authority." *Ibid*.

In *Carter v. Howe Mach. Co.* (1878) 51 Md. 290, 34 Am. Rep. 311, it is said that where it is sought to "hold a corporation liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and the goods of the company, in order to sustain the right to recover it should be made to appear that the agent had been previously expressly authorized by the corporation to act as he did, or that the act has been subsequently ratified

and adopted by the company." But the actual doctrine adopted by the court is indicated by the following passage in another part of the opinion: "If, therefore, property be intrusted to an agent or servant for sale or safe-keeping, there is clearly an implied authority to do such things as may be proper and necessary for the protection of that property; or if a servant be assigned to a position requiring the performance of certain duties, he has an implied authority to do all such things as may be required to enable him to perform those duties. And for all acts done within the scope of the employment and the limits of the implied authority, the master is liable, however erroneous, mistaken, or malicious such acts may be; but for acts done beyond that limit, the corporation cannot be made liable, unless express authority be shown, or there be subsequent adoption or ratification of the act complained of."

In *Baltimore, C. & A. R. Co. v. Ennalls* (1903) 108 Md. 75, 16 L.R.A. (N.S.) 1100, 638 Atl. 638, the court, after referring to the distinction taken by Blackburn, J., in *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week. Rep. 127, 11 Cox, C. C. 621 (see § 2465, *post*) between an act done for the purpose of protecting the master's property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done, proceeded thus: "It is only necessary to keep that distinction in mind to understand why it was said in

2464. Purpose or motive of the act complained of.—From the fundamental principle enounced by Blackburn, J., (see preceding section) it is, in a negative point of view, a necessary inference that an action will not, as a general rule, be against the master unless the act complained of was done by the servant for the purpose of protecting the property intrusted to his charge. Liability therefore will not be imputed to him.

(1) Where no evidence is offered from which it can warrantably be inferred that this was in point of fact the purpose for which the servant put the law into operation.¹

(2) Where the evidence shows either that the master's property was safe at the time when the act complained of was done,² or that it

Carter v. Howe Mach. Co. supra; *Beiswanger v. American Bonding & T. Co.* (1904) 98 Md. 287, 57 Atl. 202, and other similar cases which might be cited, that it was necessary to show that the agent was expressly authorized by the corporation to procure the arrest, or that it subsequently ratified it. Both of those mentioned above were actions of malicious prosecution for prosecuting the plaintiffs for embezzlement, and in such cases nothing done by the agents was for the purpose of protecting property in their charge by preventing a felony, or recovering it back, but they were attempts to punish the offenders for what they had already done. There was therefore no implied authority in the agent in such case to act, and it was necessary to prove that he was expressly authorized by the corporation to do so. If that were not so, then any corporation would be at the mercy of indiscreet, overzealous, or perhaps dishonest agents." The other cases alluded to by the court as having been decided with reference to the requirement of proof of express authority are *National Bank v. Baker* (1893) 77 Md. 462, 26 Atl. 867; *Baltimore & Y. Turnp. Road v. Green* (1897) 86 Md. 161, 37 Atl. 642. The emphatic language used in that regard certainly needs some explanation. Whether the one given is satisfactory was a question which only concerns practitioners in Maryland itself.

¹ In *Laird v. Farwell* (1899) 60 Kan. 513, 57 Pac. 98, a chattel mortgagee in possession of a stock of merchandise employed an agent to take charge of the same, who had the usual power of selling the goods and accounting for the

proceeds. Held, that the principal was not liable for the acts of the agent in causing the arrest of a person on the charge of perjury in making an attachment affidavit in an action wherein some of the goods were seized and taken from the possession of the agent. The court said: "There is nothing to show in the evidence but that Curtis might have been prompted in causing the arrest by a motive beyond that of serving his employers. The court below was called upon to infer that in causing the arrest Curtis was doing an act in furtherance of his master's business, for which his employer was liable. This, however, might be inferred of any agent in charge of his principal's property who might commit a tort which the custody of the property afforded him an opportunity to commit. The rule of implied authority cannot be extended as far as contended by counsel for plaintiff in error."

² In *Jones v. Duck*, a decision of the English court of appeal reported only in the Times, March 16, 1900, A. L. Smith, L. J., said that the general rule "that a servant had an implied authority to give a person into custody, if it was necessary to do so in order to protect the master's property," did not apply, because the master's property was safe before the plaintiff was given into custody.

In *Stevens v. Hinshelwood* (1891) 55 J. P. (C. A.) 341, the plaintiff, the servant of a carrier, was deputed by his master to watch the defendants, their competitors in business who were able to get their parcels delivered into railway vans after the time fixed by the

was done for the purpose of vindicating public justice,³ or from purely personal motives,⁴ or with the view of subserving the interests of a third person.⁵

railway company, and at an hour later than that at which other carriers could deliver them. A servant of the defendants, after having watched the plaintiff for a while, assaulted him, and then gave him into custody on a charge of "loitering with intent to commit a felony." The charge was dismissed. A judgment entered for the defendants by the trial judge was sustained. Lord Esher, M. R., said: "Where there is an implied authority from the master to the servant to give into custody, it must be when such giving into custody is reasonably necessary for the protection of the master's property. . . . The property here was not in danger at all. The plaintiff had taken nothing, and was not likely to take anything." The authority relied upon was *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week. Rep. 127, 11 Cox, C. C. 621.

See also cases cited in § 2465, *post*.

3 "Where the act is done for the punishment of the supposed criminal, or for the vindication of the law, it is not the act of the principal, and does not subject him to liability. This principle has been uniformly recognized in the decisions on the subject, and whatever lack of harmony there is in the cases has resulted from the difficulty of applying it to the particular facts." *Markley v. Snow* (1904) 204 Pa. 447, 64 L.R.A. 685, 56 Atl. 999.

In *Abrahams v. Deakin* [1891] 1 Q. B. (C. A.) 516, 523, Kay, L. J., said: "If a servant has an implied authority to arrest a man who, as he thinks, has attempted to pass false coin, in order to prevent other people from attempting to commit a similar offense, he must equally have an implied authority to do almost any other illegal act,—for instance, to assault the supposed offender, or to libel him by publishing in a newspaper that he is a thief. Whatever the servant did for the purpose of frightening other people, and thus preventing possible injury to his master's property, the master would be liable for it. That would be clearly contrary to the decisions which have been referred to."

In *Mulligan v. New York & R. B. R.*

Co. (1892) 129 N. Y. 506, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952, one of the grounds on which the defendant was held not to be liable for the act of a station agent in pointing out the plaintiff to the police, and directing his arrest on a charge of having given a counterfeit coin for a ticket, was that the object of his acts was, as the evidence showed, to entrap the plaintiff and the police.

See also the case cited in § 2464, note 1, *post*.

4 In *Lumsden v. London & S. W. R. Co.* (1867) 16 L. T. N. S. 609, Bramwell, B., ruled at nisi prius that the defendant railway company was not liable for the act of a porter in giving into custody a man who, together with some other, had got into an altercation with him. The contention of plaintiff's counsel was that, under 3 & 4 Vict. chap. 97, § 16, by which a penalty was imposed upon anyone who should obstruct an officer or agent in the execution of his duty, the porter was authorized to take into custody anyone misconducting himself on the premises of the company, in charge of which he was placed; and, consequently, that if he exceeded or misconceived his duty, and took into custody any person by his own authority, he yet acted so much within his authority as to make the company liable for his acts.

In *Larson v. Fidelity Mut. Life Asso.* (1898) 71 Minn. 101, 73 N. W. 711, an insurance agent had been appointed for a certain district, under a contract which provided that he should be responsible for the acts and doings of such agents as he should appoint. Maliciously and without probable cause, he procured the arrest and imprisonment of one of the agents of his own appointment on a charge of embezzling the funds of the defendant. Held, that, even if the act of the agent might otherwise have been in the course and within the scope of his agency, yet, as he had a purpose personal to himself, because of his liability to the defendant for the acts of his subagent, it must be presumed that he instituted the criminal proceedings to subserve that purpose.

In *McKain v. Baltimore & O. R. Co.*

(1909) 65 W. Va. 233, 23 L.R.A.(N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634, the grounds upon which it was held that the railway company was not liable for the arrest of the plaintiff by a special policeman assumed, for the purposes of the decision, to represent the company in what he did, were thus stated: "He was not arrested or prosecuted for any act respecting the railway company or its property. The offense with which he was charged was an act done respecting the wife of the prosecuting officer, and did not in any way involve any right of the company. That it was done upon the premises of the railway company is in our opinion immaterial. The motive of the arrest, assault, and prosecution clearly appears to have been either vindication of the law, or a desire on the part of the officer to avenge the insult to his wife or to comply with her wishes, and in none of these aspects of the case would the company be responsible for the acts, however unjustifiable they may have been. Nor is it material that the plaintiff had a return ticket, was lawfully at the station awaiting a train, and was not carried by the railway company. According to the evidence, his losses and injuries were all caused by Downey, not the railway company."

See also *Waters v. West Chicago Street R. Co.* (1902) 101 Ill. App. 265, where the court, in laying down the law with reference to a trespass, adverted to the nonliability of a master for an arrest made by a servant to accomplish an end of his own.

In *Emerson v. Lowe Mfg. Co.* (1909) 159 Ala. 350, 49 So. 69, where the defendant's superintendent had testified that "he swore out the warrant on his own responsibility," the majority of the judges were of opinion that this statement was one relating to the capacity in which the witness acted, and not to his intention or motive, and was therefore admissible.

⁵ In *Lubliner v. Tiffany & Co.* (1900) 54 App. Div. 326, 66 N. Y. Supp. 659, an employee of the defendant, whose duties were to superintend the administration of its business and look after lost jewelry belonging to it, had, without any specific authority from defendant, made affidavit for the arrest of plaintiff as being concerned in the theft of certain lost jewelry which belonged to

a customer of defendant, and for which defendant had offered a reward according to his custom. Held, that defendant was not liable for false imprisonment. The court said: "So far as appears, it was not the duty of Hyde to protect or recover this property. The fact that, at the request of a customer, the defendant had offered a reward for the return of the property, did not, so far as appears, give the defendant an interest in the recovery of the property which made it the duty of their employees to take proceedings for its recovery or the punishment of those who had stolen it. As superintendent of the defendant's store, Hyde had charge of the defendant's property located there, and as such undoubtedly would be authorized to take proceedings to recover any property stolen from it; but there is nothing to show that it was any part of his duty, or that he was authorized, either expressly or by implication, to commence criminal proceedings against persons who had stolen property from the defendant's customers when such thefts were not committed upon the defendant's premises. The plaintiff is seeking to charge the defendant, a corporation, with liability for an imprisonment based upon a warrant issued by a police magistrate. To hold the defendant liable, it was necessary to prove that the person who procured the warrant was acting within the scope of the authority conferred upon him by the defendant. In this case Hyde had no authority from the defendant under which he would have been authorized to make a complaint against a person who had committed an offense not connected with the defendant's business or property. In making this charge against the plaintiff, he was not protecting or endeavoring to recover possession of any of the defendant's property, and the charge itself had no relation to any interest of the defendant which he was authorized to protect. We think the case comes within the principle established in *Mulligan v. New York & R. B. R. Co.* (1892) 129 N. Y. 511, 14 L.R.A. 791, 26 Am. St. Rep. 539, 29 N. E. 952."

See also *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168, where it was held that no recovery could be had in respect of a wrongful arrest procured by a station agent in compliance with a

2465. Time when the proceedings were taken.—"There is," as was stated by Blackburn, J., in a leading case, "a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property, to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is **not** anything done with reference to the property; it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual."¹ The purport of these remarks has been thus summa-

telegram sent in behalf of a third person. See § 2465, note 2, *post*.

¹*Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65. There the plaintiff went to the booking office of a railway company, and asked for a passenger's ticket, in order that he might travel upon the railway. B., a ticket clerk in the employ of the company, handed to him a ticket, and also money for the change he was entitled to receive. The money so handed to the plaintiff contained a foreign coin, which he refused to receive. B. refused to take it back, and the plaintiff threw it down upon the counter, saying, "I will have my right money." Thereupon B. seized him and gave him into the custody of a policeman, charging him with putting his hand into the till and attempting to steal money therefrom. Held, that there was no implied authority from the company to give the plaintiff into custody, and that, in an action brought by him against the company for false imprisonment, he had been properly nonsuited.

After stating the nature of the functions of the employee in question, Blackburn, J., proceeded thus: "On these facts, it may be fairly said that the booking clerk has an implied authority to do all the acts which are necessary for the protection of the money intrusted to him. I am inclined to think that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender;

or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that also might be within the authority of a person in charge of a till. I am not, however, prepared to pronounce a decided opinion on these supposed cases; the present case is altogether different. . . . If the law were that the defendants are responsible for the act of their booking clerk in giving the plaintiff into custody, on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop; every merchant would be responsible for a similar act of his clerk; and every gentleman for the act of his butler or coachman. The principle which governs the present case has been laid down in the cases that have been cited. [*Goff v. Great Northern R. Co.* (1861) 3 El. & El. 672, 30 L. J. Q. B. N. S. 148, 7 Jur. N. S. 286, 3 L. T. N. S. 850; *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309; *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 448, 39 L. J. C. P. N. S. 241, 22 L. T. N. S. 656, 18 Week. Rep. 834; *Limpus v. London General Omnibus Co.* (1862) 1 Hurlst. & C. 526, 32 L. J. Exch. N. S. 34, 9 Jur. N. S. 333, 7 L. T. N. S. 641, 11 Week. Rep. 149, 17 Eng. Rul. Cas. 258.] There is an implied au-

rized by Lord Esher: "Although a servant is acting with a view to protect his employer's property against similar attempts in the fu-

thority to do all those things that are necessary for the protection of the property intrusted to a person, or for fulfilling the duty which a person has to perform. To apply that principle to the present case, the booking clerk had an implied authority to do everything that was necessary for the fulfilment of the duty intrusted to him, but he had no implied authority to punish for a supposed infringement of the law. This distinction runs through all the cases.

. . . With regard to the act of the policeman, he was at the station for the purpose of enforcing the by-laws of the company, but there is no ground for saying that he has an implied authority to arrest the plaintiff, simply because the booking clerk said, 'I insist upon your taking him in charge.' The policeman was not bound to obey such an order. I think, therefore, that there is a total failure of evidence to show that the clerk was acting within the scope of his authority in giving the plaintiff into custody, and that neither the clerk nor the policeman had any authority to arrest the plaintiff, when the arrest could only be for the purpose of vindicating public justice, and not for the purpose of protecting the property of the company." Hannen, J., referring to the argument of counsel, said: "The proposition Mr. Seymour asks us to affirm is this, that every servant who is intrusted with the property of his master has an implied authority to put the law in motion with reference to any offense that may be committed in connection with that property. I think that is a proposition wholly unsupported by authority, and would lead to very grievous consequences if it was established."

In *Daniel v. Atlantic Coast Line R. Co.* (1904) 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718, where the defendant was held not to be liable for an arrest made on suspicion of theft, by a man employed as the cashier of a local railway station, with power to collect money, give receipts, sell tickets, take care of the money received, and forward it to the treasurer of the company, the court argued thus: "It is not pretended in this case that there was any express authority, or that there was any ratification of the acts of

the alleged agents. The plaintiff's sole contention is that what Atkinson did at Greenville, and Meacham at Kingston, was within the line of their duty and the scope of their employment, and therefore they had implied authority from the defendant to do what they did, upon the theory, we suppose, that every authority carries with it, or includes in it, as an incident, all the powers which are necessary, proper, or usual as means to effectuate the purposes for which it was conferred, and that, consequently, when an agency is created for a specified purpose or in order to transact particular business, the agent's authority, by implication, embraces the appropriate means and power to accomplish the desired end. He has not only the authority which is expressly given, but such as is necessarily implied from the nature of the employment. Story, *Agency*, 9th ed. § 97. This is the general rule, and the doctrine of *respondet superior* is a familiar one. But in our opinion it has no application to the facts of this case. . . . A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service, but when the property has been taken from his custody or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent. . . . There is no ground for saying that what was done by the agent was in the ordinary course of the business of the company, nor that it was for its benefit, except in so far as it is for the benefit of all the citizens of the state that a criminal should be prosecuted, convicted, and punished. If the agent acted from a sense of the duty which rests on everyone to give in charge a person who he thinks has committed a felony, his conduct, while commendable, would in

ture, he has no implied authority to take a man into custody for that which has already been done. That is a distinct statement of the

no way be connected with the defendant so as to fasten liability upon it."

In *Rowe v. London Pianoforte Co.* (1876) 34 L. T. N. S. 450, the grounds upon which Bramwell, B., speaking for himself alone, based his opinion that the managing director in question had no power to render the company liable under the particular circumstances of the case, were thus stated: "The defendants' property, if it had been stolen, was restored to them; so the charge against the plaintiff was not for their protection. It would not in any way have been for their benefit unless the reputation of their managing director, as a stern man, might tend to secure their future immunity from servants' dishonesty; but even if that effect could be traced, the benefit to the defendants would not be sufficient to make them liable here. The managing director of a company must be acting more specifically in their interests than Wood was doing in this case, if the company is to be held responsible for a false imprisonment caused by him."

In *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168, where a station agent had sent a telegram which resulted in the wrongful arrest of the plaintiff, who had eloped with a girl, one of the contentions of the plaintiff, *viz.*, that the defendant was liable because the agent procured the arrest by causing it to be falsely represented to the police officer that he had stolen defendant's property was thus discussed: "The question thus presented is whether or not the defendant was responsible for this act of its station agent. The station agent had no authority from defendant either to arrest or to prosecute any person, although such person wrongfully took the property of defendant which had been placed in the custody of such station agent. Nor do we think that he had the apparent authority to make such arrest or prosecute such wrongdoer. It was his duty to care for and protect the property in his charge, but, after such property was stolen, it was not his duty, either expressly granted or impliedly given, to put in motion the criminal laws of the land and cause the arrest or prosecution

of the person guilty of the larceny. He had the right to protect the property of defendant placed in his charge, and to recover it back; but the arrest of the offender and his prosecution would not protect or recover the property. Such act was not within the real or apparent scope of his employment, nor was it in the line of the business with which he was intrusted, nor was it for the benefit of the defendant. . . . But under the undisputed evidence adduced in the case, the station agent at Donaldson was solely acting for Burton, the father of the girl, in sending the messages. He was doing a service solely for the benefit of his friend, and not for the defendant. He had stepped aside from the defendant's business and from the line of his employment, and was acting solely for his own purposes."

In *Hanlon v. Manson* (1902) 2 New South Wales, L. R. 291, the doctrine formulated in the *Allen Case*, *supra*, was adduced as a ground for holding that the defendant was not liable for the act of the manager of a branch store, 200 miles away from the defendant's own residence, in arresting a customer on the charge of theft.

"The trend of decision is against holding the principal liable when the arrest has been made after the supposed crime had been committed, and not for the protection of his property or interests. In such cases the agent has been presumed to have acted on his own account, for the vindication of justice. . . . In this case it may safely be said that there was no presumption of authority from the mere fact of the agency, to make an arrest three months after the supposed crime had been committed, and when there had been the fullest opportunity in the meantime for the agents to confer with their principal." *Markley v. Snow* (1904) 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999.

In *Staples v. Schmid* (1893) 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193, the court remarked that one of the principles to be extracted from the English cases was "that when a servant not specially appointed to protect property arrests a person whom he supposes to have stolen his master's goods, the servant must be presumed to have acted in

law.”² In this statement, it will be observed, there are no words which specifically correspond to that part of the passage quoted above in which Blackburn, J., adverts to the right of acting in respect of arrests made by a servant for the purpose of recovering back stolen property. Unless this omission was due to mere inadvertence, it must apparently be regarded as reflecting the opinion of Lord Esher that the right of action thus recognized is predicable only in respect of cases in which the arrest is made immediately after the commission of the crime to which it has relation. Such would in fact seem to be the rule deducible from the more recent English decisions which bear upon the point. These all seem to proceed upon the theory that the authority of a servant to make an arrest after the asportation of the stolen property is so far complete as to take it for the time being out of his reach except on the ground of a peculiar exigency.³ The right of action has been affirmed without any such qualification by some American courts.⁴

The doctrine that a servant has ordinarily no implied power to make an arrest for a past offense will not preclude recovery, where

pursuance of his duty as a good citizen, and not in the scope of his employment as a servant.”

In *Minter v. Southern Exp. Co.* (1910) 153 N. C. 507, 69 S. E. 497, a complaint which alleged in effect that the defendant's agent and night watchman, acting under the instructions of the night foreman, swore out a search warrant and a warrant of arrest for plaintiff, charging him with larceny, was held to be demurrable in the absence of any averment that the defendant had authorized or ratified the proceedings. The *Allen Case*, *supra*, was relied upon.

In *Wikle v. Louisville & N. R. Co.* (1902) 116 Ga. 309, 42 S. E. 525, an action for malicious prosecution, it appeared that a ticket agent, having missed certain money from the cash drawer, procured the arrest of plaintiff because of resemblance to a man whom he suspected of the theft, and had a warrant issued for larceny. Held, that there was not sufficient evidence to authorize a finding that the prosecution was within the scope of the agent's authority.

See also *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 445, 39 L. J. C. P. N. S. 241, 18 Week. Rep. 834,

22 L. T. N. S. 656, § 2471, note 15, *post*.

² *Abrahams v. Deakin* [1891] 1 Q. B. (C. A.) 516.

³ See next section, note 9.

⁴ In *Green v. Southern Exp. Co.* (1871) 41 Ga. 515, a man who was suspected of having stolen money of an express company was wrongfully arrested by one of its agents, for the purpose of the recovering back the money. Held, that the company was liable, for the reason that the agent had acted within the sphere of his appropriate duty.

In *Cameron v. Pacific Exp. Co.* (1891) 48 Mo. App. 99, where the agent of an express company wrongfully procured the arrest of a man who had taken from its office an article upon which the charge had not been paid, the right of action was affirmed on the ground that the agent had implied authority to take such a step for the purpose of regaining control of the property.

In *Markley v. Snow* (1904) 207 Pa. 447, 64 L. R. A. 685, 56 Atl. 999, the court remarked, *arguendo*, that the authority to make an arrest has been inferred in some cases “when the arrest was to recover the property back.”

the arrest complained of was one of a continuous series of acts, which together constituted a single tort.⁵

The power of a railway conductor to procure, in his capacity as a servant, the arrest of a passenger for an infringement of the regulations of the railway company, disorderly conduct, or other misfeasance, is terminated when the passenger ceases to occupy the position of a passenger.⁶

2466. Necessity for immediate action in the master's interest.—The consideration that the master's interest would have suffered damage, unless the servant whose wrongful act it is sought to impute to him was invested with authority to act promptly with regard to the detention of offenders, at the time and place where that act was done, is an element which is susceptible of being regarded under one or the other of two aspects, *viz.*:

(1) As bearing upon the question whether or not the power of taking or giving third persons into custody or of prosecuting them was a normal incident of the functions discharged by the given servant. The significance of the element in this point of view is illustrated by various cases which proceed upon the doctrine that "the au-

⁵ *Berry v. Carolina, C. & O. R. Co.* (1911) 155 N. C. 287, 71 S. E. 322 (complaint not demurrable, which alleged that while the plaintiff was riding peaceably as a passenger on a train, the agents of the carrier wilfully and maliciously assaulted him and committed a battery on him, and violently ejected him from the train, and caused his arrest on a criminal charge); *Louisville R. Co. v. Kupper* (1909) — Ky. —, 118 S. W. 266.

⁶ In *Lezinsky v. Metropolitan Street R. Co.* (1898) 31 C. C. A. 573, 59 U. S. App. 588, 88 Fed. 437, 4 Am. Neg. Rep. 595, a blockade had obstructed a street railway car in which the plaintiff had paid his fare, and the conductor, having no transfers, told him and the other passengers that they were to walk to a certain street and take another car, and that it would be all right if he would explain to an inspector. The inspector told the plaintiff to explain to the conductor of the other car that a new payment of fare would not be required. The plaintiff got on the other car and made the explanation, but the new conductor directed him to pay his fare anew or to leave the car. As he refused to do either the plaintiff was ejected, and, at the request of the conductor, was arrested

for disorderly conduct. The plaintiff, having been tried and discharged, sued the street railway company for malicious prosecution and false imprisonment. Held, (1) that the conductor was not acting in the course of his employment and within the scope of his authority, either express or implied, in causing the arrest of the passenger after he left the car for his prior disobedience; (2) that there was no testimony from which a jury could properly infer a ratification by the street railway company of the conductor's act in causing the arrest; and (3) that a verdict was properly directed by the court for the street railway company. The court said: "The subsequent act of the conductor in causing the arrest of the passenger was apparently outside of the course of his employment, outside of his service as a conductor, and was his act as an individual. It cannot be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thus to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor."

thority to arrest offenders is only implied where the duties which the officer was employed to discharge cannot be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot.”¹ As a criterion of liability, this doctrine has most frequently been applied with special reference to the exercise of powers given by statutory provisions to the servants of railway companies or other carriers.² “In the case of a person

¹ *Bank of New South Wales v. Owston* (1879) L. R. 4 App. Cas. 270, 48 L. J. P. C. N. S. 25, 40 L. T. N. S. 500, 14 Cox, C. C. 267, 25 Eng. Rul. Cas. 124.

In *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 535, 538, Blackburn, J., said: “There can be no question since the decision of the case of *Goff v. Great Northern R. Co.* [see next note], that where a railway company or any other body (for it does not matter whether it is a railway company or not) have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business,—all such things as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is prima facie evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess, while acting within the scope of his authority, his employers are responsible for it.”

² By §§ 103, 104 of 8 & 9 Vict. chap. 20 (re-enacted in substantially similar terms as a portion of § 5 of the regulation of railway act, 1889, chap. 57) it was provided that “all officers and servants and other persons, on behalf of the company,” were authorized to apprehend persons who traveled in a railway without having paid the fare and with intent to defraud. The effect of the provision was considered in *Goff v. Great Northern R. Co.* (1861) 3 El. & Bl. 672, 30 L. J. Q. B. N. S. 148, 3 L. T. N. S. 850, 7 Jur. N. S. 286, an action for false imprisonment. There the evidence for plaintiff showed that he, after having traveled on defendants’ line with a return ticket from L. to W. and back, had, at the end of the return journey,

given up to defendants’ ticket collector at the L. station the return half of an other ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendants’ paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff’s explanation, said to the inspector, “I think you had better take him, but first you had better obtain the concurrence of the secretary.” The inspector thereupon left, and returned shortly afterwards, but whether or not he had obtained the secretary’s concurrence did not appear. He then directed a police constable, also in defendants’ pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, plaintiff’s story proving true, dismissed the complaint. Held, that the conduct of all defendants’ other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff. In a judgment delivered to the whole court, Blackburn, J., observed that the general principle laid down in *Giles v. Taff Vale R. Co.* (1853) 2 El. & Bl. 822 (an action for conversion; see § 2403, note 1, *post*), is “applicable to all exigencies that may be naturally expected to arise in the ordinary course of any of the business of the company. If these are of such a nature that a decision must be come to on behalf of the company promptly, the company may reasonably be expected to authorize someone on the spot to decide for them in such cases.” The learned judge then stated the effect of the enactment referred to above, and proceeded thus: “In the ordinary course of affairs, the

company must decide whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as, from the nature of the case, the decision whether particular passengers shall be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, we think it a reasonable inference that, in the conduct of their business, the company have on the spot officers with authority to determine, without delay attending on convening the directors, whether the servants of the company shall, or shall not, on the company's behalf, apprehend a person accused of this offense. We think that the company would have a right to blame those officers if they did not, on their behalf, apprehend the person, if it seemed a fit case; and if so, the company must be answerable if, in the exercise of their discretion, these officers, on their behalf, apprehend an innocent person. Then, was there evidence that the parties concerned in apprehending the plaintiff, or some one of them, was an officer having such authority from the company? It is difficult to see why the company pay the police, if the inspector of their police is not to act for them to this extent; but there is more in this case. We find that the ticket collectors and the ticket clerk and the police, and all the persons acting for the company, go to the office of the superintendent of the line, and refer to him as the superior authority. We agree with Platt, B., in *Giles v. Taff Vale R. Co.* (1853) 2 El. & Bl. 822, 834, that such conduct is sufficient evidence to go to the jury that the superintendent of the line was the person in authority. The evidence does not show that the concurrence of the secretary was actually obtained; but, if it were, he is but an officer of the same sort of authority as the superintendent of the line." In *Bank of New South Wales v. Owston* (1879) L. R. 4 App. Cas. 270, 25 Eng. Rul. Cas. 124, it was remarked that this case turned "on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest, and indeed the only, representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury

might infer the necessary authority."

In the *Goff Case*, *supra*, the effect of the decision in *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297, which had been cited as an authority in favor of the defendant, was thus discussed by Blackburn, J.: "The question arose on a bill of exceptions. All that is stated on the bill of exceptions is that the plaintiff was taken out of a railway carriage and imprisoned by the defendant Richardson, 'then an inspector [ticket collector] in the service of the company, professing to act, in so doing, as the servant of the company, and under the assertion by the defendant Richardson of the cause of justification set forth in the defendants' several pleas of justification, but which several pleas, except the several by-laws therein mentioned, were disproved by the evidence.' The pleas set forth as a justification that the plaintiff had infringed various by-laws; that Richardson interfered to enforce them; that in revenge the plaintiff assaulted Richardson, and for that assault was given into custody. It is not at all clear on this statement what the evidence really was, nor whether it brought the case within the principle afterwards laid down in *Giles v. Taff Vale R. Co. supra*. It is observable that both the argument and the judgment are almost exclusively directed to the question whether there was a justification or not. But if the decision in *Eastern Counties R. Co. v. Broom* is on a principle inconsistent with that subsequently laid down by the court of exchequer chamber in *Giles v. Taff Vale R. Co.*, we consider ourselves free to choose which of the two authorities we shall follow, and we prefer the latest date which we think also the soundest in principle." In the judgment delivered for the privy council in *Bank of New South Wales v. Owston* (1879) L. R. 4 App. Cas. 270, 25 Eng. Rul. Cas. 124 the case thus criticized was "scarcely consistent with late authorities."

Another case upon which Blackburn, J., commented in the *Goff Case*, was *Roe v. Birkenhead, L. & C. Junction R. Co.* (1851) 7 Exch. 36, 6 Eng. Ry. & C. Cas. 795, 21 L. J. Exch. N. S. 9. There the plaintiff had taken his ticket at a station of the defendants for B. and back. The dispute as to his fare arose on the other side of C., where the line

of another company began. The plaintiff was taken at the C. station to a superintendent. Three companies occupy the station at C., and there was no evidence to show to which company the superintendent belonged, but apparently he was the superintendent of the line on which the dispute arose, which was not defendants' line. This superintendent gave the plaintiff in custody to P. who, according to one of the witnesses, was one of the servants of the defendant. On this state of facts the court of exchequer thought there was no evidence that any person concerned in the arrest was a servant of the defendants, except one P., and that there was "no evidence of any course of dealing to show that, as a servant of the company, he (the wrongdoer) was authorized to make any arrest in their behalf." (Parke, B.) This decision was declared by Martin, B., during the argument of counsel in *Seymour v. Greenwood* (1861) 6 Hurlst. & N. 359, 30 L. J. Exch. N. S. 189, 9 Week. Rep. 518, to go further than any other on the subject of servants' authority.

In *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 445, Montague Smith, J., observed, *arguendo*: "No doubt if, in furtherance of the particular business of the company, it is necessary to arrest a person, the servants of the company have an implied authority to do it. Thus, if there is a by-law of the company, and power to arrest any person infringing it, it must be presumed that the company give authority to anyone they put in charge of the station to so enforce it, since this can only be done by the company's servants on the spot."

In *Moore v. Metropolitan R. Co.* (1872) L. R. 8 Q. B. 36, the plaintiff took a ticket which entitled him to travel in the underground railway in London as far as Notting Hill Gate. If he wished to get out at Edgware road, a station which was reached before the train got to Notting Hill, he would not be permitted to do so without paying 2d. more than he had paid for the whole distance to Notting Hill Gate. He did get out at Edgware road, and was informed that he must pay an additional fare of 2d. This he refused to do. He was thereupon given into custody by the charge of refusing to give up his ticket or pay his fare, and thereby de-

frauding the company. This charge was dismissed. The passenger having brought an action of trespass and false imprisonment, a nonsuit on the ground that there was no evidence that the inspector had any authority, either express or implied, to give the plaintiff in charge, was held to have been improperly granted. Blackburn, J., said: "Where a railway company are carrying on business, there are certain things which are necessary to be done for the carrying on of the business and the protection of the company, and there are things which, if done at all, must be done at once, and therefore the company must have some person on the spot to do these things, a person acting with common prudence and common sense, clothed with authority to decide as the exigency arises what shall be done. . . . If the plaintiff meant to get out at Edgware road with a view to defraud the company of the sum of 2d., it would be a plausible thing for the company to say that he had violated the first part of § 103. I do not, however, say that it would be an offense under that section. At all events, the company's agent would have to determine whether the act of the plaintiff was within that section, and to consider whether, acting for the company on the spot, he should exercise his authority and give the plaintiff into custody. Being placed on the spot by the company for the express purpose of determining whether he shall exercise the power he has, the inspector makes a mistake, and the company are responsible for the consequences of that mistake. It has been argued that, unless the plaintiff had committed an offense under § 103, the inspector at the station had no authority from the defendants to give the plaintiff into custody, and consequently the defendants were not liable; but if this were so, there never would be an action against a railway company for false imprisonment. If the plaintiff had committed the offense, there would have been a defense upon the merits. It is upon the ground that the servant of the company has made a mistake that the company are liable." Mellor, J., said: "I agree that by §§ 103 and 104 power is given to the defendants to arrest and detain persons acting fraudulently, and in order to carry out these provisions some person must be at the station to protect the interest of the defendants, and in case he is of

opinion that an attempt to commit any of the specified frauds has been made, he is clothed with authority to act upon the emergency, and to decide as best he may whether the supposed offender ought to be arrested. Now the inspector was clearly mistaken, but I think that the company are liable if their official did not exercise a sound discretion. The arrest was within the scope of his authority to protect the company's interests, and to prevent the commission of the frauds specified."

Van Den Eynde v. Ulster R. Co. (1870) Ir. Rep. 5 C. L. (Q. B.) 6, affirmed in (1871) Ir. Rep. 5 C. L. (Exch. Ch.) 328. A ticket clerk, erroneously believing that he had seen a ticket in the plaintiff's hand, detained him, asked him for the ticket, and searched him, and subsequently charged him, in the presence of the station master, with having stolen a ticket, whereupon the plaintiff was also searched by the station master. In an action for assault and false imprisonment, it was held that there was evidence of the defendants' liability for the acts of the ticket clerk and station master, and that the learned judge was right at the trial in refusing to direct a verdict for the defendants on the ground that there was no evidence that they committed or authorized the trespass proved. One of the grounds upon which the action was held by four of the judges to be maintainable was thus stated by Pigott, C. B.: "Upon the evidence which I have stated, there was, I think, not only that from which a jury might reasonably infer, but that which left no ground for reasonable doubt, that both the station master and the ticket clerk came to the conclusion upon what appeared before them,—first, that the plaintiff had stolen the ticket; and, secondly, that when he was detained by the ticket clerk, he was proceeding with it to the train, then at the platform and about to start, for the purpose of using it on the journey, and of thereby traveling on the railway without paying his fare; and that, in so doing, he was then engaged in an 'attempt to travel in a carriage of the company without having previously paid his fare, and with intent to avoid the payment thereof.' . . . The question is not whether the plaintiff was, in fact or in law, making the attempt to travel, as prohibited by the statute. The ques-

tion is whether the officials of the company would have acted within the scope of their authority in detaining the plaintiff until he could be conveniently brought before a magistrate upon a charge of 'attempting to travel in the company's carriage without paying his fare, with intent to avoid payment thereof,' if the plaintiff, when he was detained, was proceeding direct from the ticket office to the train (which was then ready to start from the platform outside it), with a ticket which he had just stolen in the office, and with the intent of using that ticket on the journey so as to avoid paying his fare. If, under such circumstances, the officials, or one of them, would be acting within the scope of their authority, and if that authority was involved and implied in the nature of the officials' employment, then the company must be answerable for any mistake or excess which their servants committed while so acting within the scope of their employment, and cannot be exempted from liability merely because the officials, acting according to their judgment in a sudden emergency, so far acted illegally as to expose themselves and their employers to an action. This very distinction between illegality in a mistaken exercise of discretion and judgment, and illegality where, upon the assumption that the facts were as they believed them, but where in no view of them could the act, whether it was done by the officials or by their employers, be lawful, is enunciated by Mr. Justice Blackburn in *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 536. . . . In the first place, I am prepared to decide that for the purpose of regaining for the company the ticket, their property, which was in the immediate charge of the ticket clerk, it was within the scope of his employment to arrest, and to give into custody upon a charge of stealing, a person caught *in flagrante delicto*, in the very act of making away with the plunder. And if it would be within the scope of his employment to arrest and detain the plaintiff, if he had been guilty of the act charged, it cannot, I think, be out of the scope of his employment, merely because, in the firm and honest belief that he saw the theft in course of commission, he ultimately was found to have been mistaken. In the second place, I think, irrespectively of any charge of felony, it was within the scope

being arrested for breaking the company's by-law, it may well be said that that is the way the company carry on their business."³ But the

of the employment, both of the ticket clerk and the station master, if the plaintiff took the ticket, the company's property, and was going away with it, to stop him and take it out of his possession, using no unnecessary violence. And if that formed what was within the scope of their employment, I think it was within the scope of that employment, when they were convinced, upon reasonable grounds, that the plaintiff was making away with their employers' property, having taken it out of the custody of the clerk, to act at once in endeavoring to regain it."

By one of the clauses of § 5 of the regulation of railways act, 1887 (a more comprehensive provision which has replaced the act, chap. 57 of 8 & 9 Vict., mentioned *supra*) it is provided that any passenger who fails to produce his ticket, deliver it up or pay his fare, and refuses his name and address, may be detained by any servant of the railway company. In *Mulkern v. Metropolitan R. Co.* (1892) 8 Times L. R. 232, a nisi prius case, the plaintiff had shown his season ticket several times, but refused to give it up or to state his address. He was thereupon arrested. A verdict was rendered in his favor, and no attempt was made to set it aside.

In *Knight v. North Metropolitan Tramways Co.* (1898) 78 L. T. N. S. 227, the applicability of the principle formulated in the *Goff Case*, *supra*, was denied, for the reason that the plaintiff had not been charged with an attempt to avoid payment of his fare or any misconduct of a like nature within § 51 of the tramways act, 1870.

In *Lundie v. Macbrayne* (1894) 21 Sc. Sess. Cas. 4th series, 1085, the owner of a steamboat was held to be liable for a wrongful arrest made by the purser acting in the exercise of the authority conferred by §§ 35, 37 of the merchant shipping amendment act, 1862, upon the master or other officers of a passenger steamer to arrest any person who traveled without having previously paid his fare, and with intent to avoid payment thereof.

In *Hamilton v. Railway Comrs.* (1905) 5 New South Wales St. Rep. 267, 22 W. N. 691, an employee temporarily assigned to the duty of collecting

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the tickets of passengers on a train then about to arrive was, while waiting for the train, assaulted by a man and gave his assailant into custody. Held, that the defendants were not liable in an action for false imprisonment. Discussing the argument that § 118 of the railway act of New South Wales gave the employee power to commit the plaintiff to the custody of a constable for assaulting him in the execution of his duty, the court said: "That section provides that 'any railway officer or agent may seize and detain any person who has committed any offense against the provisions of this act, and whose name and residence are unknown to such officer, and convey him with all convenient despatch before some magistrate.' It was contended that the plaintiff was liable to be so arrested for an offense against § 114 (c). That section makes it an offense to wilfully obstruct or impede any officer of the commissioners in the execution of his duty. But it is quite clear that that is not the offense which is alleged to have been committed in this case, nor was it the offense with which the plaintiff was charged. There is no evidence before us that the plaintiff obstructed or impeded Furlong in the execution of his duty. The evidence is that plaintiff, in passing onto the platform, 'pushed' Furlong, and was thereupon given into custody upon a charge of assaulting him in the execution of his duty. It may be that an assault would result in the obstruction of an officer in the execution of his duty, but there is no evidence here of any such thing. And the charge laid against the plaintiff at the police court was of assaulting, which is not in the act constituted an offense." The opinion was also expressed that if the right of recovery were to be determined without reference to the statute, the defendants could not be held responsible, because the act of the employee "was not for the purpose of protecting property or preventing a felony or anything of that kind, but for the purpose of vindicating justice by punishing the plaintiff for a supposed assault."

³ Brett, J., in *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 448. In the same case Montague Smith, J., said:

scope of the doctrine is manifestly not restricted to cases in which statutory powers of that description are involved.⁴

(2) As bearing upon the question whether a servant who, under normal circumstances, was not authorized to put the criminal law in motion, was, upon the particular occasion disclosed by the evidence, entitled to do so, on the ground of a special exigency then existing.⁵ Some judges have expressed the opinion that such an exigency may always be inferred where a servant, in the absence of his master, sees a person attempting to steal property intrusted to his charge.⁶ Such a doctrine would appear to be not an unreasonable one. But in Eng-

"No doubt if, in furtherance of the particular business of the company, it is necessary to arrest a person, the servants of the company have an implied authority to do it, thus, if there is a by-law of the company, and power to arrest any person infringing it, it must be presumed that the company give authority to anyone they put in charge of the station so to enforce it, since this can only be done by the company's servants on the spot."

⁴ The precedent mainly relied upon by Blackburn, J., in the *Goff Case*, was and has been stated in note 2, *supra*, an action for conversion, and the defendant's liability was considered without reference to any statute.

In *Ashton v. Spiers* (1893) 9 Times L. R. (C. A.) 606, where it was held that the manager of a restaurant had authority to give into custody visitors who acted in a notorious manner, Lord Esher observed that the result of the decision was that an authority to arrest could be implied only where the appointed duties of the employee could not be properly discharged unless he had the power to arrest offenders promptly and on the spot.

⁵ In *Jones v. Duck*, a decision the English court of appeal reported only in the Times, March 16, 1900, A. L. Smith, L. J., said that the cases showed "that a person might have such an implied authority [*i. e.*, to give a supposed offender into custody] derived from the exigencies of a particular occasion." This statement was quoted by Kennedy, J., in *Hanson v. Waller* [1901] 1 K. B. 390, and by O'Brien, L. Ch. J., in *Cullimore v. Savage South Africa Co.* [1903] 2 I. R. 589.

⁶ One of the grounds upon which the

plaintiff was held entitled to recover in *Van Den Eynde v. Ulster R. Co.* note 2, *supra*, was thus stated by Monahan, Ch. J.: "*Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 445, 39 L. J. C. P. N. S. 241, 22 L. T. N. S. 656, 18 Week. Rep. 834, and *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week Rep. 127, 11 Cox, C. C. 621, . . . decide that when a theft has been supposed to have been committed or attempted, a clerk or porter has no implied authority from the company to arrest the suspected party for the purpose of bringing him before a magistrate and prosecuting him criminally. But these cases have no application to a case like the present, where the property taken is in the charge of the clerk, and he sees a party take it. No one, I think, can entertain a doubt, not only that he is authorized, but that it is his duty towards his employers, to stop the party, and take from him his employers' property. That it is lawful for him to do so, *Blades v. Higgs* (1861) 10 C. B. N. S. 713, 30 L. J. C. P. N. S. 347, 7 Jur. N. S. 1289, 4 L. T. N. S. 551, is an express authority. And that the servant has an implied authority from his master to do so is a necessary consequence of his duty to take care of his master's property in his possession; and such appears to have been the opinion of Mr. Justice Blackburn in the case of *Allen v. London & S. W. R. Co.* *supra*, to which I have referred, though he professes not to give a decided opinion on the subject." Similar views were expressed by Lawson, J., and Pigott, C. B.

It was, however, pointed out by O'Brien, L. Ch. J., in *Cullimore v. Sav-*

land the question still remains open for discussion.⁷ It has been recognized in some American states; but the significance of this recognition is somewhat diminished by the fact that, so far as appears, the attention of the courts in question was not called to the more recent English authorities.⁸

So far as regards that class of cases in which damages are claimed in respect of a wrongful arrest made after the time at which the plaintiff is alleged to have stolen the property of the tort-feasor's master, "it is part of the supposition that the property might be got back by the arrest; but in such a case the time, place, and opportu-

age South Africa Co. [1903] 2 I. R. 589, that in *Blades v. Higgs*, *supra*, the question of implied authority by reason of position was not decided or discussed or raised; that for anything that appeared in the case "the command" of the master in question might have been an express particular authority, and not one to be implied or inferred from position; and that the only point raised was the ownership of the game which his servants had seized. This criticism, the propriety of which seems to be beyond dispute, leaves the doctrine formulated by Monahan, L. Ch. J., without any positive support except the *obiter* doctrine of Blackburn, J. (see next note). O'Brien, L. Ch. J., stated that his individual opinion would be in favor of affirming the proposition left undetermined by the English court of appeal in the two cases cited in the next note, *viz.*, "that a manager who saw property of his employer being feloniously taken could then and there give the taker into custody with a view to protect or recover it." His previous remarks indicate that he did not regard this power as being vested in servants of every grade. But from the following remarks, it is apparent that the more comprehensive doctrine was adopted by Walker, L. J., another of the judges who sat in the *Cullimore Case*: "Davis was employed at a turnstile to receive the employers' money from persons who were taking admission tickets, and to that limited extent he was intrusted with the protection of the employers' property, and if, while he was admitting, say, the plaintiff, he (Cullimore) attempted to steal money lying on the top of the turnstile, or appropriated on the spot a half sovereign given him by mistake

in change, and refused to return it, there would, I think, have been an implied authority to do all acts, including arrest, necessary for the protection of the property of the employers. The duty could not be efficiently discharged unless it involved the power to arrest the offender promptly on the spot."

⁷ In *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, Blackburn, J., was "inclined to think," but did not decide in terms, that a servant might be impliedly authorized to arrest a man whom he found attempting to steal property of which he was in charge. See § 2465, note 1, *ante*.

In *Stedman v. Baker* (1896) 12 Times L. R. (C. A.) 451, Lord Esher said: "It might be that if the manager saw a person taking away the property of his master, he could take that person into custody, or give him into custody, for the purpose of protecting the property of the master. The court refused to decide that point in *Abrahams v. Deakin* [1891] 1 Q. B. (C. A.) 520, and they refused to decide it now."

⁸ In *Markley v. Snow* (1904) 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999, the court remarked that "the authority may be implied when the arrest is made by the agent in the absence of the principal for the protection of property that is in danger."

From the language used *arguendo* in *Daniel v. Atlantic Coast Line R. Co.* (1904) 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann Cas. 718, it would seem that the court accepted this doctrine. See § 2465 note 1, *ante*.

See also the extract quoted in § 2469, note 1, *post*, from the opinion in *Knowles v. Bullene* (1897) 71 Mo. App. 341.

nity of consulting the employer before acting will be material circumstances to be considered in determining the question of authority." ⁹

⁹ *Bank of New South Wales v. Owston* (1879) L. R. 4 App. Cas. 270, 288, 25 Eng. Rul. Cas. 124. There W., the acting manager of a bank, who had laid an information against the plaintiff, had testified as follows: "In a case where a man presented a forged check I have as accountant, and should now take proceedings to arrest, where we have to catch the man on the spot,—only in such a case. I should do this as acting manager or as assistant manager, accountant, or clerk." The general manager spoke to the same effect: "I will not say that in cases in which the property of the bank is taken and in danger of being lost unless arrest ordered, action has not been taken without reference to the board. In such an emergency I should take the responsibility of violating the rule, whether it would be my duty or not." Discussing this evidence, Sir Montague Smith said: "These statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred. An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere facts that the agent acted on behalf of and in the supposed interest of the principal; were it otherwise, the special authority would be equivalent to a general one. What, then, was the situation when these unwarrantable proceedings took place? The bill

had been sent to Allen & Bowden, as notaries, to be presented to the plaintiff for acceptance, and noted if acceptance was refused. It was a trade bill accompanied by shipping documents which were in the hands of the bank. The plaintiff was a merchant having an office and clerks, one of them known to the notaries' clerk, and it was at his own office the bill was presented to him. According to the plaintiff's evidence, he told the clerk he would accept and send it to the bank. The clerk (Muir) admits he said he would accept it, and thereupon the bill was left with him. Muir seems to have been blamed for leaving it, and Bishop, another clerk, went with Muir to the plaintiff to demand it, and the plaintiff, as Bishop says, put him off on two occasions, and would have nothing to say to him. Some temper appears to have been shown on both sides. Upon Bishop going back to the office, a consultation took place among the clerks of Messrs. Allen & Bowden, and after referring to books, and apparently with the consent of one of the partners, it was determined to lay an information against the plaintiff for stealing the bill. It cannot possibly be considered that this state of facts raised a case of emergency requiring immediate action by criminal proceedings against a person in the plaintiff's position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out, when there could evidently be no urgency either to obtain or serve it. It was obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be."

In *Hanson v. Waller* [1901] 1 K. B. 390, where the manager of a public house had given his head barman into custody on a charge of stealing whisky from the cellar, the contention of the defendant that there was an "exigency

2467. Power of employer to authorize the act which caused the injury complained of.—The cases cited in the footnote were decided with reference to a doctrine which is discussed generally in an earlier chapter (see §§ 2241–2243); *viz.*, that a master cannot be held vicariously responsible in respect of the commission of an unlawful act by his servant.¹

on the particular occasion" was rejected on the ground that "there was no evidence that any whisky had gone, or that any of it was in such a position that it could be deemed to be property which might be saved if a prompt arrest were made. There were no circumstances to justify a supposition that the master's property could only be protected by the extraordinary step of an arrest."

In *Cullimore v. Savage South Africa Co.* [1903] 2 I. R. 589, Walker, L. J., after expressing the opinion that the arrest made by the servant (a ticket seller at a public show) would have been within his implied powers if it had been made at the very moment when the supposed fraud was committed (see note 6, *supra*), went on to say: "Such a circumstance did not exist here, because the plaintiff passed in, and it was a disputable and doubtful matter, even in the mind of Davis, whether the plaintiff had wrongly received half a sovereign too much, and no attempt to arrest was made then."

In *Thompson v. Bank of Nova Scotia* (1893) 32 N. B. 335, where the manager of one of the local branches of the defendant was held not to be empowered, by virtue of his position, to give the plaintiff into custody, the contention that a special emergency existed was thus discussed by Tuck, J.: "If Daniel had received information on the morning of the 8th of June, that Thompson had robbed the bank, and was about to leave the country at once, and that there was no time to lose, in that case there would be an emergency which would justify prompt action to be taken to have the thief arrested; and for what the agent did under such circumstances, the bank would be responsible. As I have already said, the facts show that there was no such emergency here. There was ample time to consult with Mott; and instead of acting as if on an emergency or on the spur of the moment, time was taken for deliberation, and hours had elapsed before the parties

started from Campbellton for the purpose of arresting Thompson. . . . The whole matter could, by telegraph, have been laid before the bank at Halifax, and instructions received."

¹The English tramways act 1870, §§ 51, 52, employers officers or servants of the promoters or lessees of any tramway to seize and detain any person seeking to avoid payment of his fare.

In *Charleston v. London Tramways Co.* (1888) 4 Times L. R. (C. A.) 629, 32 Sol. Jo. 557, affirming (1887) 4 Times L. R. 157, 36 Week. Rep. 367 (verdict for plaintiff set aside), it was held that this provision could not be construed in such a sense as to render a tramway company liable for the act of a conductor of a car in arresting a passenger whom he suspects of having tendered a counterfeit coin in payment of the fare. The reason assigned for the decision was that the words of the statute showed that the company itself had no power to arrest passengers under such circumstances, and in consequence could not be presumed to have authorized its conductor to do so. So far as the report shows, the court did not discuss the contention of counsel, that the offense charged was virtually one within the statute, because if the half crown had been a bad one, the use of it would have been equivalent to an attempt to evade the payment of fare. But the decision itself shows that this theory was rejected. The case, therefore, must be regarded as having overruled an earlier one in which Stephen, J., had, on the precise ground thus disapproved, ruled at nisi prius that the tramway company was liable for a wrongful arrest made by a conductor for a supposed offense of a similar character. *Furlong v. South London Tramways Co.* (1884) 48 J. P. 329, Cab & El. 316.

The doctrine of the court of appeal was subsequently applied with reference to the same state of facts. *Knight v. North Metropolitan Tramways Co.*

(1898) 78 L. T. 227, 14 Times L. R. 286. Counsel for the plaintiff relied upon the *dictum* of Blackburn, J., in *Allen v. London & S. W. R. Co.* (1870) L. Rep. 6 Q. B. 65, 23 L. T. N. S. 612, 40 L. J. Q. B. N. S. 55, 19 Week. Rep. 127, 11 Cox, C. C. 621, with regard to the implied authority a man in charge of a till ordered to take into custody a person whom he should find attempting to rob it. (See § 2465, note 1, *ante*). Discussing this contention in a well considered judgment, Bruce, J., said: "I take the words of Blackburn, J., in the fullest and most unqualified sense, and it does not appear to me that there is evidence to bring the present case within the lines laid down by him. I cannot see that the acts of the conductor can be said to have been done with the view of recovering the property of the company, or that there was any evidence from which the jury could properly infer that the acts were done with any such view. That the acts were done by the conductor to make an example of the plaintiff, and to prevent the commission of other offenses such as he believed the plaintiff had committed, and in that sense indirectly to protect the company's property, I do not doubt; but to admit such a state of things as affording any evidence of an implied authority on the part of a servant to give a person into custody would be to go far beyond the principles laid down. It would be to affirm the principle that every servant who is intrusted with the property of his master has an implied authority to put the law in motion with reference to any offense that may be committed with reference to the property."

In *Barry v. Dublin United Tramways Co.* (1889) Ir. L. R. 26 C. L. 150, the servant of a tramway company, who had been directed to exclude the public from an inclosed portion of a street, then being repaired by the company under the provisions of a local act of Parliament (which empowered the company to exclude the public, and subjected any person obstructing the company's servants to a fine), forcibly prevented one of the public from driving into and through such inclosure, and such person was in consequence arrested by a police constable. Held, that, even if such arrest was caused by the direct accusation or charge of the servant, the company were not responsible for it. Referring to the

English cases, Holmes, J., remarked: "If these decisions are examined, one distinct and intelligible principle will be found underlying them all. Authority from the master can only be implied where the act is one which, in a certain state of circumstances, might have been legally done by the master himself."

In *Emerson v. Niagara Nav. Co.* (1883) 2 Ont. Rep. 528, the liability of the defendants in respect of an alleged imprisonment of the plaintiff by the purser in his office for nonpayment of his fare was denied on the ground that such an imprisonment was not an act which the defendants themselves could legally have done.

In *Thomas v. Canadian P. R. Co.* (1906) 14 Ont. L. Rep. 55, 8 Ann. Cas. 324, one of the grounds on which a railway company was held not to be liable for the wrongful arrest of the plaintiff by a special policeman was that it could not be inferred that the company had authorized the policeman to do what it could not itself lawfully do under the Dominion railway act. See further as to this case, § 2475, note 6, *post*.

In *Hern v. Iowa State Agri. Soc.* (1894) 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092, the defendant society was empowered by law to arrest persons for selling intoxicating liquors, and for gambling and horse racing within its grounds (Code, §§ 1114, 1116), but not on any other grounds. The arrests and detentions complained of were not for any of the causes specified. The court said: "It seems to us, then, that in doing the acts complained of, the defendants were not acting within the scope of the powers which the society could confer upon them. Such acts were entirely foreign to the purposes for which the society was organized. It was not authorized to enforce the criminal statutes of the state generally. The directors of the society had no power to do the acts complained of in its behalf, and hence could not so authorize others to perform them as to bind the society. In any case, as the directors of the corporation are only its agents for the promotion of its business within the legitimate scope of the purpose for which it is created, any attempt on their part to confer authority on their agents or servants to do an act without the scope of the corporate business would not be binding upon the corporation."

2468. Functions discharged by the tort-feasor. Generally.—The elements considered in the foregoing sections operate irrespectively of the nature of the functions discharged by the servant by whom or through whose procurement the criminal law was set in motion against the plaintiff. The question whether those functions were such as to warrant the inference that the servant was entitled to take such a step admits of a ready answer in one class of actions, *viz.*, those which are founded upon the torts of servants engaged for the express purpose of enforcing the criminal law against offenders. A master is clearly responsible for an arrest made or a prosecution instituted by any servant whom he has invested, either expressly or by implication, with power to take such proceedings with respect to actual or supposed offenders, if his general authority included, either expressly or by general usage and consent, the power to make arrests on behalf of the defendant.¹ This rule is taken for granted in all those cases which are concerned with the liability of carriers and

¹ In *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, it was held error to instruct the jury that, if the arrest of the plaintiff by a conductor acting under the orders of a detective in the employ of the railway company had been effected without a warrant, the defendant would not be liable. The court said: "If he had the general authority, actual or apparent, to act for the defendant in the capacity of detective officer, and such authority included, expressly or by general usage and consent, the power to make an arrest in their behalf, then the mode of execution of such power, with warrant or without, was immaterial, and the defendant was liable in either event. That is the general ground of the operation of the maxim *respondet superior*. If the master orders the thing done, he is responsible for the manner in which the servant does it."

In *American Exp. Co. v. Patterson* (1881) 73 Ind. 430, an unlawful arrest made by the express company's agent employed to pursue and cause the arrest of a person who had stolen its property was held to be imputable to the company.

In *Evansville & T. H. R. Co. v. McKee* (1884) 99 Ind. 519, 50 Am. Rep. 102, where an agent employed by a railroad company to arrest and prosecute persons who should place obstructions on its track carried off an innocent

man and left him in the woods, the company was held liable on the ground that "where the principal confers a general authority upon the agent to make arrests for injuries to property, and the agent, in exercising that general authority, forcibly and wrongfully arrests an innocent person, the principal, who conferred the general authority, is liable for the injury consequent upon the wrongful act."

The liability of a railroad company for the arrest of an innocent man by an agent hired for a similar purpose was again affirmed in *Pennsylvania Co. v. Weddle* (1884) 100 Ind. 138.

In *Pennsylvania Co. v. Weddle, supra*, a railroad company was held liable for the arrest of an innocent man by an agent employed to detect and arrest persons guilty of crimes against its property.

In *Newman v. New York, L. E. & W. R. Co.* (1889) 54 Hun, 335, 7 N. Y. Supp. 560, it was assumed by the court that a railway company is liable for the wrongful arrest of a passenger. The point actually decided was that liability was negatived by the fact that the appearance and behavior of the plaintiff justified the suspicion that he was about to commit a felony.

In *Eichengreen v. Louisville & N. R. Co.* (1896) 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219, an action for false imprisonment of plain-

other persons for the acts of police officers commissioned to perform the duties of constables with reference to their property, and for the acts of servants to whose ordinary powers those of a constable have, either by a statute or by special arrangement with a public authority, been superadded. See §§ 2474 *et seq.*, *post*.

In some instances the courts seem to have proceeded upon the theory that a servant whose functions, in so far as they are expressly defined, are restricted to the investigation of facts and the discovery of criminals, may properly be found to possess an implied authority to make arrests and institute prosecutions in connection with the discharge of those functions.² But the more reasonable view, it is apprehended, is that the mere fact of a servant having been employed in the capacity of a "detective" will not warrant the inference that he was authorized to take or give a person into custody.³ In the absence

tiff on a charge of attempting to pass counterfeit money, it was shown that the detective had been employed for the purpose of protecting the property of the company and of ferreting out and prosecuting persons guilty of crimes against the company, and that he had general instructions not to make arrests without first consulting the local attorneys of the road, but was empowered to make an arrest when the proof against the party was clear, and there was no time to consult the local attorneys. A charge which directed the jury that no recovery could be had if, in the particular case of the plaintiff, he exceeded his authority and acted contrary to his general instructions respecting the caution to be exercised, was held to be erroneous.

²In *Johnston v. Chicago, St. P. M. & O. R. Co.* (1907) 130 Wis. 494, 110 N. W. 424, where the plaintiff had been arrested, on a charge of throwing sticks at the cars of a railway company, by a subordinate employee who had been deputed to investigate the matter by the general agent of the company at one of its stations, a verdict for the plaintiff was sustained, on the grounds that there was evidence tending to show that the agent had authority to look after the safety of passenger cars, and investigate any damage done to them; that he used to make investigations, sometimes in person, and sometimes through subordinates; and that he did not get special authority from his superior officers for each investigation, but was invested with such authority in his capacity of

general agent. The authority of the employee in respect of investigations had been derived in this instance from the general agent of the company at a certain place, who was shown by affirmative evidence to have been empowered to make investigations either in person or through a subordinate.

In *Harris v. Louisville, N. O. & T. R. Co.* (1888) 35 Fed. 116, the jury was instructed that if a private detective in the service of the defendant company had, while pursuing a certain criminal in the course of his employment, illegally arrested the plaintiff, the company would be answerable, although he might have disobeyed orders in respect of further pursuit.

³*Penny v. New York C. & H. R. R. Co.* (1898) 34 App. Div. 10, 53 N. Y. Supp. 1043. The court said: "There is no such settled significance attached to the term 'detective' as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts. Where the business of the master requires the performance of such acts, and the employment of the detective is in connection therewith, or if there be expectation that he may be required to make arrests in the discharge of the duties intrusted to him, liability may attach. But it is essential that evidence of such conditions be given, sufficient to warrant the inference. In some cases slight proof would be required, depending in large measure upon the business prosecuted by the master, from which a jury might find the act to be within the scope of employment.

of specific testimony, it is going very far to draw an inference which can only be justified on the supposition that it is the intention of a master to invest a servant whom he merely deposes to gather evidence regarding a crime with a discretionary power to determine whether the evidence collected is sufficient to warrant the laying of a charge against the party to whom it relates. It is more natural to assume that, under such circumstances, the master intends to reserve an opportunity of considering what steps should be taken after the evidence

But it is quite well known that the term 'detective' is applied to persons in the employ of various individuals and corporations whose authority is limited to the collection of evidence and the performance of other acts having sole reference to civil litigation. Some are employed in the surveillance of employees suspected of bad habits and practices which unfit them for retention in places of trust and confidence. There exists a wide scope of employment of persons called detectives which scarcely has connection with crimes or criminals, and in which no arrest of persons is authorized or contemplated. Under such circumstances there would exist no authority for holding the master responsible for the arrest, detention, and search of an individual."

See also *Walker v. Culman* (1900) 9 Kan. App. 691, 59 Pac. 606, where the liability of the defendant was denied on the ground that the detective who had arrested the plaintiff was acting "in line of his employment."

In *Kehoe v. Marshall Field & Co.* (1908) 141 Ill. App. 140, affirmed in (1909) 237 Ill. 470, 86 N. E. 1054, it was held that the engagement of a man to do general detective work in a department store did not invest him with an implied authority to arrest persons for the supposed commission of criminal acts.

In *Richoux v. Mayer Bros.* (1877) 29 La. Ann. 828, it was held that the defendant, who had employed a detective to find property of his judgment debtor on which execution could be levied was not liable for the act of the detective in causing the arrest of the debtor on a charge of illegally selling lottery tickets.

In *Milton v. Missouri P. R. Co.* (1906) 193 Mo. 46, 4 L.R.A. (N.S.) 282, 91 S. W. 949, it was held that employment of a detective to ascertain and re-

port such facts as tended to show who was concerned in a robbery did not render the employer liable for an arrest made by him for the purpose of ascertaining whether or not the person arrested was concerned in the robbery. The court said: "The case at bar is totally different from cases wherein the agent was charged with the duty of keeping and preserving the property of a principal, and, in the attempt so to do, caused the arrest of a third person who undertook to interfere or make way with the principal's property. In the case at bar a grievous wrong was clearly done to the plaintiff, but the defendant is not liable therefor, unless it could be held that the employment of the detective to ascertain the facts as to who was concerned in the hold-up and robbery of its train contemplated within its scope the right or duty of the detective to cause the arrest of anyone whom the detective might suspect had been concerned therein. The employment by the defendant of Furlong was to ascertain the facts as to the robbery, and to report the result to the defendant's general superintendent. The fact that Furlong was engaged in the detective business does not alter the defendant's liability in the least. The defendant's liability would be the same if it had sent one of its own employees to make such investigation and report. The fact, if it be a fact, that detectives unlawfully arrest persons for the purpose of extorting confessions from them, or of subjecting them to scrutiny by other persons for the purpose of identification, cannot alter the rules of law applicable to the liability of a principal for the acts of his servant, unless the principal knew that the detective employed was in the habit of employing such methods; and there is no evidence that such was the case in this instance."

has been placed before him. His nonliability for an arrest is, of course, an unavoidable conclusion, if his intention in that regard is affirmatively proved.⁴

2469. Extent of authority ascribed by reason of their position to managing employees.—The theory which seems to be embodied in several American decisions is, that a general or departmental manager possesses, by virtue merely of the functions ordinarily intrusted to such an agent, an implied authority to arrest or prosecute a person whom he believes to have done something which prejudicially affects the property of his principal.¹ The cases cited below

⁴In *Atchison, T. & S. F. R. Co. v. Brown* (1897) 57 Kan. 785, 48 Pac. 31 (first appeal [1893] 51 Kan. 6, 32 Pac. 630), the employee in question was engaged in the "Claim Department" of the defendant company, his duties being to investigate depredations committed against the company's property, and, in the event of his discovering evidence of the guilt of any person, to lay all facts which he had ascertained before the county attorney of the proper county, and act only under his direction and advice. Held, that he was not authorized to procure the arrest of any person upon his own judgment, and had no authority to investigate or report any crimes committed against the state of Kansas or the United States which did not constitute depredations upon the property of the railroad company.

In *St. Louis & S. F. R. Co. v. Wyatt* (1907) 84 Ark. 193, 105 S. W. 72, a railway company was held not to be liable for an arrest made by its "secret service agent," whose duty it was to look after criminal matters, and who, as the evidence showed, was merely empowered to report to the head office, after he had investigated the facts.

¹In *White v. International Text-book Co.* (1909) 144 Iowa, 92, 121 N. W. 1104, the liability of a publishing company for the act of one of its district superintendents in prosecuting a former employee on a charge of embezzling money paid for books sold by him was put upon the ground that he had full authority respecting the collection of debts owed to the company.

In *Wheeler & W. Mfg. Co. v. Boyce* (1887) 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609 (action for false imprisonment), the plaintiff had been arrested at the instance of the general agent of

a sewing-machine company in a city other than the one in which its principal place of business was situated. The evidence showed that the agent was authorized not only to make conditional sales of sewing machines, and to collect the instalments of the price as they fell due, but also to institute legal proceedings to recover possession of the machines for which payment had not been made in accordance with the terms of the sale. Held, that he had acted within the scope of his powers in procuring the detention of a defaulting purchaser in order to enforce redelivery of the machines, under a provision relating to replevin, by which it was enacted that, where the defendants or any other persons knowingly concealed the property replevied, or, having the control thereof, refused to deliver the same to the officer, they might be committed until they disclosed where the property was, or delivered the same to the officer. The *ratio decidendi* was that, under the given circumstances, the manager had full authority to represent the company, and whatever was done by him was done for the benefit of the company and for the accomplishment of its purpose.

In *Vara, v. R. M. Quigley Constr. Co.* (1905) 114 La. 262, 38 So. 162, the court emphasized the fact that the tort-feasor was not a general agent, but a mere subordinate servant employed to keep books, etc. The contrast thus drawn may presumably be regarded as indicating that, if the plaintiff had been arrested by a general agent, he could have recovered against the principal.

In *White v. Apsley Rubber Co.* (1907) 194 Mass. 97, 8 L.R.A. (N.S.) 484, 80 N. E. 500, one of the grounds on which the liability of the defendant for an arrest procured by its bookkeeper was affirmed

was that, "if original authority were wanting, there was evidence from which ratification could be found, for both a director of the defendant empowered to act as a general manager of its business, and also the president of the company, had a knowledge of the measures taken, and either assented or declined to interfere." See further as to this case in § 2472 *c*, *post*.

In *Smith v. Munch* (1896) 65 Minn. 256, 68 N. W. 19, the general superintendent of a manufacturing company gave directions that a man who, several hours before, had unlawfully entered the factory, and attempted by threats to induce the employees to quit work, should be arrested without any warrant, the plaintiff had entered the defendant's factory and attempted by threats to induce the employees to quit their work, and was arrested some hours afterwards by the direction of the general superintendent of the concern. The company was held liable on the broad ground that the duties of such an agent, having charge of the premises, the business, and the employees while performing their work, "impliedly included the protection of the premises and property from trespassers, and the protection of the employees, while at work, from the interference of the intruders," and that the act complained of "was evidently not done in his own interest, or for his own benefit, but in the furtherance of the interest of the company by protecting its property and employees from wrongdoers."

In the *United Cigar Stores Co. v. Young* (1911) 36 App. D. C. 390, a subordinate employee of the defendant company was wrongfully arrested, on a charge of burglary, by the orders of an employee who was "superintendent of sales" for its stores east of Chicago, except New York city. His duties were not defined in writing; but there was evidence going to show that it was his duty to see that the stores were properly stocked and cared for, that the clerks conducted themselves properly, and that the stores were run according to the policy of the company. It was also admitted that he had authority to hire and discharge clerks. The court was of the opinion that "from this and other testimony it was evident that he was really a general or supervising manager for defendant," and that it was a question for the jury, whether the defendant, "by the nature and scope of the af-

fairs to be transacted in Washington which it had committed to its particular manager or employee, committed such an authority to operate in Washington on its behalf as carried with it the authority and right on behalf of the corporation to institute criminal proceedings against dishonest employees." It was also observed: "From the testimony it may fairly be assumed that the defendant had a large number of retail salesmen in its employ. It is apparent, therefore, that it would be to the interest of the company to bring about the arrest and punishment of such employees as had betrayed their trust by the commission of a crime like the one of which Steinecke suspected the plaintiff to be guilty. It is likewise apparent that the recovery of the stolen money would benefit the defendant. Taking into consideration all the facts and surrounding circumstances, we think it may fairly be inferred that Steinecke's acts were within the general scope of his employment."

In *Knowles v. Bullene* (1897) 71 Mo. App. 341, the liability of the proprietors of a department store for the acts of a saleswoman, a floorwalker, and a superintendent of the department, in arresting and searching a customer on a charge of stealing goods which the saleswoman erroneously claimed to have observed, was affirmed, although the employees had been told not to arrest persons charged with theft, unless they themselves witnessed the act. The court said: "This floorwalker, superintendent, as well as the lady clerk, were intrusted with the custody and care of the defendant's goods; and it was their duty, while so intrusted, to protect them from theft or spoliation. These servants were, within their respective spheres, the agents and representatives of the defendants, empowered, as the nature of their employment implied, to do everything that was reasonably necessary to protect the property in their keeping, just as the principals could if present. To that end the clerk, floorwalker, and superintendent were authorized to arrest and detain persons charged with theft,—not for the purpose of criminal punishment, but to recover the master's goods. This authority was necessarily implied from the nature of the employment, and was within the line of the master's service. It may be that such clerks or employees will at times act indiscreetly or with bad judgment, will carelessly charge theft and arrest persons not guilty, yet

who shall suffer for this indiscretion or misjudgment? Surely not the inoffensive customer, but rather the principal who placed the agent there as his representative." The decision in *Mali v. Lord*, note 5, *infra*, was disapproved.

The effect of the decision in *Wehmeyer v. Mulvehill* (1910) 150 Mo. App. 197, 130 S. W. 681, is merely that a mercantile corporation is liable, where its president acts within the scope of his authority and for the corporation in making an unlawful arrest of a person, as an incident of a controversy resulting from a sale of goods by the corporation to such person, and an endeavor to collect money from him. The evidence showing the scope of the president's authority is not stated.

In *Ricord v. Central P. R. Co.* (1880) 15 Nev. 167, the first prosecution of the plaintiff, an employee of the defendant company, had been instituted by its general superintendent. The second had been instituted by the direction of the defendant's general attorney at its head office, and its "local agents and servants" had co-operated in the proceedings with its local attorney at the town where the case was tried. In an action for malicious prosecution the company was held liable. The court said: "It is absurd to suppose that such a corporation will adopt a regulation requiring its directors to be convened every time a clerk is to be arrested for embezzlement, or a tramp for breaking into its cars. On the contrary, it is only reasonable to presume, in the absence of opposing proof, that its legal advisers, acting in conjunction with such of its servants and agents as have knowledge of the facts, will be authorized to institute the proper proceedings in such cases."

In *Gulf, C. & S. F. R. Co. v. James* (1889) 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744, the court rejected the contention that the trial judge should have instructed the jury that, as a matter of law, the employee in question was not authorized, by reason of the fact that he was general manager of the defendant railroad company, to institute the prosecution against the plaintiff for the company.

In *Staples v. Schmid* (1893) 18 R. I. 224, 19 L.R.A. 824, 26 Atl. 193, where it was held that a salesman left in charge of a shop was acting within the scope of his employment in causing the arrest and search of a person whom he be-

lieved to have stolen property from his custody, the court, after having expressed its disapproval of the doctrine that a master cannot be presumed to have authorized his servant to do an act which he himself could not lawfully have done (see §§ 2241 *et seq.*, *ante*), proceeded thus: "The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public. The establishment was not a railroad station where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals, nor a large dry goods emporium where detectives and watchmen are employed to guard against thieves. The servant here was a salesman and custodian in one. Whatever the master might do in the protection of his property he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question, and had allowed her to walk away with them unmolested, could anyone say that he had not been derelict in his duty to his master? If, in the performance of this duty, he mistook the occasion for it, or exceeded his powers, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master. We conclude, therefore, that the directions asked by the defendants were rightly refused and that the charge correctly stated the law of the case."

In *Topolewski v. Plankinton Packing Co.* (1910) 143 Wis. 52, 126 N. W. 554 (action for malicious prosecution in a charge of theft), the evidence showed that the whole conduct of defendant's affairs had been left to M., the secretary, and B., the general manager, with L. as manager of the wholesale department, and that there was no president, and, for aught that appeared, no vice president. In the opinion of the court the secretary and general manager had authority, under the circumstances in-

indicate that this view has been adopted in Scotland and Quebec also.²

On the other hand, the doctrine that, even where an employee of this rank is concerned, it cannot be presumed from the sole circumstance of the position held by him that he was empowered to take such a proceeding on behalf of his employer has been adopted in England, and also in nearly all the British colonies in which the matter has been discussed.³ A similar view has

dictated, to protect the corporate business from unlawful depredations, and prosecution of depredators, such as the respondent was supposed to be, was a legitimate means to that end, and within the scope of their employment in that regard. Such being the case, it was considered that whatever the sales manager did to protect the business by precedent direction of those in charge thereof, and within the scope of such direction, was imputable to the defendant. The court said: "The evidence is clear that the general manager impressed strongly upon the submanager, Layer, the necessity of apprehending those who were guilty of defrauding the company, and that whatever he subsequently did was pursuant thereto. His act in causing the irregular, illegal restraint of respondent was, at the best, for appellant, represented by its general manager, Booth, an abuse of power in the execution of a trust. But it satisfactorily appears that, after Layer's conduct came to the knowledge of Booth and all in authority, they not only did not disavow it, but ratified it. The conduct of all representing appellant, from first to last, shows that the act of Layer had all the corporate approval it could have had other than by precedent authorization or subsequent ratification by the board of directors, and no such formal authorization or ratification was necessary to make his act in legal effect the corporate act."

As to the New York decisions, see note 5, *infra*.

² *Mackenzie v. Cluny Hill Hydropathic Co.* (1908) Sc. Sess. Cas. 200, an action for wrongful detention (*i. e.*, false imprisonment), the court affirmed the relevancy of averments to the effect that the pursuer, while a guest at the defender's establishment, went, at the request of their manager, to his private room; that Mr. and Mrs. R., two other

guests, whom the pursuer found in the room, placed themselves in front of the door to prevent the pursuer from going out; that the manager said he could not allow the pursuer to leave the room until she had apologized to Mrs. R. for slamming a door in her face; and that the manager assisted Mr. and Mrs. R. in detaining the pursuer in the room for about fifteen minutes.

In *Croteau v. Arthabaska Water & Power Co.* (1906) Rap. Jud. Quebec, 30 S. C. 128, a company engaged in rafting lumber was held to be liable for the act of its superintendent in arresting workmen on a charge of having by threats extorted from their foreman money which they asserted to be due to them as wages.

³ In *Stevens v. Midland Counties R. Co.* (1854) 10 Exch. 352, the defendant railway company was held not to be liable for a prosecution which a local superintendent, at one of its principal stations, had instituted, without any direction from his superiors, against the plaintiff on a charge of stealing the company's property. The *ratio decidendi*, as stated by Platt, B., was that the tort-feasor was "merely a servant," and that there was "no proof that the company had given directions for this particular proceeding." The principal subject of discussion was the liability of a corporation to be sued for a malicious prosecution.

In *Rove v. London Pianaforte Co.* (1876) 34 L. T. N. S. (Div. Ct.) 450, the grounds upon which it was agreed by all the members of the court that a nonsuit should be entered in an action brought by a discharged workman, who had been arrested on a charge of theft by the foreman of the defendant's factory were, first, that it was not within the scope of the ordinary power of such an employee to give into custody a workman who was suspected of having

stolen the company's property; and secondly, that, assuming such authority to have been vested in the managing director, the plaintiff's evidence did not show that he had ratified the foreman's proceedings in the matter. With regard to the other reason given by Bramwell, B., for affirming the nonliability of the defendant, see § 2465, note 1, *ante*.

In *Bank of New South Wales v. Ows-ton* (1879) L. R. 4 App. Cas. 270, 25 Eng. Rul. Cas. 124, an action for malicious prosecution by the acting manager of a bank, the Privy Council reversed the judgment in (1876; *New South Wales*) Knox, 36, in which it was held that the trial judge had properly directed the jury that "it was to be inferred from the wrongdoer's position as manager that he had sufficient power under the circumstances for directing a prosecution." The grounds of the reversal were thus stated: "The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him; at least, in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed, the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed, from his position

alone, that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorized to perform. The plaintiff offered no evidence whatever on this point; and the testimony of the two managers, which has been set out above, directly negatives the possession of such a power by the acting manager. The contention of counsel that the evidence showed the existence of an emergency (see § 2466, *ante*), which took the case out of the general rule, was rejected.

In *Abrahams v. Deakin* [1891] 1 Q. B. (C. A.) 516, the plaintiff and a friend went into the defendant's public house. The friend in payment for some refreshment which they had, tendered a foreign coin by mistake, and asked the barman for change. The barman went to fetch the change; but before giving it, he observed that the coin was a foreign one, and took it back to the plaintiff's friend, who gave him a half sovereign instead of it, and the barman thereupon gave him the change. The plaintiff and his friend then left the house. A person who was acting as manager of the bar in the absence of the defendant followed them into the street, and gave them into the custody of a policeman on the charge of attempting to pass bad money. In an action for false imprisonment, held that the manager had no implied authority by reason of his position to arrest the plaintiff. Lord Esher, M. R., said: "The evidence showed that Nunney managed the bar of the public house when his master was absent. There was no evidence that he was the general manager of the business; he only managed the bar when his master was away. Did that position give Nunney any authority to do that which he did? No evidence was given of any custom of the trade that the manager of the bar of a public house should have authority to give into custody people who offer him bad money. If any such evidence had been given, it would have been a question for the jury whether the custom had been proved. Were the jury entitled to say, from the mere fact that Nunney was the manager of the bar of a public house, that he had authority to act as he did? It is said that a publican runs a greater risk of the passing of bad money than an ordinary shopkeeper

does, and so the learned judge seems to have thought; but no evidence was given of it. I doubt whether such evidence would have been admissible. But I am bound to say that I differ from the view of the learned judge. As regards the risk of things being stolen from his shop, a publican certainly runs no greater risk than a jeweler or a man who keeps a large haberdashery establishment. And it seems to me there is no ground for saying that a publican runs a greater risk of loss from the passing of bad money than any other shopkeeper does." Lopes, L. J., said: "What is the nature of the authority which must be implied in the present case in order to make the defendant liable from the mere fact that Nunnev was left in charge of the bar at the time? We must presume that he had authority at a time when his master's property was safe in the till—when there was no question about protecting it from danger—to go out into the street and arrest the plaintiff for something which he supposed he had attempted to do some time previously. It appears to me that Nunnev was doing an act which he had no authority whatever to do; it is impossible that any such authority could be implied from his position."

In *Stedman v. Baker* (1896) 12 Times L. R. (C. A.) 451, the manager of a restaurant gave the plaintiff, who had partaken of refreshments there, into custody for refusing to pay the whole amount of the bill, the accuracy of which the plaintiff bona fide disputed. The jury found that the act of the manager was done for the purpose of making him pay the bill. Held, that judgment for the plaintiff had properly been entered on the facts so found. Lord Esher, M. R., said that "the manager had no right to give a customer into custody, because he thought that the customer had defrauded his master. He had no implied authority to give anyone into custody on behalf of his master merely for having committed an offense."

In *Hanson v. Waller* [1901] 1 K. B. 390, the plaintiff was head barman and cellarman in a public house of which the defendant was the owner; the defendant took no part in the management of the house, though he visited it nearly every day, the manager on behalf of the defendant being one M., who had general management of the house.

While the plaintiff was superintending the operation of bringing mineral waters into the cellar, the manager, acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman and gave the plaintiff into custody on a charge of stealing whisky. In an action for false imprisonment, held, that there was no evidence that the manager had an implied authority from the defendant to give the plaintiff into custody, the act not being reasonably necessary for the protection of his master's property. Kennedy, J., said: "The present is not a case where the manager had a special sphere of duty like the cases against railway companies, where the act of an official acting under a by-law may involve the arrest of a passenger, nor is it a case where the general nature of his employment involves the necessity of deciding questions as to arrest." The learned judge was of opinion that the evidence did not show any special exigency which operated so as to enlarge the ordinary powers of the tort-feasor. See § 2446, *ante*.

In *Ashton v. Spiers* (1893) 9 Times L. R. (C. A.) 606, it was held that the manager of a restaurant was invested with implied authority to give into custody visitors who behaved in a riotous manner. But this decision was based on the general principle discussed in § 2466, *ante*. Consequently it is not to be regarded as reflecting a theory different from that embodied in the above cited cases, which illustrate merely the extent of a manager's powers, in so far as they depend upon the fact of his exercising functions of superintendence.

In *Thompson v. Bank of Nova Scotia* (1893) 32 N. B. 335, the defendant's agent in charge of an office at C. (a town in New Brunswick, distant from the defendant's head office at H. in Nova Scotia), upon the nonpayment of notes which had been discounted there for the plaintiff, caused a bailable writ to be issued against the plaintiff by the bank's solicitor at C. On his crossing to M., in Quebec province, the agent consulted the solicitor, who advised that the representations made by the plaintiff on obtaining the discount constituted false pretenses for which he was liable criminally. The agent laid an information, a warrant was taken to M., and the plaintiff was arrested and

been adopted in Alabama, Illinois, Maryland, Michigan, and Pennsylvania.⁴

brought back to C., where, after he had been discharged on the hearing, he was arrested under the writ. Though the agent could have consulted the head office by telegraph, before the warrant was taken out, he never reported the matter, and never received any instructions. It was also shown that he paid the expenses of the prosecution and of defending the actions brought by the plaintiff. In an action for malicious prosecution against the bank, it was held by three out of five judges: (1) That it could not be presumed that the agent had a general authority to prosecute on behalf of the bank; (2) that there was no evidence to show that such a prosecution was within the scope of the duties and class of acts he was authorized to perform; (3) that the facts did not show an emergency which would give an implied authority; (4) that the authority of the solicitor was no greater than that of the agent.

In *Miller v. Manitoba Lumber & Fuel Co.* (1890) 6 Manitoba L. Rep. 487, an action against a lumber company for malicious prosecution was held not to be maintainable, because the by-laws by which the duties of the manager who had prosecuted the plaintiff were prescribed did not provide for his taking proceedings of that description.

In *Hanlon v. Manson* (1881) 2 New South Wales L. R. 291, a shopkeeper was held not to be liable for an arrest of a customer, made by a manager in full charge of a branch establishment about 200 miles away from the one which he himself superintended.

In *Hamilton v. Hordern* (1903) 3 New South Wales St. Rep. 139, 20 W. N. 7, a nonsuit was held to have been properly granted where the plaintiff failed to show that the prosecution instituted by the manager of a department store was for the purpose of recovering certain property alleged to have been stolen by a clerk. The court rejected the contention that, "because the tort-feasor was a general manager with full authority, he could prosecute his master's employees for the purpose of punishment, and make them liable."

⁴In *Emerson v. Lowe Mfg. Co.* (1909) 159 Ala. 350, 49 So. 69, where the defendant company's superintendent

had a general power to rent houses and collect the rents, it was held that his act in swearing out a warrant against a tenant could not be computed to the company, unless in respect of that act he was invested with a special authority "independent of his inherent powers and duties."

In *Pinkerton v. Gilbert* (1887) 22 Ill. App. 568, the liability of the owner of a cotton mill for an arrest made in the course of a suit instituted by the superintendent of the mill for the purpose of recovering property wrongfully taken from the premises was denied on the broad ground that authority to institute a suit for such a purpose could not be implied from the mere fact of his holding the position of superintendent.

In *Central R. Co. v. Brewer* (1894) 78 Md. 401, 27 L.R.A. 63, 28 Atl. 615, where a passenger on a street car was arrested at the instance of the superintendent of the railway company on a charge of having put a bad coin in the fare box, and refused to replace it by a good one, the court, referring to the statement of the company's counsel that its president was also present at the time when the superintendent made his affidavit, said: "In our view of the case, it is immaterial whether he was or was not. The president was but the agent of the defendant, as were the other officers and employees. There is nothing in the record which directly or indirectly tends to show that the superintendent was acting in pursuance of express precedent authority from the defendant (*Carter v. Howe Mach. Co.* [1897] 51 Md. 298, 34 Am. Rep. 311) in causing the arrest of the plaintiff, nor had he any implied authority for so doing, arising out of the scope of his employment, so far, at least, as the testimony of the record discloses. The fact that he had general authority to look after and manage the affairs of the defendant in running its cars on the streets of Baltimore city for the carriage of passengers in no manner suggests that he had, unless expressly authorized so to do by his principal, any authority to arrest a passenger for placing in the fare box a leaden nickel in payment of his fare. He may have a general authority to look after and pro-

With regard to New York, it is not easy to determine from the decisions as they stand what the doctrinal position really is at present in

tect the property of the defendant, and he may possess all the powers properly pertaining to such employment, and yet he would not be empowered to invoke the aid of the criminal law on behalf of his company, unless he had express precedent authority. And if this be true of the superintendent, it is equally true of the other agents and employees of the defendant."

In *Baltimore, C. & A. R. Co. v. Ennalls* (1908) 108 Md. 75, 16 L.R.A. (N.S.) 1100, 69 Atl. 638, the same doctrine was taken for granted in regard to the authority of the superintendent of a railway wharf; the decision being made to turn solely upon the question whether the police officer who made the arrest had acted as an employee of the defendant, or in his capacity as a public servant.

In *Bernheimer v. Becker* (1905) 102 Md. 250, 3 L.R.A. (N.S.) 221, 111 Am. St. Rep. 356, 62 Atl. 526, the nonliability of a storekeeper for the act of a manager of one of the departments of his store in arresting and searching a customer whom he suspected of stealing was affirmed upon the broad ground that "an agent or employee about an ordinary business has no implied authority to resort to such means of protecting his master's interests."

In *Tolchester Beach Improv. Co. v. Steinmeier* (1890) 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188, it was held that the superintendent of an improvement company had no implied authority by virtue merely of his official position to direct the arrest of an alleged offender.

In *National Bank v. Baker* (1893) 77 Md. 462, 26 Atl. 867, it was apparently taken for granted that the defendant bank would have been liable if it had been proved that its cashier had given instructions to the collection clerk who procured the plaintiff's arrest. Such a position seems inconsistent with the decisions just cited.

In *Travis v. Standard Life & Acci. Ins. Co.* (1891) 86 Mich. 288, 49 N. W. 140, after the payment of a claim under an accident insurance policy, the insured was prosecuted criminally upon the complaint of the company's general state agent, for obtaining the money under false pretenses. On the trial of

an action for false imprisonment, he failed to show that the agent acted as such in making the complaint, or that he was authorized so to act, or his act had been ratified by the company. On the other hand, the agent testified that he acted individually in making the complaint. Held, that it could not be inferred from the mere fact of his agency that the agent represented the company in instituting the criminal proceeding.

In *Markley v. Snow* (1904) 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999, the decision of the court that the act of the superintendent of a mine in arresting, three months after a building on the premises had been burnt, a man whom he suspected of having wilfully set it on fire, was not within the scope of his authority, was mainly based upon the ground that the time which had elapsed between the commission of the supposed crime and the arrest had been amply sufficient to enable him to confer with his employers. But the court disapproved an instruction which stated, in substance, that "if the care and management of the property, especially of the barn and its contents, which were burned, were committed to the superintendent and paymaster, it was their right on behalf of the company, when the barn was burned, to engage actively in ferreting out the perpetrator of the crime, and to make an information; and if, in so acting as representatives of the company, they instituted an unfounded prosecution, their principal would be liable." It was laid down that "generally, the duty of superintendence does not carry with it the duty to arrest or prosecute. The inference of authority to do either does not arise from the mere fact of the agency." It may be presumed, therefore, that, even in the absence of the special element of the lapse of time, the action would have been held not to be maintainable.

In *Canon v. Sharon & W. Street R. Co.* (1907) 216 Pa. 408, 65 Atl. 795, where the defendant was held not to be liable for a malicious prosecution instituted by its superintendent, the court stated its views as follows: "Under his general powers as superintendent

that state. Nearly fifty years ago it was held by the court of appeals in a leading case that a storekeeper was not liable for the act of his superintendent in detaining a female customer on a charge of theft, and causing her to be searched.⁵ But an examination of the opinion will show that the real rationale of the decision was not the extent of the tort-feasor's powers, as inferred from his position, but the general doctrine, now discarded in most jurisdictions,⁶ that there could be no implication of an authority to commit illegal acts. By the court of appeals it has recently been declared that the conclusion arrived at in this case was correct. For the purposes of the present discussion the

there was no implied authority to commit the company to the prosecution. It was for an offense alleged to have been already committed. For the protection of the property of the company that might have been in danger he might have had implied authority to invoke criminal process for the prosecution of the offender; but in seeking to hold this appellee for the alleged wrongful and malicious act of its superintendent or agent, in instituting a criminal prosecution, not for the recovery or protection of any of its property, but for the sole purpose of vindicating the law through the punishment of an alleged offender, either express precedent authority of the agent or subsequent ratification and adoption of his act by the corporation must be shown." The effect of this statement is to exempt the employer from liability for any wrongful use of criminal process subsequent to the actual or supposed crime, irrespective of the length of the period that had elapsed since its commission.

⁵ *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448. The decision was put upon the broad ground that, "by employing a clerk to sell goods for him in his absence, or a superintendent to take the general charge and management of his business at a particular store," a merchant does not confer authority upon those employees to arrest a customer under such circumstances as those alleged. The court said: "The utmost good faith and the firmest belief that a person has stolen and secreted about his or her person goods will not justify the owner in detaining and searching the suspected person. . . . Calling in the policeman, and his presence and participation, affords no

justification. The policeman had no right to order the search of the plaintiff by the female, and he could confer no power upon anyone to make the search. . . . It must be assumed that, by the employment, the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property, to protect it against thieves and marauders; and that the servant owes the duty so to protect it to his employer. But this does not include the power in question. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor. If not responsible if the superintendent acted in good faith, in the belief of the plaintiff's guilt, they clearly would not be if he acted from malice, in the absence of such belief. The plaintiff having, at the time of resting, given no evidence connecting the defendants with the clerk and superintendent except their employment by the former, the motion of defendants for a dismissal of the complaint should have been granted."

⁶ For a discussion of this doctrine, see §§ 2241 *et seq. ante*.

importance of this approval is greatly diminished by a consideration of the standpoint from which it was expressed.⁷ But it has to be taken into account in any analysis of the New York decisions. Until it is withdrawn or qualified, there must necessarily be much uncertainty as to whether certain rulings in which inferior courts have apparently departed from the doctrine of the leading case are to be regarded as valid precedents.⁸ The situation is still further obscured by the fact that one of those rulings was affirmed by the court of ap-

⁷ *Collins v. Butler* (1904) 179 N. Y. 156, 71 N. E. 746, 17 Am. Neg. Rep. 106 (action for assault). In reply to the contention that cases subsequent to *Mali v. Lord* have modified, if not changed, the rule there applied, it was remarked that "the only modification of the cases to be gathered from later cases is that, in all such cases the question whether the servant was acting within the scope of his employment or otherwise was for the jury." (The court presumably means "primarily for the jury".) This observation indicates very strongly that the court failed to appreciate the real force of the contention negated. The general rule thus referred to has always been accepted as a fundamental part of the law relating to a master's vicarious liability (see § 2275, *ante*), and certainly nothing inconsistent with it was said or decided in the case under discussion. The real point of the contention was that the doctrine regarding the nonimplication of authority to commit illegal acts had been abandoned in New York since the date of that case; and it is shown in § 2241, *ante*, that this change had really taken place.

⁸ In *Clark v. Starin* (1888) 47 Hun, 345, the evidence showed that the defendant was the owner of a public resort, of which his son was the manager; that he had made an agreement with one R., under which P. was to furnish all the police needed; that P. had made one H. captain of the men put there by him, and that the plaintiff, a ticket taker, had been wrongfully arrested and detained by the defendant's son, and H. on a charge of larceny, in stealing tickets. Held, that the trial judge had erred in directing a verdict in favor of the defendant. The court said: "The defendant, however, claims that he is not liable, because the arrest was not within the scope of the authority con-

ferred by the defendant upon the parties making the arrest. The question is not whether the particular act was authorized, but whether the servant was engaged in his master's business and acting within the general scope of his authority. The test is whether the act complained of is in the course of the employment or outside of it. Here the Pinkertons had general authority to do all necessary police acts. The management of this business was confided to them; and if, through lack of judgment or discretion, or even infirmity of temper, they went beyond the strict line of authority, the defendant must be held liable." *Mali v. Lord*, was not cited.

In *Fortune v. Trainor* (1892; Sup. Ct. Gen. Term) 47 N. Y. S. R. 58, 19 N. Y. Supp. 598, affirmed in (1894) 141 N. Y. 605, 36 N. E. 940, it was held that the owner of a saloon whose manager unjustifiably assaults a customer while acting within the scope of his duty, and as part of the same transaction causes such person's arrest, is liable for the false imprisonment as well as for the assault and battery.

In *Warren v. Dennett* (1896; N. Y. City Ct.) 17 Misc. 86, 39 N. Y. Supp. 830, a motion to dismiss the action was held to have been properly denied, on the ground that the employee who had caused the arrest of the plaintiff for refusing to pay for a meal at the defendant's restaurant had been left in full charge of the establishment during the defendant's absence from the state in question.

In *Lubliner v. Tiffany & Co.* (1900) 54 App. Div. 326, 66 N. Y. Supp. 659, it was laid down *arguendo* that a superintendent who had charge of his employer's property in a jewelry store would "undoubtedly be authorized to take proceedings to recover any property stolen from it." By the statement

peals, and that no opinion was delivered from which the precise grounds upon which the affirmation rested were given.⁹

the court no doubt meant merely that a jury would be warranted in finding that such an employee was invested with such authority.

In *Fogarty v. Wanamaker* (1901) 60 App. Div. 433, 103 N. Y. Supp. 883, a complaint was held not to be demurrable which alleged that the plaintiff purchased an umbrella in the defendant's store on a certain day, and that on the same day, while she was legally and lawfully in said store, one of the agents or servants of said defendant illegally and unlawfully arrested her on a charge of having stolen the said umbrella, brought her to the office of the defendant's superintendent, who illegally and unlawfully restrained, retained, and imprisoned her for the space of two hours, and prevented her from leaving said establishment. The allegation that the imprisonment was effected by the agent or servant of the defendant was decided to be broad enough to permit proof of the actual relations existing between the parties, as to whether such agent or servant was acting within the scope of his employment. The general rule adopted by the court was thus stated: "If the master puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, he is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

In *Staton v. Mason* (1907) 119 App. Div. 437, 104 N. Y. Supp. 155, a finding that the defendant was liable for the act of defendant's credit clerk, in having plaintiff arrested and prosecuted for removing from the state furniture which he had bought at defendant's store and mortgaged to defendant to secure the instalments of the purchase money was held to be authorized by evidence that the prosecution and arrest were directed by defendant's manager, who was at the time in charge of defendant's business; that defendant was seldom at his place of business, but

such business was conducted and managed entirely by the manager, who acted and was regarded by the employees as the head of the concern; that the manager authorized the credit clerk to do as he did; and that the criminal proceedings were conducted by defendant's general counsel. This case, it will be observed, was decided after *Collins v. Butler*, note 7, *supra*.

In *Holloway v. Kent* (1910) 67 Misc. 440, 122 N. Y. Supp. 684, the question whether, in making a charge of larceny against one of his subordinates, the superintendent of the delivery department of defendant's store was acting in the general scope of his employment, was held to be for the jury, upon evidence which tended to show that it was his duty to see that all purchased articles to be sent out from the store were delivered to the purchaser, to trace merchandise lost or stolen, and to look after the department generally. Under such circumstance it was an allowable inference that the power to apprehend a suspected thief was incidental to his function in respect of the recovery of stolen goods.

⁹ *Dupre v. Childs* (1900) 52 App. Div. 306, 65 N. Y. Supp. 179, affirmed in (1901) 169 N. Y. 585, 62 N. E. 1095. There a man who had gone into a restaurant left it, before being served, without stopping at the cashier's desk. A rule of the restaurant provided that everyone passing the cashier's desk must stop whether he had a check or not; but this rule was not posted or displayed so that customers could become aware of it. The general manager of the restaurant, supposing that the man was attempting to evade payment of his bill, followed and overtook him outside, a few steps from the entrance, and, after some conversation, procured his arrest. Held, that the proprietors of the restaurant were responsible for the act of the general manager, and that the existence of a rule that the manager should not go out of the restaurant until he had been relieved by someone else did not excuse them from liability. The *ratio decidendi* in the supreme court was that the manager "caused the arrest to be made in an effort to compel the performance by a customer of

As several courts of the highest authority have pronounced in favor of each of the conflicting doctrines reviewed above, a commentator cannot, without undue presumption, offer any decided opinion regarding the matter. It will be sufficient to say that, in the opinion of the present writer, the preferable theory is that which treats the discharge of managerial functions by an employee as being an element which does not of itself justify the inference that he is impliedly authorized to put the criminal law in motion against an actual or supposed offender. That this general rule will ultimately be conceded by the courts which follow it to be subject to some qualifications is extremely probable. So much, it is apprehended, may reasonably be inferred from the suggestions thrown out in the judgment delivered in one of the English cases.¹⁰ It may fairly be contended that

a rule which the defendants had made for the protection of their business." Referring to the case of *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448, the court remarked that although it "was undoubtedly well decided upon the facts there made to appear, it cannot be said, I think, now to be an accurate statement of the law as to the responsibility of the master for the wrongful act of his servant. The later cases which are cited above have laid down the rule in such different terms that the case of *Mali v. Lord* must be assumed to have been considerably limited. In that case it was quite clear that the salesman had not authority to do any such act as he did do, and the case was decided, as was said in the case of *Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, upon the ground that the general employment of the salesman could not warrant such an act. But in this case Tullis was more than a salesman; he was the general manager and superintendent of the defendants. He was in general charge of their business, and from that fact it must be assumed that he had all powers in the management of this restaurant which the defendants themselves would have had had they been there, and in this aspect the case is entirely different from the case of *Mali v. Lord*." The court, however, was obviously mistaken in treating *Mali v. Lord* as being a case which involved merely the powers of a salesman. The arrest in question was made by the authority of the

superintendent. With regard to the effect of a regulation of the employer that the manager should not go out of the restaurant until he had been relieved by someone else, the court said: "He was there as the *alter ego* of the defendants, and to do precisely those things which the defendants might have done and would do if present; and if, in the performance of those duties, it became necessary for him, in order to collect a bill, to step outside the restaurant and to procure payment from the person who had not paid his bill inside, there is no doubt that he might not only properly do it, but was expected to do it. The rule that he should not leave the premises was made undoubtedly to require him to stay in charge of the restaurant until he was relieved; but it was not intended, nor could it be intended, to restrain him from doing on the steps of the restaurant just what he might do inside by way of collecting a bill." In *Collins v. Butler*, note 7, *supra*, this decision was not referred to in the opinion of the court of appeals. This circumstance is somewhat remarkable, in view of the fact that the judgment, which was reversed, was avowedly based upon the theory that the language used in *Dupre v. Childs* might be presumed to have been indorsed by the court of appeals, for the reason that its affirmance of the judgment was on the opinion of the supreme court.

¹⁰ *Bank of New South Wales v. Owston*, note 3, *supra*.

the master should, at all events, be held liable for the acts of a tortfeasor who is, in the proper sense of the expression, his *alter ego*, vested with full discretionary powers in regard to the conduct of the business and all its incidents.

2470. —to subordinate employees.—Whatever may be regarded as the correct doctrine concerning the implied powers of managing employees, it is beyond question that, except in so far as the right of recovery may be affected by the operation of the theory as to the obligation of a carrier to protect his passengers, unless some specific evidence is given from which authority to take such proceedings can warrantably be inferred,¹ a master cannot be charged with liability for an arrest made, or prosecution instituted, by a subordinate servant. Such evidence may assume the form either of testimony showing that the defendant had, in point of fact, authorized the servant in question to take proceedings of that character on his behalf, or of testimony which introduces into the case one of those general elements which operate independently of the grade character of the position held by the servant in question. See § 2467, *ante*. An examination of the decisions which have proceeded upon evidence of the latter description shows that most of them may appropriately be referred to the operation of the element discussed in § 2466, *ante*.

2471. Same subject. Illustrative decisions as to the authority of subordinate employees of railway companies.—*a. Station masters or agents.*—Decisions affirming the liability of a railway company for an employee in charge of a station have been rendered in cases where the evidence showed that he himself had locked the door of his station for the purpose of detaining a passenger and forcing him to give up his ticket;¹ that he caused the apprehension of an employee in a

¹ *Hardy v. Chicago, M. & St. P. R. Co.* (1895) 58 Ill. App. 278 (right of recovery denied on the ground that there was no evidence to show that the servant of a railway company [capacity not stated], by whom the plaintiff had been given into custody, was authorized to take such a step); *Minter v. Southern Exp. Co.* (1910) 153 N. C. 507, 69 S. E. 497 (demurrer to declaration in an action for wrongful arrest by an employee at the office of an express company was sustained on the ground that it did not contain any allegation that the employer had authorized or ratified the act); *Mafft v. Chicago, R. I. & P. R. Co.* (1897) 57 Kan. 912, 48 Pac. 1116 (similar decision with regard

to an employee whose position is not stated in the report).

¹ *Farry v. Marshall* [1898] 2 I. R. 352 (plaintiff having alighted at the station next before that for which his ticket was issued, refused to give up his ticket, alleging that he was breaking his journey, but offered his name and address). Palles, C. B., said: "In the present case, the act which caused the plaintiff's imprisonment, *viz.*, the locking of the door, was no more than the exercise by the station master, although in an illegal manner, of his ordinary control of the station. The station master was placed there by the defendants to take care of the station. Under certain circumstances it was

charge of having stolen a parcel from the station;² that he participated in the arrest of a person by the ticket clerk, on a charge of having stolen a ticket;³ that he had approved of the action of the local train despatcher who, after having locked up a man found asleep in a car, had sent for the sheriff to take him into custody.⁴

In an English case the right to maintain the action was denied where a railway passenger holding an excursion ticket was conveyed to his destination by a train in which such a ticket did not entitle him to travel, and, upon his refusal to pay the extra fare demanded, was taken into custody by a servant of the railway company, acting under the direction of the superintendent of the station.⁵ But this decision would probably not be followed at this present day. It seems to be scarcely reconcilable with the doctrine subsequently de-

necessary that he should shut and lock the door, the key of which was put by the defendants under his control. . . . In actions of this class, two separate things are to be considered: first, the act done; secondly, the purpose for which it is done. The error of defendants' counsel in the present case arises from a failure to keep separate these two matters. If the act is outside the scope of the servant's employment, the master is not responsible, and in such a case it is unnecessary to consider the purpose. All the cases cited are of that description. But, when the act has been shown to be, or evidence has been given that it is, one within the ordinary scope of the servant's employment, then arises the question whether the act complained of was done for the employer. . . . Thus, it will be observed that, in these two classes of cases, the questions to be determined are wholly different. In the first class, where the act is outside the scope of the employment, there is no question of purpose. In the second, where the act is within the scope of the employment, the only question is that of purpose. The present case is, I think, clearly within the second class; and thus the only question we have to consider is that of the purpose. . . . In the present case it was practically admitted during the course of the trial, and, if not admitted, it is apparent upon the facts proved, that the station master acted bona fide in protecting what he believed to be the rights of the company, in their interest, and not for any purpose of his own. If it is not

formally admitted, I have no hesitation in inferring it as a fact, as I am entitled to do, as no question was left to the jury."

² *Kirkstall Brewery Co. v. Furness R. Co.* (1874) L. R. 9 Q. B. 468. Cockburn, C. J., remarked: "It is impossible to say that the man who has the sole management of the station has not authority to cause a person to be apprehended whom he has reasonable ground to suspect has stolen a parcel from the station." It was there held, in an action to recover, under the carrier's act, the value of a parcel alleged to have been stolen from a station by one of the defendant's servants, that the trial judge had properly admitted evidence of what the station master had said to the police officer whom he instructed to apprehend the employee.

³ *Van Den Eynde v. Ulster R. Co.* (1870) Ir. Rep. 5 C. L. 6, affirmed by Exch. Ch. in (1871) Ir. Rep. 5 C. L. 328. See § 2466, note 2, *ante*.

⁴ *Texas & P. R. Co. v. Parker* (1902) 29 Tex. Civ. App. 264, 68 S. W. 831. In this case the agent testified that the property and cars were in his charge, that it was his duty to protect them from trespassers, and that he told the employees under him to lock the door on anyone found in empty cars. But it seems reasonable to say that, even in the absence of explicit evidence of this tenor, a jury would be warranted in ascribing such duties and functions to an employee of this description.

⁵ *Roe v. Birkenhead, L. & C. Junction R. Co.* (1851) 7 Exch. 36, 6 Eng. Ry. & C. Cas. 795, 21 L. J. Exch. N. S. 9.

veloped as to the implied powers of servants intrusted in behalf of their employers with functions which cannot be properly discharged unless they are authorized to act promptly. See § 2466, *ante*. That doctrine is also apparently contravened by another case where the plaintiffs had insisted that they were entitled to pass through a station, and had thereupon been arrested by a policeman, acting under the direction of an employee who was discharging the duties both of gatekeeper and station master. The tortious act was held not to be imputable to the railway company for the reason that the rule of the company which defined his powers did not authorize him to order the arrest to be made.⁶

In a leading English case the right of recovery in respect of an arrest made by a station master was denied with reference to the doctrine that authority to do an act which is *ultra vires* as regards an employing corporation cannot be implied.⁷

b. Ticket clerks.—In one case where a ticket agent accepted in payment for a ticket a bill which he believed to be counterfeit, and thereupon sent for a policeman, who arrested the person who tendered the bill, it was held that an action for false imprisonment could not be maintained against the company.⁸ On the other hand, where a wom-

⁶ *Chicago, R. I. & P. R. Co. v. Nelson* (1908) 87 Ark. 524, 113 S. W. 44. The rule in question stated, *inter alia* that the station master "has charge of the passenger station and the station employees where he is located. It is his duty to see that the station is kept in proper condition, preserve order about the station, prevent confusion and delay in seating the passengers and receiving and delivering baggage, and attend courteously to the comfort and wants of passengers, and see that the employees do the same." As the court did not sustain its conclusions by any authorities or argument, the precise reasons which led it to reject the claim are not ascertainable. It is submitted that, under such a rule, more especially that part of it relating to the preservation of order, an arrest made under the circumstances might fairly be regarded as being within the scope of the station master's employment.

⁷ *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 8 Best & S. 616, 17 L. T. N. S. 11, 36 L. J. Q. B. N. S. 294, 16 Week. Rep. 309.

⁸ *Mulligan v. New York & R. B. R. Co.* (1892) 129 N. Y. 506, 14 L.R.A.

791, 26 Am. St. Rep. 539, 29 N. E. 952, reversing (1891) 39 N. Y. S. R. 20, 14 N. Y. Supp. 456. Plaintiff, accompanied by a friend, purchased two passenger tickets of defendant's ticket agent, to whom he gave a \$5 bill and received the change with the tickets. A short time before, a detective had left with said agent a circular describing three men who, it stated, were engaged in passing counterfeit \$5 bills; the detective told said agent to look out for these men, and if they appeared, to have them arrested. The agent took the bill of the plaintiff, supposing that he and his companion were two of the men, and that the bill was counterfeit. After testing it, he sent word to a detective, and a police officer came. The agent, according to the plaintiff's testimony, pointed out the plaintiff, who was sitting at the time outside the station, and directed his arrest; he was thereupon arrested and brought into the ticket office. The agent charged him with having passed a counterfeit bill, which plaintiff denied, but gave the agent another bill in its place. He was then taken to the police court, and, upon examination, was discharged, the

an who had bought a railway ticket at a railway station was pursued by the ticket clerk onto the platform, and charged by him with having given him counterfeit money, and upon her refusal to comply with his demand for other money in its stead, he insulted her and put his hand upon her, forbidding her to stir until he got a policeman to arrest her, the company was held to be liable for false imprisonment

first bill having been found to be good. Held (Earl and Finch, JJ, dissenting), that defendant was not liable. In delivering the opinion of the court, O'Brien, J., said: "Assuming, as we must, that the agent directed the arrest, and that the plaintiff had committed no offense that justified it, the question still remains whether the agent was acting in the line of his duty, so as to make the defendant responsible for his acts. It is quite clear from the evidence that the agent was first put upon his guard and in fact set in motion, not by any direction from the defendant, but by the police. When he took the bill he knew, or, at least, believed, it to be a counterfeit; but notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crime. This may have been laudable enough on his part as a citizen, or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then, attempted to recover what he had, or supposed he had, lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interest of the defendant, and therefore acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person, applying to purchase a ticket, what he believes to be a counterfeit \$5 bill; not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals, and then immediately directs the arrest of the person from whom he took the bill. Such an act on

his part is not binding on his principal. If he was in fact acting within the scope, and in the line, of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such property, except upon receipt of what, at least, he believed to be good money. The defendant, as a citizen, might with perfect propriety render to the police such services as he could in procuring the detection and arrest of persons engaged in passing counterfeit money, but it does not follow that all his acts in that respect are binding on the defendant. . . . The law is settled that a common carrier, by its contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to him. *Stewart v. Brooklyn & C. T. R. Co.* [1887] 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547. Upon the facts disclosed by the record, it is very difficult to bring this case within that principle. All we know with respect to the duties of the agent is that he sold tickets at the station from a place behind a window in the waiting room. It does not appear that he had any charge of the place where the plaintiff was when arrested, or that the plaintiff was, within the meaning of the decisions, in his custody or under his protection, or that the ticket agent was intrusted by the defendant with any powers or duties with respect to the execution of contracts for the transportation of passengers. Upon the facts disclosed at the trial, it would be quite difficult, if not impossible, to classify the act of the agent, in pointing out the plaintiff to the police and directing his arrest, as negligence or wilful misconduct. There can be no doubt that a conductor, or like agent of a carrier of passengers, who has them in charge and under his care, may violate

on the ground that the agent was acting within the scope of his employment.⁹

the duty which he owes to them by directing an arrest without cause, for which his principal may be held liable, but sufficient was not shown in this case to bring it within that rule." In his very able dissenting opinion Earl, J., took his stand upon the general doctrine of the absolute liability of a carrier, and argued thus: "In this case the relation of carrier and passenger having been created by the purchase of the tickets, the plaintiff was just as much entitled to protection against the wrongful acts of the defendant's servants as if, at the time of the assault upon him and his arrest, he had been in one of its cars. He was in a place where he had a right to be, and where, under the rules of law announced in the cases cited, he was entitled to protection against injury from the negligent or wilful acts of its servants. It is immaterial what the ticket agent's motive may have been. He may have been prompted by the desire to do a public service by the arrest of criminals, or by a malicious motive, simply to do the plaintiff an injury; and still, under the authorities cited, the defendant was liable for his acts. Suppose, instead of directing the police officer to arrest the plaintiff, he himself had seized and confined him in the depot,—would anyone then contend that the defendant would not be liable? And can it be said that that case would have been any different in principle from this? Suppose, instead of directing the police officer to arrest him, he himself had made the arrest, and dragged the plaintiff through the streets to the police station; can it be doubted that the defendant would have been liable? The law makes it liable in such cases simply because of the unlawful interference with the person of the plaintiff, a passenger, by one of its employees; and the motive of the employee is entirely immaterial upon the question of its liability. The motive may operate upon the question of damages, but cannot wholly shield the defendant against liability. The agent not only caused the arrest, but, in violation of the duty which the defendant owed the plaintiff, growing out of the sale of the tickets and the contract thus made to carry

him to his destination, he broke the contract by rendering it impossible that the plaintiff could be carried. Instead of going upon the train, as he had the right to do under his contract, by the act of its agent, he was taken to police station and kept under arrest for an hour or more. Can a ticket agent sell tickets to a passenger and then arrest him, or cause him to be arrested, so that he cannot take passage upon the train for which he has purchased a ticket, and the railroad company escape all responsibility for his acts?"

⁹ *Palmeri v. Manhattan R. Co.* (1892) 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001, affirming (1891) 39 N. Y. S. R. 23, 14 N. Y. Supp. 468. The court argued thus: "For all the acts of a servant or agent, which are done in the prosecution of the business intrusted to him, the carrier becomes civilly liable if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defense if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the wilful misconduct or negligence of the persons employed by it, in the execution of the contract which it has undertaken towards the passenger." It was observed that, in the *Mulligan Case*, *supra*, the reason why the company was held not to be responsible for what he did was that "his acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interests, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime." The court proceeded as follows: "Here the agent was acting for his employers, and with no other conceivable motive, losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and

c. *Ticket collectors*.—In an English case where a ticket collector had taken the plaintiff into custody on a charge of having failed to comply with a by-law which provided that a passenger who refused to give up his ticket must pay the whole fare from the place whence the train had started, the verdict was set aside on the broad ground that there was no evidence of the wrongdoer's having been authorized to enforce the by-law.¹⁰

d. *Gatekeepers*.—Where a passenger, having lost his ticket during his journey, was detained at the station where he alighted, and given into custody by the gatekeeper, acting under general instructions to collect tickets or fares, the company was held to be liable in an action for false imprisonment.¹¹

if, in his conduct, he committed an error which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury." Commenting upon *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448, the court remarked: "There is no parallel between the case of a clerk in a store, who has a person arrested and searched, upon suspicion of a theft, and whose general employment could not warrant such an act; and the present case of an agent who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed."

For another decision regarding employees of this class, see § 2466, note 1, *ante*.

¹⁰ *Eastern Counties R. Co. v. Broom* (1851) 6 Exch. (Exch. Ch.) 314, 20 L. J. Exch. N. S. 196, 15 Jur. 297. But this decision, although rendered by a court of error, would possibly not be followed at the present time in the jurisdiction where it was rendered. See § 2466, note 1, *ante*.

¹¹ *Lynch v. Metropolitan Elev. R. Co.* (1882) 90 N. Y. 77, 43 Am. Rep. 141. After laying it down that the company had no regulation and could legally have none that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and if

he did not, that he should then and there be detained and imprisoned until he did do so, and that, "at most the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor," the court proceeded thus: "When the plaintiff attempted to pass through the gate, the gate keeper told him that in resisting and detaining him he was simply doing his duty; and he testified that in all he did he considered that he was acting in the line of his duty. The defendant's president testified that there was a rigid rule of the company that passengers were required to show at the gate that they had paid their fare in order to be able to pass out; that when they came to the gate the rule was that the gate keeper was not to let them go out till they either paid their fare or showed a ticket, and that the instructions to the gate keepers were to collect tickets or fares. From these facts and all the circumstances of the case, if it is not entirely plain, the jury could at least find that the company expected the gate keeper would detain a passenger who could not or would not produce a ticket or pay his fare at the gate, and the gate keeper clearly understood that it was his duty so to do. In anything that he did, he did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal. It matters not that he exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his

e. Platform men.—In a case decided by one of the inferior courts of New York, the defendant railway company was held to be liable for the act of an employee designated as a “platform man” in giving a passenger into custody on a charge of disorderly conduct.¹²

f. Employees working on railway trains.—In a case where the employees operating a train arrested a man whom they suspected of having placed obstructions on the track, the ground upon which the right of recovery was denied was that, in the absence of evidence as to any other authority than that implied from the mere relation of employer and employee, the railway company could not be held liable for the act.¹³ This decision is no doubt correct, so far as it goes. But it would seem that a different result might well have been reached if the attention of the court had been directed to the general principle under which liability is imputed to a master in respect of arrest made by servants intrusted with functions which cannot be efficiently discharged unless they are empowered to take prompt action for the protection of his interests by detaining actual or supposed offenders. See § 2466, *ante*, where some English cases relating to arrests by servants whose duties were connected with the operation of trains are cited. Several American decisions to the effect that conductors are acting within the scope of their authority when they arrest passengers, or give them into custody of a police officer, for the purpose of carrying out some direction given by the company

duty, or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service. He detained the plaintiff at the station, caused his arrest, went with the police officer to the police station, there made a complaint, and then the next morning appeared before the police magistrate and renewed his complaint. These were successive steps taken by the gate keeper to enforce the payment of the fare by the plaintiff, or to punish him for refusing to pay it, and for all that he did the defendant is responsible.”

¹² *Shea v. Manhattan R. Co.* (1890; C. P.) 15 Daly, 528, 29 N. Y. S. R. 313, 8 N. Y. Supp. 332, affirming (1889) 27 N. Y. S. R. 33, 7 N. Y. Supp. 497. The court said: “If the plaintiff was making a disturbance, as was claimed by the defendant on the trial, it was certainly within the scope of Clements’ employment to suppress it, and, if necessary for that purpose, to cause the

arrest of the plaintiff. He had the charge for the defendant of the platform where the trouble arose; it was his duty to see that the business of the company was transacted there with comfort and safety to the passengers; and the company, having intrusted him with that duty, was liable for a misuse of the authority which it gave him; hence it was properly left to the jury to say, on the facts presented before them, whether the action of Clements in causing the arrest was justified by the circumstances. It is the duty of the defendant to treat its passengers with courtesy and kindness, and where one of its employees, while engaged in the business of the company, whether wilfully and maliciously, or in consequence of what he considered a duty, illtreats a passenger so far as to wrongfully cause his arrest, the company is liable for it.”

¹³ *Porter v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 358.

with regard to the course to be pursued under certain specified circumstances, may appropriately be referred to the principle in question.¹⁴ But it was not specifically mentioned in the opinions of the courts.

A conductor is, of course, authorized to make an arrest whenever, either through the operation of some express statutory provision, or

¹⁴In *Lake Shore & M. S. R. Co. v. Prentice* (1892) 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261, it was conceded by the counsel of the railway company that compensatory damages were recoverable against it for the act of a conductor in directing a policeman to arrest a passenger who had purchased several return halves of tickets from other passengers. The only point actually disputed was the liability of the company for punitive damages.

In *Berry v. Carolina, C. & O. R. Co.* (1911) 155 N. C. 287, 71 S. E. 322, a railway company was held to be liable for the act of a traveling passenger agent who, while assisting a conductor to manage an excursion train which carried numerous passengers, caused the arrest of a passenger for disorderly conduct. The *ratio decidendi* was that as the passenger agent "was assuming this authority [*i. e.*, of management] openly on the train, it must be presumed to have been within the scope of his temporary authority and with defendant's consent; especially when the defendant offers no evidence to the contrary."

For cases in which an arrest made by a conductor for the purpose of enforcing the payment of fare was held to be within the scope of his authority, see *Elser v. Southern P. Co.* (1908) 7 Cal. App. 493, 94 Pac. 852 (passenger refused to pay fare); *West Chicago Street R. Co. v. Luleich* (1899) 85 Ill. App. 643 (passenger given into custody on a charge of having given a counterfeit coin in payment of his fare); *Palmer v. Maine C. R. Co.* (1899) 92 Me. 399, 44 L.R.A. 673, 69 Am. St. Rep. 513, 42 Atl. 800 (arrest made on the ground of an attempt to evade payment of fare); *Kelly v. Durham Traction Co.* (1903) 132 N. C. 368, 43 S. E. 923, 14 Am. Neg. Rep. 164 (passenger given into custody, who, after having paid his fare once, refused to pay it again upon the conductor's demand).

In *Glaiborne v. Chesapeake & O. R. Co.* (1899) 46 W. Va. 363, 33 S. E. 262,

exemplary damages were awarded for an arrest made at the instance of a conductor.

In *Whitman v. Atchison, T. & S. F. R. Co.* (1911) 85 Kan. 150, 34 L.R.A. (N.S.) 1029, 116 Pac. 234, Ann. Cas. 1912 D, 722, a conductor was instructed by the railroad company to obtain written statements from injured passengers. By representing that the law required a written statement of the injury, he detained a passenger who had broken his leg in alighting from a train. Held, that the detention was an act within the scope of his authority.

In *Sullivan v. Old Colony R. Co.* (1888) 148 Mass. 119, 1 L.R.A. 513, 18 N. E. 678, 8 Am. Neg. Cas. 416, where a conductor had removed an intoxicated and disorderly passenger to the baggage car, so as to prevent him from annoying the other passengers, it was held that the removal was a rightful exercise of the company's common-law rights, although it was provided by statute that the railroad police officers might arrest a noisy or disorderly passenger without a warrant, and confine him in the baggage or other suitable car until the train arrived at a station where he could be placed in charge of an officer. The company, therefore, could not be held liable on the ground of assault or wrongful imprisonment.

In *Galveston, H. & S. A. R. Co. v. Donahoe* (1882) 56 Tex. 162, 8 Am. Neg. Cas. 624, where a conductor had wrongfully procured the arrest of a passenger on a charge of tendering counterfeit money in payment of his fare, it was held that a court could not say, as a matter of law, that it was within the scope of the powers of the conductor, as agent of the company, to take such a proceeding. It was conceded that the liability of the company might have been determined as a question of law if the tortious act complained of had been one incidental to the exercise of the powers conferred upon him by statute. In *Decker v. Lackawanna & W. Valley*

as the result of an arrangement between his employers and a public authority, he is invested with the powers of a police officer. See § 2473a.

As to the cases in which the right of recovery was regarded as turning, not upon the authority of the conductor, but upon the question whether his act constituted a breach of the railway company's absolute obligation to protect passengers against injurious treatment, see chapter CIII., *ante*.

As to arrest made by conductors of street cars, see subsec. *j*, *infra*.

g. Foremen of porters at stations.—A foreman porter who, in the absence of the station master, is in charge of a station, has no implied authority, merely by virtue of his position, to give into custody a person whom he suspects to have stolen the goods of his employer.¹⁵

R. Co. (1909) 39 Pa. Super. Ct. 225, the conductor of a passenger train of defendant telephoned to the despatcher at the terminal station that he had a disorderly crowd aboard. He was informed by the despatcher that the police would be at the station, but were not to arrest anyone for anything that occurred on the train, and that they had been so instructed. After he alighted from the train at the station, the conductor, at the request of a policeman, pointed out the crowd that had been disorderly, and the plaintiff was in consequence arrested. Held that the company was not liable because (1) the evidence did not show that the conductor actually participated in, or caused, the arrest of the plaintiff; and that (2) the company was not liable even if he had done so, because the conductor would have acted beyond the scope of his authority if he had arrested anyone after he had finished his trip and left the train.

A complaint is demurrable unless it contains allegations which show prima facie that the arrest made by the conductor was made by him in the course of his duties. Thus, in *Patterson v. Maysville & B. S. R. Co.* (1904) 25 Ky. L. Rep. 1750, 78 S. W. 870, it was held that no cause of action was shown by paragraphs of a complaint which, when read together, alleged in effect that the plaintiff was arrested at a certain place on a charge of rape, under warrant sworn out by one M., a conductor in the defendant's employ, and taken to another town, and there confined in

jail until the grand jury had refused to indict him.

¹⁵ *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 445. Keating, J., said: "It is admitted that the point is new, and that there is no case in which such an authority has been assumed to exist. The cases that have been referred to in support of the contention are cases where a company has made by-laws and an act of Parliament has given authority to the company's servants to apprehend persons committing offenses against the by-laws. It has been held that under such circumstances the servant may be considered to have authority to enforce the by-laws and to do whatever is necessary for that purpose. [See § 2466, note 2, *ante*.] That is the limit to which the cases have gone, and it seems to me that it would be carrying the doctrine much further to hold that the defendants were liable in this case. There seems no ground for saying that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on everyone to give in charge a person whom he thinks is committing a felony, his conduct would in no way be connected with the defendants." Montague Smith, J., observed: "Here, however, the cause of the arrest was not at all connected with the company's business, and it cannot, I think, be presumed that the company

h. Foremen of railway yards.—In one case the court proceeded upon the hypothesis that, in the absence of specific evidence, it could not be presumed that a yard master was impliedly authorized to arrest offenders.¹⁶

i. Trackmen on railways.—In the absence of positive evidence tending to show that he was invested with authority in this regard, it cannot be inferred that a mere foreman of track laborers acts within the scope of his powers in giving a person into custody for threatening him.¹⁷

j. Conductors of street railways.—In some jurisdictions the doctrine has been applied that the act of a street car conductor in giving a passenger into custody on a charge of nonpayment of fare, disorderly conduct, etc., cannot be imputed to his employers, if its rules only authorize him to remove delinquent passengers from the car.¹⁸

give authority to their servants generally to apprehend any person whom the servants think is committing a felony, even though on the company's property. It is clear, too, that Holmes might act for himself in furtherance of public justice without any authority of the company."

¹⁶ In *Southern R. Co. v. James* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303, 15 Am. Neg. Rep. 269, the plaintiff had been arrested, and while trying to escape had been shot by an employee who, when he was hired as watchman in a yard, was directed by the yard master to arrest persons stealing rides on the cars, as the plaintiff had done. No affirmative evidence was given either as to the authority of the yard master to employ a watchman for these purposes, or as to the want of authority averred in the defendant's plea. But it appeared that the watchman's predecessors had several times arrested trespassers, and that the railway company had paid his wages. Held, that this evidence was sufficient to warrant the conclusion that the yard master was authorized to employ a watchman and empower him to make arrest for the causes mentioned. The very meager evidence here deemed to warrant the inference of an implied authority would probably not be regarded by all courts as sufficient for that purpose. The case seems to be "considered an extreme one by the bench and the profession" in Georgia. See the remarks of Powell, J., in his dissenting opinion in *Century*

Bldg. Co. v. Lewkowitz (1907) 1 Ga. App. 636, 57 S. E. 1036.

¹⁷ *Philadelphia, B. & W. R. Co. v. Stumpo* (1910) 112 Md. 571, 77 Atl. 266.

¹⁸ In *Cunningham v. Seattle Electric R. & P. Co.* (1892) 3 Wash. 471, 28 Pac. 745, where a conductor gave a passenger into custody on a charge of disorderly conduct, the liability of the company was denied on the ground that no affirmative evidence had been given to show that he was authorized to take such a step.

In *Little Rock Traction & Electric Co. v. Walker* (1898) 65 Ark. 144, 40 L.R.A. 473, 45 S. W. 57, the grounds of the decision were stated as follows: "There is no connection whatever between his [the conductor's] authority to put a delinquent passenger off his car (given expressly under the rules of the company), and thus prevent a further imposition on the part of the passenger, and the authority to arrest him and prosecute him for a violation of the criminal laws in attempting to ride on the car without paying his fare. Nor can the limited authority of a car conductor from the company to put a delinquent passenger off be enlarged by his calling to his aid a policeman, whose general powers as such as to make arrests and prosecute for violation of the municipal law. Nothing else being said, in such a case, the policeman is called in to aid the conductor in the execution of the con-

Another view, which, in the opinion of the present writer, is clearly the preferable one, is that, apart from any powers which may be vested in him by a statute or by the rules of his employers,¹⁹ he possesses, like the conductor of a railway train (see subsec. *f*, *supra*), an implied authority to give into custody a passenger who refuses to pay his fare, or is disorderly, or is guilty of any other misconduct which is or threatens to be injurious to the other passengers.²⁰

In one case the liability of the defendant company for the arrest

ductor's powers, and not those belonging to his office generally."

¹⁹ In *Ruth v. St. Louis Transit Co.* (1902) 98 Mo. App. 1, 71 S. W. 1055, a dispute arose between the passenger of a street car with regard to the genuineness of a coin which the latter tendered for his fare. He refused either to pay with another coin or leave the car, and resisted the attempt of the conductor to eject him. The conductor then called a policeman and gave him into custody. On the ground that the rules of the street car company directed its conductors to call a policeman in case of trouble on the car, it was held that the conductor in question was acting within the scope of his authority when he caused the arrest of plaintiff and preferred the charge of disturbing the peace against him. See also the *Grayson Case*, cited in the next note.

²⁰ In *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730, the grounds upon which the court held that a count of the petition, although it was defective, in that it failed to allege that the conductor had authority from defendant, as its agent, to cause the arrest of the plaintiff, was not fatally defective for that reason, were thus stated: "The conductor had charge of the car, and full control of it, for the time, and represented the defendant, in the fullest sense, as to any and every matter connected with its management and control; and, it being his duty to protect passengers from insult and injury, it cannot be said, as a matter of law, that in the discharge of this duty he had no authority to call an officer and cause the arrest of a passenger, when necessary to preserve the peace on board the car, and to protect his passengers from insult and injury. On the contrary, it seems to us that if a passenger should be guilty of a flagrant breach of the peace, to the annoyance

and disturbance of his copassengers, the conductor would have the right, and that it would be his duty, to cause his arrest by an officer, if one was by to make it. It is true he is not a conservator of the peace, yet it is his bounden duty to preserve the peace on his car, and to prevent insult and injury to the passengers; and if, to discharge this duty, it should become necessary to call a policeman, we are satisfied that he should do so, and that to do so is within the scope of his employment, and conclude that the second count is sufficient after verdict. The evidence is that, under a rule of the company, the conductor did have authority to call a policeman,—to call a policeman generally signifies that an arrest is to be made,—and we think that, both from necessity and under the company's rules, it was within the scope of his authority to cause the arrest of any passenger when necessary to preserve the peace and to protect other passengers." According to the *Dwyer Case*, *infra*, the effect of this decision was that, "in cases of flagrant breaches of the peace, to the annoyance and disturbance of his passengers, or in any emergency where a crime has been committed or is about to be committed, the conductor has the right, and it is his duty, to cause the arrest of the offender by an officer, if one is at hand."

In *Dwyer v. St. Louis Transit Co.* (1904) 108 Mo. App. 152, 83 S. W. 303, an action for malicious prosecution, the conductor of a street car, on the refusal of a passenger to pay second fare which he demanded, called a police officer to arrest the passenger. The police officer refused to arrest him until a formal charge was made. Immediately the conductor left the car, and the three went together to the police station, where the conductor made the formal charge, and the plaintiff was ar-

of the plaintiff by one of its conductors, on a charge of having stolen a portion of the money received by him from the passengers, was denied on the following grounds,—that he was not on duty when the arrest was made; that it was not made upon view of the offense, but some time after its commission; though the money alleged to have been stolen belonged to the company, the loss fell upon the conductor,

rested, giving bond for his appearance. Discussing the contention that there was no evidence that the conductor had express authority from the defendant to call on a police officer to arrest a passenger for any offense, or supposed offense, the court said: "He had the right under the statutes (§§ 1074, 1163, Rev. Stat. 1899) to eject a passenger for refusing to pay fare, for disorderly conduct, etc., but no statutory power is given to arrest or cause the arrest of a passenger. But, independent of any statute on the subject, if authority to call an officer by a conductor is not conceded in an emergency, it would practically put street railway travel in populous cities at the mercy of thieves and thugs. It is the duty of conductors to protect their passengers from insult and injury, and to protect them from the raids of thieves and pickpockets. . . . The efficient discharge of this duty would, in case of great aggravation, require the conductor to call an officer when practicable to make an arrest. To deny him this authority would be to deny him the use of the agencies provided by law to preserve the peace; and we think that the conductor, when he made the formal charge against plaintiff to cause his arrest, was acting for the defendant and within the scope of his authority, and the fact that there was no disturbance of the passengers, or of any passenger on the car, in fact, no disturbance of any kind whatever, does not militate against the authority of the conductor to cause the arrest; it shows an abuse of that authority, not the lack of it, for if he was authorized to do the act at all, the master is liable." It was also held that the transaction was continuous, without interruption, and was done by the conductor while serving his master as conductor.

In *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L.R.A. (N.S.) 162, 40 So. 714, the liability of the defendant for the wrongful arrest of the M. & S. Vol. VI.—470.

plaintiff whom a conductor had pointed out to a policeman as a pickpocket was affirmed on grounds thus stated: "We do not think that the conductor was in this case malicious. On the contrary, though acting erroneously, carelessly, and to the great injury of the plaintiff, his acts were in the line of the discharge of his duty to his employers and in their supposed interest, and not his own. The railway company, by reason of its act of incorporation, came under certain obligations for the safety and protection of the public and particularly of its passengers, and it had for that purpose to act through employees for whose acts in that regard it assumed responsibility. The conductor of the street car represented in this instance the street railway company. The company could not free itself from obligations referred to by failing to give its conductors full and proper instructions, or by restricting the limit and extent of their authority so as to disable them properly from performing duties which it was inherently necessary and essential they should have in order to carry out to the extent of legal requirements the functions of the position in which they were placed. It could not, by merely enjoining upon the conductors to perform their duties cautiously, prudently, and well, break the effect of their failure to comply with these injunctions, nor could it, by throwing its instructions in the form of prohibitory orders, alter the legal scope of their power, duties, and authority. These are matters which it cannot lessen and make to fall below the limits affixed to the positions themselves by operation of the law itself. The conductor in the case before us did not himself arrest the plaintiff, but it was through his instrumentality that the latter was arrested in and ejected from the car in which he was a passenger, by a policeman, and taken to the police station through the streets in a patrol wagon as a prisoner. The conduct of the

so that the company had no more interest in having the arrest made than the conductor or any other member of the community.²¹

k. Drivers of street cars.—There is some apparent conflict in the decisions as to the right of a passenger to recover damages in respect of the act of a horse car driver in causing him to be arrested for having infringed some regulation as to the payment of fare.²² As the

policeman was the direct and natural consequence of the course pursued by the conductor. Article 2324 of the Civil Code declares that he who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable *in solido* with that person for the damage occasioned by that act."

In *Toomey v. Delaware, L. & W. R. Co.* (1893; N. Y. Super. Ct.) 4 Misc. 392, 24 N. Y. Supp. 108, the authority of a conductor to cause the arrest of a passenger was taken for granted, the decision absolving the defendant being put upon the ground that, under the circumstances, the arrest was not wrongful.

That a street railroad company is liable for a false arrest of a passenger, procured by the driver in charge of the car, and assumed by its inspector on a charge of not paying his fare, was held in *White v. Twenty-third Street R. Co.* (1885) 20 N. Y. Week. Dig. 510. The precise *ratio decidendi* is not apparent from the report.

²¹ *Cordner v. Boston & M. R. Co.* (1904) 72 N. H. 413-415, 57 Atl. 234. There the conductor, while he was paying to the defendant's ticket agent, through the window of the ticket office, his collections of the previous day, missed two silver dollars which he had placed on the shelf of the window, and he suspected the plaintiff, who approached the window to make an inquiry, of taking them. Having reported the loss to a clerk of the assistant superintendent of the street railway and to the city marshal, he went in search of the plaintiff for the purpose of recovering the money, and about two hours afterwards saw him upon an electric car, and told him of his suspicion. The plaintiff having denied that he had taken the money, the conductor telephoned to the ticket clerk that he had found the plaintiff, and asked the clerk to inquire of the city marshal if he had authority to bring the plaintiff back to

the city. The clerk was instructed by the marshal to direct the conductor to bring the plaintiff to his office. The plaintiff having objected, the conductor exhibited his badge and told the plaintiff he would be obliged to return. Thereupon he accompanied the conductor to the marshal's office, and after a brief conference with the marshal, he was allowed to go.

²² In *Roun v. Christopher & T. Street R. Co.* (1885) 34 Hun, 471, the right to recover damages in respect of the act of the driver of a street car in procuring the arrest of a passenger, who, after having duly paid his fare, refused to comply with the demand of the driver to pay it or leave the cars, was discussed entirely with reference to the question whether the driver was authorized to give the passenger into custody. That he was so authorized was the opinion of the court, its reasons for this conclusion being stated thus: "His statement was that the plaintiff not only resisted him in his attempt to remove him from the car, but beyond that made use of profane and abusive language, and was charged with having conducted himself in a disorderly manner, and that charge, under the authority of chapter 186 of the Laws of 1880, would not only justify his removal from the car, but, in addition to that, his arrest and confinement by the officer.

. . . And under it the driver of the car would be authorized to act as he did, if the plaintiff's conduct had been such as it was charged to be by the driver. He so regarded it according to his sworn statement and the testimony given by him upon the trial. It was consequently within the limits of his authority, in the views entertained by him, to deliver the passenger into the custody of the officer. . . . And the company cannot exonerate itself from liability because it had not, as a matter of fact, delegated this broad authority to the driver. He had it by virtue of his position, and could exercise-

functions of such an employee, in so far as they are concerned with the control of passengers, are essentially similar to those of a conductor, it would seem that their powers with regard to such a matter may not improperly be viewed as being, for practical purposes, coextensive.

1. *Other employees on street railways.*—In one case it was held that the timekeeper and the road master of a street railway company were acting within the scope of their authority in requesting a police constable to arrest a person on the charge of wilfully obstructing the cars by making an excavation in the street for his own purposes.²³ In another case it was held that an averment to the effect that the plaintiff, a passenger, after having been wrongfully ejected on the ground of his refusal to pay the fare demanded, had been arrested by a policeman at the request of a road master, showed *prima facie* a good cause of action.²⁴

it within the scope of his employment, whenever a state of facts arose indicating to him that it was the proper course to be followed. What was done was a continuous act, beginning with the attempt of the driver to remove the passenger, and terminating only with his discharge the next morning by the court before which he was taken. No division of it can, either legally or logically, be made, relieving the defendant from any part of the liability incurred in consequence of the unlawful removal of the plaintiff from the car, and his imprisonment, because of the fact that he resisted the effort of the driver to remove him."

In *Corbett v. Twenty-Third Street R. Co.* (1886) 42 Hun, 587, a passenger upon a street railway, having by mistake put an excessive fare in the box, and requested the driver to restore same, which the latter refused to do, collected such excess from passengers as they came in. Upon being ordered by the driver to put this money in the box, he refused to do so, and was forcibly removed from the car by such driver, and placed in the custody of an officer. Held, that the company were liable for the damages caused by his expulsion and arrest. The court said: "The plaintiff was clearly entitled to a restitution of the money deposited by him by mistake in the box placed in the car to receive the fare of the passengers, and, as the driver himself was not authorized to return the fare, and in that

manner correct the mistake, it was an entirely reasonable course to adopt for the plaintiff to receive the fare, which he did of the other passenger, and in that manner reimburse himself for the money inadvertently placed in the box. The regulation of the railway company requiring a passenger who may be deprived of his money by his own mistake in this manner, to go to the office of the company for its reimbursement and the correction of the mistake is entirely unreasonable. As long as the car is placed under the charge and management of the driver, he should be, as a necessary part of that management, invested with authority to reimburse fares inadvertently placed in the box in this manner. The time to correct the mistake is when it may be made and discovered, and the facts attending it fully known to the defendant's agent."

On the other hand in *Lafitte v. New Orleans City & Lake R. Co.* (1890) 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701, a case where the driver caused the arrest of a passenger on a charge of having tendered a counterfeit coin, recovery was denied on the ground that his authority to take such a proceeding could not be inferred from the fact of his having been empowered to change money for passengers.

²³ *Kolzem v. Broadway & S. Ave. R. Co.* (1892; C. P.) 1 Misc. 148, 48 N. Y. S. R. 656, 20 N. Y. Supp. 700.

²⁴ *Carmody v. St. Louis Transit Co.* (1907) 122 Mo. App. 338, 99 S. W. 495.

m. Land agents of railway companies.—It has been held that the institution of a criminal action for stealing timber cut from the lands of a railroad company is not within the scope of the authority of an employee charged with the supervision of those lands, the making of leases and contracts of sale, and the collection of rents and “stumpage.”²⁵

n. Detectives.—See § 2468, *ante*.

2472. —of other classes of employees.—*a. Treasurers.*—Under ordinary circumstances, an employer is not liable for an arrest made

²⁵ *Pressley v. Mobile & G. R. Co.* (1882) 4 Woods, 569, 15 Fed. 199. The court said: “In every agency there is incidental or implied power and authority to the agent from his principal to employ all the necessary and usual means to execute the principal authority with effect. Authorities are cited to this general proposition, and they show that this rule is carried, not only to the extent that an agent is authorized to employ the usual means to effect the object of his employment, but it goes so far as to authorize an agent to employ extraordinary means and remedies provided by law; as, for instance, when an agent is authorized to collect a debt, he may not only bring suit, but may resort to attachment process, or to a replevin or detinue suit; and has authority to bind his principal in a bond required by law in order to obtain such remedy. Cases are also cited to the proposition that an agent authorized to collect a debt may, when the law allows it, arrest and imprison the debtor, upon the principle that it is one of the means of the recovery of the debt. Imprisonment for debt, however, is inhibited by article 1, § 22, of the state of Alabama; and conceding that Van Kirk, in order to carry out the objects and purposes of his appointment, might employ all the usual and even the extraordinary means and remedies provided by law, still the question remains, could he, for such a purpose, resort to a criminal prosecution, and so bind his principal for damages if the prosecution were malicious? It is claimed that, by § 4362 of the Revised Code of Alabama, a criminal prosecution for larceny is a means for the recovery of a debt, because by its terms the owner of the property stolen may recover the value of his property. . . . In view of the constitutional

provision to which we have referred, it can hardly be maintained that it was the object of this statute to furnish a remedy to a party whose property had been stolen, and thus give sanction to the idea that a criminal prosecution may be resorted to as a means for the recovery of a debt. It is more consistent to say that this provision of the law was not intended for the benefit of the person whose property had been stolen, but that it was to lend additional sanction to the law, and thus more effectually deter persons from the commission of this class of crimes. . . . In the case at bar, if the property of the corporation defendant in charge of its agent Van Kirk was depredated upon, and the criminal law violated in regard to it, it might have been the agent's duty to complain to the officers of public justice, and even to take proper steps to have the matter presented to a grand jury; but, in doing so, could he act otherwise than as a citizen? that is, in the absence of express authority from his company so to do? The question is, can such action on his part be held to be within the scope of his agency, and in the course of his employment? There may be and the books recognize some difficulty in determining what acts of an agent or employee are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency, and in the course of his employment, is a proposition which, in the light of the decided cases, cannot be maintained. There are cases to the contrary. *Carter v. Howe Mach. Co.* (1879) 51 Md. 290, 34 Am. Rep. 311, and authorities there cited.”

by or at the instance of a servant whose functions are those of a treasurer.¹

b. Secretaries.—In one case the nonliability of the defendant company for a malicious prosecution instituted by an information which had been sworn out by an employee acting under instructions from its assistant secretary was affirmed on the ground that there was no evidence going to show what was the actual scope of authority in respect of such a proceeding.²

c. Clerks.—In a case where a bookkeeper had used criminal process as a means of compelling the plaintiff to vacate a house belonging to the defendant, recovery was allowed on the ground that the wrongdoer had a general supervision of the renting and management of the house.³ The decision therefore turned upon the notion that the wrongdoer was in effect a departmental manager. The analogy of the decisions reviewed in this and the preceding sections indicates clearly that a master cannot as a general rule be held liable for an arrest made on a prosecution instituted by a mere clerk. Nor is specific authority wanting for the doctrine.⁴

¹ In *Moon v. Towers* (1860) 8 C. B. N. S. 611, where it was held that the defendant was not liable for the act of his minor son, then employed as treasurer of defendant's theater, in wrongfully causing the arrest of a subordinate employee, it was taken for granted that such a tort was not done within the scope of the son's ordinary powers as treasurer, the only points actually decided being that there was no evidence to show that the defendant had either expressly authorized or ratified the arrest.

In *Lyden v. McGee* (1888) 16 Ont. Rep. 105, it seems to have been assumed that the arrest of a servant who had fraudulently appropriated money belonging to an industrial association was within the scope of the powers of the treasurer of that body. If this was the view of the court, it clearly was erroneous, unless the powers of the treasurer were larger than the report indicates. The point actually decided was merely that there must be a new trial for the reason that the jury had been misdirected as to "reasonable cause."

² *Beiswanger v. American Bonding & T. Co.* (1904) 98 Md. 287, 57 Atl. 202.

³ *White v. Apsley Rubber Co.* (1907) 194 Mass. 97, 8 L.R.A. (N.S.) 484, 80 N. E. 500.

⁴ *Staton v. Mason* (1905) 106 App. Div. 26, 94 N. Y. Supp. 417, it was held to be error to submit the case to the jury upon evidence which showed merely that the person who had prosecuted the plaintiff was a credit clerk employed in a furniture business.

In *Waters v. Anthony* (1902) 20 App. D. C. 124, it was held that the liability of partners engaged in an express business for an arrest made at the instance of a clerk in their office, on a charge of stealing goods intrusted to the firm, could not be predicated upon the mere fact that the general instructions of the firm to its agents directed them to use the utmost diligence in the performance of their duties.

In *Gearity v. Strasbourger* (1909) 133 App. Div. 701, 118 N. Y. Supp. 257, where the plaintiff's action was held to be maintainable, it was shown by specific evidence, not only that the salesman in question was impliedly authorized to make the arrest complained of but that his employers had approved of the course taken by him.

Compare also *Dally v. Young* (1878) 3 Ill. App. 39, where it was held that a prosecution instituted by the subagent of a manufacturing company represented in the same state by a general agent

d. Ushers and floorwalkers in mercantile establishments.—In one case the liability of a storekeeper in respect of the arrest of a customer by one of his ushers was affirmed on the following grounds: that the tort-feasor was employed in a manner which made it his duty to protect his employer's merchandise against thieves; that authority to stop a thief who was carrying off any of that merchandise was to be implied from the nature of such an employment; and that an authority of this scope imported that he was also invested with the further authority to detain anyone whom he suspected of having previously stolen a portion of that merchandise.⁵ The logical sequence thus relied upon cannot, without disregarding many authorities, be accepted as one which is applicable with respect to all classes of employees whose functions are such as to place them in charge of their employer's property. It is apprehended that the decision must be supported, if at all, on the same grounds as those which have been deemed by some judges sufficient to warrant a jury in finding that a watchman is impliedly authorized to arrest offenders. See subd. *f*, *infra*.

In a New York case it was taken for granted, without any discussion, that a floorwalker in a store had, in giving a customer into the custody of a detective on a charge of theft, and causing her to be searched, acted within the scope of his employment.⁶ But it is difficult to see how such a standpoint can be reconciled with the general rule formulated in § 2470, *ante*, which is sustained by an overwhelming preponderance of authority.⁷

In two other cases, one decided in New York and the other Wisconsin, the liability of the defendants for arrests made by employees of this description turned upon the effect of certain specific evidence bearing upon the extent of their authority.⁸

was not within the scope of the sub-agent's authority.

See also subd. *e*, *post*.

⁵ *Field v. Kane* (1901) 99 Ill. App. 1. The court disapproved of the decision and reasoning in *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448 (§ 2469, note 5, *ante*).

⁶ *Stevens v. O'Neill* (1900) 51 App. Div. 364, 64 N. Y. Supp. 663, affirmed in (1902) 169 N. Y. 375, 62 N. E. 424 (only a technical point of procedure was discussed by the higher court).

⁷ The court, strange to say, entirely ignored *Mali v. Lord* (1868) 39 N. Y. 381, 100 Am. Dec. 448 (§ 2469, note 5, *ante*), where the liability of the defend-

ant was denied with reference to facts of precisely the same character, except that the tort-feasor was a superintendent, a difference which serves to accentuate still more noticeably the conflict between the two rulings.

⁸ In *Wallach v. Ridley*, an action for false imprisonment procured by a floorwalker in the defendants' store, it was held by the supreme court on the first appeal ([1883] 18 N. Y. Week. Dig. 16) that the defendants were not liable unless they had authorized the arrest, and that, as the evidence was conflicting with regard to this question, it should have been submitted to the jury. The evidence reviewed on the second appeal

e. Employees authorized to demand and receive money owed to their employers.—For the wrongful use of criminal process by em-

([1887] 43 Hun, 336) was to the effect that the duties of a floorwalker were assigned to him, to maintain order, to see that customers are properly waited upon, and to direct customers; that by protecting the stock, was meant to see that the hands behind the counter were keeping the stock clean, and not to protect it from being stolen; that it was not his duty, and that he had no authority from the defendants, to arrest or order the arrest or detention of any person on suspicion of having stolen; that his duty in a case where a person was acting suspiciously was to report it to the man in charge of the floor, or, if the superintendent was around, to report to him or send a message; that when he saw a person in the act of theft, he had a right to arrest or order a policeman to arrest, but that when a person was suspected of having stolen, that was a different thing; and that he had distinct orders from the general superintendent in reference to these two matters. In the opinion of the court this testimony showed that he was not authorized by the defendants to arrest or cause any person to be arrested upon suspicion, but that his duty in part was to protect the goods in the manner above described, and also against thefts which he himself saw committed. It was held to be error for the court to charge the jury that the bare fact that the tort-feasor was employed to protect the goods of the defendants authorized him to arrest the plaintiff on suspicion, and cause her to be searched in order to ascertain whether she had stolen goods about her person. On the third appeal ([1887] 6 N. Y. S. R. 651), the court held that it should have been left to the jury to say whether the floorwalker's duty of looking after thieves did not imply instructions as to suspected persons. The evidence presented on the fourth appeal ([1888] 24 Abb. N. C. 172, 15 N. Y. S. R. 4, 9 N. Y. Supp. 922) was again deemed to be such as to justify the jury in inferring that it was the understanding that persons were to be arrested by floorwalkers when they were caught in the act of shoplifting. The court said: "It is clear that they had the right to arrest,

and if they arrested upon insufficient evidence, or made a mistake in their conclusions from what they saw or heard, the defendants cannot escape responsibility. The floorwalker evidently had the right to arrest and apprehend thieves, and under that authority, if he apprehended an innocent person, his employers are necessarily responsible. They cannot confer such an authority upon the employee, and claim the benefits of his action when he acts advisedly, and absolve themselves from all risks when he acts on insufficient evidence."

In *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276, an action against the proprietor of a store for false imprisonment, a floorwalker had accused a customer of stealing goods, and confined her in a room and searched her. The defendant testified that it was part of the floorwalker's business to watch customers, and prevent them from doing any wrongful act, and that, if he discovered anyone stealing, it was his duty to take the goods away from him, or call the police and have him arrested. Held, that if the floorwalker honestly believed plaintiff had stolen property, and acted on that belief, defendant would be liable, "because the servant was attempting to carry out his duty of taking merchandise from a customer who he supposed was in the act of stealing it, though using means not authorized by the master;" but that if the floorwalker knew that no merchandise had been stolen, but falsely or by a trick made it appear that plaintiff had stolen, and imprisoned her in order to extort money from her, the defendant would not be liable. The evidence as to the latter branch of this alternative not being adequate for the purpose of a decision, a new trial was ordered. On the second appeal ([1905] 124 Wis. 467, 102 N. W. 891), the conclusions of the court were thus stated: "It does now appear by the testimony of both plaintiff and her daughter that no such bolt of lace as that pretended to have been taken from her by Saxe was upon plaintiff's person; also that she had been subjected to such an experiment by Saxe, in fitting a corset upon her, that he must have known that she

ployees of this description, their employers cannot be held liable on the mere ground of the functions normally discharged by them.⁹

had nothing of the sort in her possession. This evidence is wholly undisputed, and supplies the certainty as to Saxe's motive in the transaction, which was lacking on the former trial. In deference to what we then declared, we must now hold that the evidence conclusively established that Saxe was acting wholly outside the scope of his employment."

⁹In *National Bank v. Baker* (1893) 77 Md. 462, 26 Atl. 867, an action for malicious arrest and false imprisonment, the officer who made the arrest said he had no orders from the defendant, but that his superior officer ordered him to go to the plaintiff's place of business and "see that there were no violations of the law committed." The defendant's collection clerk said the cashier gave him a draft, and told him to present it to the plaintiff for payment; to let him see everything that was in it, to be as polite as possible; that he did not want to have any trouble with the plaintiff, and that a detective officer would go along and protect him. The cashier swore he gave no orders or instructions as to arresting the plaintiff. Apprehending that the collector might be assaulted by the plaintiff, he went to the office of the marshal of police, and requested that an officer might be sent along to protect the collector. The arrest of the plaintiff was made by order of the collector. Held, the evidence did not justify an instruction which it was left to the jury to determine whether the defendant or its cashier authorized or directed the arrest of the plaintiff. The *ratio decidendi* was that a bank cannot be held liable for an arrest made at the request of a collection clerk, except on the ground either of an express precedent or of a subsequent ratification.

In *Craven v. Bloomingdale* (1902) 171 N. Y. 439, 64 N. E. 169, reversing (1900) 54 App. Div. 266, 66 N. Y. Supp. 525, an action for false imprisonment procured by the driver of one of the delivery wagons, the contract under which he was employed authorized the defendant to charge him for, and deduct from his wages, any money or the value of any merchandise that might be lost, damaged, destroyed or stolen

after being placed in his charge. He also gave a bond with surety under this contract. The plaintiff purchased an article which, on delivery, proved unsatisfactory. It was returned and another sent in exchange. Full payment had been made on the original purchase, and on the second article a small balance was due to defendant. Owing to an error made in the defendant's store, the driver was instructed to collect the full price of the article, and not the balance actually due, as had been agreed with the defendant. On delivering the second article, the driver insisted on full payment, or a return of the property. The plaintiff having refused to comply with either of these demands, the driver sent out for a policeman, and gave the plaintiff into custody. The ground upon which the judgment of the supreme court was reversed was that the jury had been misdirected on the subject of damages, but the court of appeals made the following remarks concerning the substantive law of the case: "The fact that the master was not present when the arrest was made does not necessarily absolve him from liability. If, on the evidence, the jury could find that the master authorized the arrest, or subsequently ratified it, he must respond in damages. In the case before us, it is not claimed the master directly authorized the arrest of the plaintiff, or ratified it when brought to his attention. It was, however, a question for the jury to determine, if the evidence warranted it, whether the manner in which the defendant conducted his business, through the intervention of the driver, constituted such a system as to render the act of the driver the act of the master."

In *Vara v. R. M. Quigley Constr. Co.* (1905) 114 La. 261, 38 So. 162, it was held that an authority to cause the arrest of persons on a charge of violating a labor contract is not implied in the employment of agents or clerks to run a commissary store, and in connection therewith to collect accounts due by laborers to a construction company. The argument rejected by the court was that, as the clerk believed that the plaintiff owed his principal a certain sum advanced on a labor contract, it

f. Watchmen.—In an English case, Brett, J., remarked, *arguendo*: "If an officer be appointed expressly to watch the company's property, I should think, if he took an innocent person into custody on the charge of stealing, it might well be said that the company were liable."¹⁰ The doctrine thus suggested would seem to be a very

was his duty to collect this amount if possible; and therefore he acted within the scope of his employment when he caused plaintiff to be arrested, with the view of extorting the payment of said sum of money, or of compelling him to return to the service of the defendant company.

In *Singer Mfg. Co. v. Hancock* (1897) 74 Ill. App. 556, the court was "unable to see how the authority of an agent to sell and lease machines of any kind, and to collect pay therefor, can be construed to embrace within its scope authority to cause the arrest of a person who maliciously injures a machine of his principal out of the presence of such agent, and while he is doing no act in connection with it."

In *White v. International Textbook Co.* (1911) 150 Iowa, 27, 129 N. W. 338, it was held that a division superintendent of a publishing company, who was working under a district superintendent, and had no authority concerning the collection of money owed to the company, had no implied authority to prosecute a former employee for embezzling such money. For the point decided on the first appeal ([1909] 144 Iowa, 92, 121 N. W. 1104), see § 2469, note 1, *ante*.

In *Equitable Life Assur. Soc. v. Lester* (1908) — Tex. Civ. App. —, 110 S. W. 499, the nonliability of a life insurance company for the acts of a cashier at a general agency office in prosecuting a subagent for alleged embezzlement of the proceeds of premium notes was affirmed upon evidence which showed that the company did not ratify the prosecution; that the cashier's duties were limited to the custody of the company's funds in a city, to acting as the general agent's bookkeeper, to looking after the collection of notes, and other clerical duties in the general agency office; that the notes to be collected were made payable to the general agents, who accounted to the company for the proportion of premiums due to it; and that the affairs of the company in the state were under the super-

vision of a general manager, who took no part in the prosecution. The court observed that "the act of an agent whose duty it is to collect money due his principal is authorized only by resort to such proceedings as are usual and legitimate for the purpose. Civil proceedings would be deemed such, but not the use of criminal process. This is not appropriate or justified in order to collect a debt."

In *Powell v. Champion Fiber Co.* (1908) 150 N. C. 12, 63 S. E. 159, the defendant corporation could not be held liable, in the absence of proof of ratification, for the act of a collector of debts in arresting the wife of a debtor. Clark, Ch. J., dissented on the ground that, on the facts in evidence, the detention of the wife was effected on the defendants' premises by its higher official (superintendent and assistant superintendent), for the purpose of collecting money which was afterward paid into its treasury.

See also *Gerber v. Viosca* (1844) 8 Rob. (La.) 150 (lessee of market not liable for the act of a person employed to collect his dues, but not to superintend its police, in causing a person to be arrested for making a disturbance in the market); *Springfield Engine & Threshing Co. v. Green* (1886) 25 Ill. App. 106 (corporation not liable in an action for malicious prosecution, because of a criminal prosecution of a debtor for forgery, instituted by an agent whose authority was merely to make collections).

In *Wilson v. Brecker* (1861) 11 U. C. C. P. 268, a principal was held liable for a wrongful arrest made by a person acting under a general power to collect money due on an arbitrator's award, and to do all things relating thereto. This decision seems to be hardly reconcilable with the doctrinal position indicated by the English cases as a whole. Most of these, however, are of later date.

¹⁰ *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 448, 39 L. J. C. P.

reasonable deduction from the character of the functions discharged by such an employee. Some of the American cases are in harmony with it.¹¹ Others embody the doctrine that such an employee is not authorized, by virtue merely of his position, to arrest an offender.¹² Even in jurisdictions in which the former of these views is adopted, it would perhaps usually be held, as it has been held in a Canadian case, that a watchman's implied powers do not extend to the arrest of offenders anywhere except on his premises or in the immediate neighborhood thereof.¹³

N. S. 241, 22 L. T. N. S. 656, 18 Week. Rep. 834.

¹¹ In *Gcary v. Stevenson* (1897) 169 Mass. 23, 47 N. E. 508, it was held to have been properly left to the jury to say whether a janitor and watchman had, in arresting the plaintiff on a charge of breaking into and stealing from the premises under his charge, acted under the authority of his employer, or under the direction of a police officer. The authorities cited were some of the cases which relate to the temporary transfer of the services of employees.

A similar standpoint is indicated by the decision in *Efroymson v. Smith* (1902) 29 Ind. App. 452, 63 N. E. 328. There the foreman and watchman of a department store wrongfully accused a customer of stealing, placed her under restraint, and searched her. Held, that the proprietors of the store were liable, although the particular act complained of was wilful and unauthorized.

In *Norfolk & W. R. Co. v. Galliher* (1893) 89 Va. 639, 16 S. E. 935, the liability of a railway company for the wrongful arrest of the plaintiff by a watchman sworn in, without authority of law, as a special policeman, was affirmed upon the ground that under such circumstances the employee had no power to make the arrest in his capacity as officer of the law, and that the arrest of the plaintiff must consequently be taken to have been made in behalf of the company.

¹² In *Govaski v. Downey* (1894) 100 Mich. 429, 59 N. W. 167, the plaintiff, an employee of the defendant, having failed to return an article belonging to the defendant, which he had borrowed, was arrested by another employee, who was sometimes designated in the record as a detective, and who, according to his own testimony, was a watchman. Held, that the action could not be maintained,

no affirmative evidence having been offered to show that the wrongdoer had acted in the line of his duty in giving the plaintiff into custody.

In *Johnston v. Chicago, St. P. M. & O. R. Co.* (1907) 130 Wis. 493, 110 N. W. 424, where a railroad watchman had arrested the plaintiff on a charge of throwing sticks at a train, the company was held liable; but the right of recovery was expressly predicated on the ground that the tort-feasor's actual authority extended, not merely to the protection of the company's property, but also to the investigation of past transactions which had caused damage to that property. The court said that, "if the facts established a naked authority to look after and protect property, and nothing more, a very different question would be presented."

¹³ In *Thomas v. Canadian P. R. Co.* (1906) 14 Ont. L. Rep. 55, 8 Ann. Cas. 324, a watchman who was also a special constable (see § 2475, note 6, *post*), arrested the plaintiffs at a spot about half a mile from the railway line, and swore out an information against them for breaking into a freight car with intent to steal. One of the grounds upon which the defendant was held to be liable was that the tort-feasor, in his capacity as such, had no authority express or implied either to arrest or prosecute the plaintiffs under the circumstances. Mulock, Ch. J., said: "As watchman, deriving authority from the company, it was his duty to protect the property on their premises which they had intrusted to his care, and he was thus clothed with implied authority from them to do such reasonable acts as he might, on the exigency of the moment, deem necessary, in order to prevent injury to their property. If, therefore, he had found the plaintiffs on the premises of the defendants, en-

g. Doorkeepers.—It has been held that a doorkeeper employed by the pastor of a church to exclude persons not having tickets of admission has no implied authority to cause the arrest of persons who attempt to enter without having tickets.¹⁴

h. Starters of elevators in buildings.—In one case where a man employed to start the elevators in the defendant's building seized a boy who had been interfering with the revolving doors at the entrance of the building, and detained him in the basement, a verdict against the defendant was sustained.¹⁵ From this decision, however, one of the judges dissented, and it seems to be clearly opposed to the weight of authority as indicated by the other cases cited in the present section.

i. Vendors of tickets at public resorts.—The nonliability of the employer in respect of the wrongful use of criminal process by an employee of this description has been affirmed in an Irish case.¹⁶

endeavoring to steal the property placed by them under his charge, it would have been within the scope of his authority, as their servant, to arrest them, if he deemed it advisable to do so, in order to perform his duty as watchman, of preventing injury to the property in question. But such was the limit of his implied authority, and any acts of his in excess of such authority would not bind the defendants." The *dictum* of Brett, J., quoted at the beginning of this subsection, was not referred to by any of the judges.

¹⁴ *Barabasz v. Kabat* (1897) 86 Md. 23, 37 Atl. 720, 3 Am. Neg. Rep. 31.

¹⁵ *Century Bldg. Co. v. Lewkowitz* (1907) 1 Ga. App. 636, 57 S. E. 1036. The rationale of the decision was simply that the defendant had "the right, through its employees, to use such force as was reasonably necessary to prevent any such interference" with its revolving doors, and that the question "whether, in doing the acts authorized by law, the company, by its servants, exceeded its authority, and in turn committed a trespass, was exclusively for the determination of the jury." Powell, J., in his dissenting opinion, argued thus: "To hold the owners of the building liable for an arrest made by an elevator starter, when the nearest approach to authority given him to that end by the master was an instruction that, if trespassers continued to interfere with the doors, he should call a policeman, is to extend the rule of master's liability for

torts of a servant to a degree to my mind unwarranted by the law. . . . If the owners of the building had instructed this elevator starter to arrest trespassers, and he had made the mistake of arresting one not a trespasser, the case would fall within the rule in the *James Case* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303. But the employee here was given no authority to make arrests; he was instructed to call a policeman, and instead of doing so, he, on his own responsibility, undertook to make the arrest himself. If a neighbor's cows are in the habit of breaking into a farmer's field, and the latter should say to his hired man, 'Watch out for the cows, and if they break in, go and notify the neighbor,' and instead of doing this, the hired man takes a gun and shoots the cows, is the farmer liable? If I go out from home and tell my hired boy to take care of the premises, and if burglars or trespassers come while I am gone, to telephone for the police, and he, seeing someone in the yards, shoots him, am I responsible for the assault or homicide? If not, the owners of the building are not justly held responsible in this case."

¹⁶ In *Cullimore v. Savage South African Co.* [1903] 2 I. R. (C. A.) 589, an action for assault and battery, false imprisonment, malicious arrest, malicious prosecution, the grievances complained of were stated to have been committed by one D., hired by the proprietor of a public show as a cellarman

j. Ushers at theaters.—In the case cited below, the lessees of a theater were held liable for the act of an usher in procuring the arrest of a patron on a charge of disorderly conduct.¹⁷ But the decision seems opposed to the general current of authority.

in their refreshment department, and as a casual hand in the ticket office. The evidence indicated that, while acting as ticket issuer, he believed he had given the plaintiff a half sovereign in excess of the proper change when the plaintiff was paying for an entrance ticket; that as soon as he had time, he asked M., the manager of the show, to take his place in issuing the tickets; that he went to the plaintiff and asked for a half sovereign, which the plaintiff denied having received, and that he then invoked the aid of the police. The charge was not persisted in, and the plaintiff, after a short delay, was liberated, but expelled from the place of entertainment. Held, that no action could be maintained against the proprietor of the show. Lord Ashbourne, Ch., could not see upon what principle it would be justifiable, under the circumstances of the case, "to imply such an immense authority in a casual ticket issuer, half an hour after the occurrence, without necessity or exigency, and with an opportunity not availed of, to consult the manager, the superior who paid and employed him." Walker, L. J., said: "There are two classes of cases which may be left out of sight. There is no by-law or statute to which the tortious act can be in any sense referred, and the present case also is not one in which the business of the company was, in the absence of the owners, left in charge of Davis. He was a mere ticket issuer, casually employed in that subordinate capacity at a salary of 30s. a week, and if he made a mistake in giving too much change to a member of the public, he was liable to have the amount deducted from his weekly salary,—an event which happened in the present case by stoppages after the issue of the writ. Further, there were upon the premises during the entire period two superior officers of the company,—a manager, who was, as the lord chief justice points out, within speaking distance, and another, Filis, who is described as the equestrian director. These superiors might both have been appealed to for authority be-

fore the act of arrest was committed." FitzGibbon, L. J., said: "In the present case, tried by any reasonable standard, it seems to me that the action of Davis in arresting the plaintiff cannot be regarded as authorized by the master in the way in which authorization must be shown,—namely, so as to make Davis the defendant's agent. It is not within the ordinary scope of a ticket taker's employment to arrest anybody, granting that he might arrest a person whom he caught, as he believed, *in flagrante delicto*, taking tickets or money of his master which were in his charge; here nothing of that kind occurred. Davis himself said that he did not 'put it down as a fraud' that the plaintiff had induced him to give the half sovereign; he did not miss it until he counted his money after the crowd had passed his turnstile. At first he told the manager that he 'had given a gentleman 10 shillings too much,' and he went to try to get it back, not for his master, but for himself; he 'was thinking of his week's wages;' he 'did not look at it in the light of the company;' he 'was looking for his half sovereign;' he 'had to refund it, and did refund it.' The arrest could not be reasonably expected to get it back; and if it was made merely to bring the plaintiff before the manager, this would be inconsistent with authorizing Davis to act for the principal. I can find no evidence of agency, in motive, in action, in interest, or in duty, on the part of Davis in the arrest."

¹⁷ *Epstein v. Gordon* (1909) 114 N. Y. Supp. 438. The undisputed evidence showed that the plaintiff and his wife attended the defendant's theater; that the tickets previously purchased by him were received at the entrance, and the coupons separated therefrom and returned to the plaintiff; that these coupons were duly presented to an usher; that after the plaintiff had been sent from one aisle to another, backwards and forwards, the usher called him vile names, took hold of his coat, dragged him into a small office, struck

k. Toll gatherers.—It has been held that a turnpike corporation is not chargeable with the act of a toll gatherer in causing the arrest of a person for evading payment of toll, unless it is shown either that he was expressly authorized to cause arrests under such circumstances, or that his act had been ratified.¹⁸

l. Employees engaged in construction work.—In a case where a servant of a telephone company, who was charged with the duty of setting poles and stringing wires along a certain route, arrested the owner of a piece of land, the liability of the company was held to be for the jury, there being evidence which tended to show, on the one hand, that the arrest had been made for the purpose of getting the landowner out of the way and thus procuring an opportunity for running the line across his property against his will, and, on the other hand, that the arrest was made because of an assault which the landowner had committed upon the servant.¹⁹ But this decision is manifestly opposed to the general current of authority. It seems to require for its support the very broad and, it is submitted, entirely untenable doctrine that a master must answer for any arrest which his servant makes or procures for the furtherance of his interests, real or supposed.

m. Employees in markets.—In one case it was laid down that an employee of a market company, "under his authority as a mere agent to keep order and collect rents in the market, certainly had no authority to make an arrest."²⁰

n. Detectives.—See § 2468, notes 2 and 3, *ante*.

2472a. Liability considered with reference to the duty of carriers to protect passengers.—In an earlier chapter (CHIL.) it has been shown that many of the American courts hold that the obligation of a carrier to convey his passengers safely and treat them properly requires him to protect them against the wilful torts of his servants, irrespective of whether those acts are, or are not, done within the scope of their employment. As the subject is fully discussed in the

him, caused his arrest and imprisonment in a station house, and appeared against him in the police court, accusing him of disorderly conduct, a charge of which the magistrate acquitted him. One of the defendants testified that the duties of the ushers were "to receive the tickets and show the people to their seats." Held, that the evidence justified the conclusion of the jury that the injuries complained of had been inflicted by the fort-feasor

while he was acting in the course of his employment.

¹⁸ *Baltimore & Y. Turnp. Road v. Green* (1897) 86 Md. 161, 37 Atl. 642.

¹⁹ *Jackson v. American Teleph. & Teleg. Co.* (1905) 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015.

²⁰ *Wells v. Washington Market Co.* (1890) 8 Mackey, 385. In this case the employee was a special policeman. See § 2478, note 1, *post*.

chapter referred to, it will be sufficient for present purposes to cite the cases in which, up to the present time, the applicability of the doctrine of an absolute obligation, as a criterion of the right to recover for injuries caused by torts of the description dealt with in the preceding sections, has been affirmed or taken for granted.¹

Several of the states in which the general doctrine has been recognized as controlling in respect of actions for injuries caused by assaults have not as yet pronounced explicitly in favor of extending it to cases in which damages are claimed for abuses of criminal process.

B. LIABILITY IN RESPECT OF THE ACTS OF CONSTABLES AND EMPLOYEES INVESTED WITH THE POWERS OF CONSTABLES.

2473. Scope of subtitle.— As the liability of an employer in respect of the unlawful violence of constables and of employees invested with the powers of constables is, so far as appears, determined upon the same footing in cases where such violence is incident to and accompanied by a wrongful use of criminal process, as in cases where that element is not present, the cases belonging to both of these categories will be reviewed in the ensuing sections.

2473a. Employees empowered to make arrests on certain specific grounds only.— The effect of some enactments is merely to confer upon certain designated classes of employees authority to make arrests for one or more specified descriptions of misconduct which are peculiarly prejudicial to the employer, and which cannot be adequately restrained by civil proceedings, or by such extra-judicial remedies as the law may allow under the given circumstances. From the standpoint of the employer's vicarious liability, there is an important difference between provisions of this tenor and those adverted to in the following sections.

In the one case, the nature of the authority bestowed indicates

¹ *Mayfield v. St. Louis, I. M. & S. R.* 642, 35 S. E. 259; *Bowden v. Atlantic Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168; *Moore v. Louisiana & A. R. Co.* (1911) 99 Ark. 233, 34 L.R.A. (N.S.) 299, 137 S. W. 826; *Louisville R. Co. v. Kupper* (1909)—Ky. —, 118 S. W. 266; *Grayson v. St. Louis Transit Co.* (1903) 100 Mo. App. 60, 71 S. W. 730; *Ruth v. St. Louis Transit Co.* (1902) 98 Mo. App. 1, 71 S. W. 1055; *Dwyer v. St. Louis Transit Co.* (1904) 108 Mo. App. 152, 83 S. W. 303; *Owens v. Wilmington & W. R. Co.* (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259; *Bowden v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 28, 56 S. E. 558, 12 Ann. Cas. 783; *Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186; *Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, reversing (1904) — Tex. Civ. App. —, 82 S. W. 524; *Galveston, H. & S. A. R. Co. v. La Prelle* (1901) 27 Tex. Civ. App. 496, 65 S. W. 488; *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

that it is intended to be exercised for the protection and benefit of the employers affected by the legislation. Consequently, an injury which may result from its wrongful exercise by a servant will, as a general rule, be imputed to employer, unless the terms of the given statute are such as to show that the servant alone is to be responsible.¹

Such is the operation of the provisions in various railway acts which empower conductors and other employees to arrest passengers who refuse to pay their fares or are guilty of disorderly conduct.²

In the other instance, the effect of an appointment under the statute is to invest the appointee with the ordinary powers of a police constable; and from the decisions reviewed in §§ 2475 *et seq.*, *post*, it is clear that different views may be taken with regard to the question whether the vicarious liability of an employer who takes advantage of the statute applies merely to such acts as are incidental to the performance of duties undertaken by the appointee at the direction of employer, or extends to all acts done by the appointee within the scope of his functions.

2474. Constables called in for a particular emergency by the servants of the defendant.—The question how far a master is chargeable with the acts of an ordinary policeman whom his servants call in to assist them in dealing with an emergency arising out of the work intrusted to them has apparently not been discussed in the United Kingdom or the British colonies. In one of the American states the doctrine has been applied that, under such circumstances, the master is liable or not liable, according as the tort complained of had relation to the conduct of his business or to the enforcement of the criminal law.¹ In this point of view, it will be observed, the ques-

¹ Sec. 246 of the English merchant shipping act, 1854, confers on "the master or any mate or the owner, ship's husband, or consignee" of a vessel, power to apprehend a seaman who deserts; and provides that, if the apprehension is made on improper or insufficient grounds, the person who makes the same, or causes it to be made, should incur a penalty, which, if inflicted, should "be a bar to any action for false imprisonment in respect of such apprehensions. In *O'Neil v. Rankin* (1873) 11 Sc. Sess. Cas. 3d series, 538, it was held that the powers conferred by this section upon masters, etc. were conferred upon them in their individual capacity, and not as acting

for the owners, and consequently that the owners were not responsible for any misuse of those powers.

² See cases cited in § 2466, note 2, *ante*.

¹ In *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590, it was held that a railway company was responsible in respect of acts done by a city policeman is assisting a conductor to eject a passenger from a train for refusing to pay the fare, but not in respect of unlawful violence in effecting the arrest of such passenger for disorderly conduct. The court said: "Upon undisputed facts the plaintiff was a disorderly person. The act of the police in removing the plaintiff from the train to

tion whether the claim is sustainable is determined upon much the same footing as in the class of cases discussed in §§ 2477, 2478, *post*.

Where a claim for damages in respect of a wrongful arrest made by a constable at the request of a servant of the defendant is grounded upon the circumstance of the servant's participation in the tort, the right of recovery is, of course, determined upon the same footing as

the station house was a continuous one; it was their duty as officers of the law to do so, and it was not within the scope of their employment in enforcing the regulations of the railroad company. Upon an undisputed state of the facts the question presented is for the court. Where a police officer takes a disorderly person from the scene of his disorder to the police station, it will be presumed to have been done in his official character, unless such presumption is repugnant to some rule of law, or is rebutted by the facts of the case. The facts of the present case, unaided by the assumption that the color of agency inhered to all the acts of the police, present nothing to rebut the presumption of the official character of the arrest. The case, then, stands thus: Plaintiff has sued for injuries inflicted upon him by the wrongful acts of the defendants at the hands of their private agents; whereas the proof is that his injuries were received by him for his own unlawful acts at the hands of public officers. The result reached is that the plaintiff should have been nonsuited at the trial, and the circuit court should be so advised." The court, after remarking that, at the trial of the cause, the only question submitted to the jury was whether the force employed by the police was at any time excessive, proceeded as follows: "This disposition of the case assumes that the original acceptance by the police of a special agency to aid in enforcing the rules of the defendant company imparted a persistent color of agency to all these subsequent acts. Upon the theory on which this case was tried, the test as to whether the company was responsible or not was whether the police were called in before or after the breach of the peace. If they came in before the breach of the peace, the jury were told that the defendants were liable; while if they were called in after the breach of the peace, and saw it, then they would be considered to have acted in their official capacity, and no liability would attach to the defendants. This was substantially the ground for the refusal to nonsuit, reserved on that motion, and stated in the charge of the court. This view of the case, it will be observed, assumes the existence of a rule of law to the effect that a peace officer, once having undertaken to act in a capacity which in law constitutes civil agency, cannot, should occasion require, assume and exercise the duties incident to his official character. The public importance of such a rule of law, if it exists, can scarcely be overstated; for it is evident that, as no public officer has a right to disqualify himself for the performance of his official duties, no policeman or other guardian of the peace could render service to a citizen, no matter how sore the need, unless an actual breach of the peace was in progress or perceptibly imminent. Conversely, a peace officer who had endeavored to aid an aggrieved or molested citizen in obtaining or defending his rights would, in the event of subsequent disorder or breach of the peace, be incapacitated from exercising any of his official duties as a public protector. The adoption of a rule which would expose the defenseless to any arrogance short of actual assault, and disqualify a public officer in proportion to his zeal, is not to be seriously considered. It is, perhaps, needless to say that I have been unable to find any authority from which such a rule could be deduced."

In *Texas & P. R. Co. v. Diefenbach* (1909) 92 C. C. A. 501, 167 Fed. 39, where a train despatcher who was shown to be authorized to eject trespassers from the railway company's premises called in some local policemen to assist him in ejecting the plaintiff, it was held that the policemen acted as agents of the railway company, and that it was liable for such excesses as they had committed in carrying out the

in a case where the arrest was made by the servant himself. See generally the preceding subtitle.²

2475. Persons appointed to discharge regularly the functions of special constables in certain places. English and colonial decisions.—

By the English courts a person appointed, at the request of a common carrier or other party, to discharge regularly, for a stated or indefinite period, all the functions of a special constable, is regarded as being *prima facie* the servant of the applicant. Accordingly, in the absence of evidence to the contrary, the applicant is presumed to be responsible for any torts, of whatever description they may be, that the constable may commit, provided they are incidental to the functions assigned to him.¹ The

ejection. The New Jersey case was not cited.

² For a case involving an arrest made by the conductor of a street railway, see *Schmidt v. New Orleans R. Co.* (1906) 116 La. 311, 7 L.R.A.(N.S.) 162, 40 So. 714 (§ 2470, note 20, *ante*).

¹ In the judgment delivered for the whole court in *Goff v. Great Northern R. Co.* (1861) 3 El. & El. 672, where the actual question involved was the liability of the defendant for the arrest of the plaintiff at the instance of a ticket collector, on a statutory charge of evading the payment of his fare (see § 2466, note 2, *ante*). Blackburn, J., remarked, *arguendo*: "It is difficult to see why the company pay the police, if the inspector of their police is not to act for them to this extent."

In *Edwards v. Midland R. Co.* (1880) 50 L. J. Q. B. N. S. 281 (an action for malicious prosecution), where the plaintiff had been arrested and charged with theft from the company on a warrant, Fry, J., after referring to the above remark of Blackburn, proceeded thus: "Can it be said that if the police whom they employ conduct a prosecution in the performance of their duties as officers of the company, it is not done without the scope of incorporation of the company? The company take to themselves as a necessary part of their business the protection of property which is intrusted to them as common carriers and otherwise. In my view it is within the scope of their incorporation."

In *Edwards v. London & N. W. R. Co.* (1870) L. R. 5 C. P. 445, Montague Smith, J., remarked: "I am by no

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means prepared to say that there may not be officers who, from the special circumstances of their appointment, have power to arrest offenders in the name of the company; for example, policemen appointed by the company to watch their stations."

In *Lambert v. Great Eastern R. Co.* [1909] 2 K. B. 776, the defendant was held to be liable for a wrongful arrest made by persons appointed under § 50 of its general powers act, which authorizes two justices, upon its application, to appoint persons recommended to them for that purpose to act as special constables upon its premises, and provides, *inter alia*, that the local authorities shall "not be liable for any expense of, or be responsible for any acts or defaults of, such constables, or for anything connected with or subsequent to their appointment." Discussing the contention that the constables were servants of the Crown, and not of the company, Cozens-Hardy, M. R. said: "What is the position of these constables? The county authorities who have to do with the ordinary police force are expressly exempted and excluded from all jurisdiction in the matter. They cannot either appoint or remove. They do not pay. It is the railway company who employ; it is the railway company who pay; it is the railway company who dismiss; and in these circumstances it seems to me these are men bound to obey the orders of the railway company, and bound to obey no other orders of any sort or kind; and that in the acts which they did they acted as servants of the company. No doubt they are servants who

same doctrine has been applied in Scotland,² and in New South

are given a special immunity and protection, and they have the peculiar protection which other constables have; namely, that they are not liable if they have reasonable ground for believing that a felony has been committed, and that the person whom they have arrested was guilty of a felony. If they had such reasonable grounds, their employers, I take it, would not be liable for their acts; but if they had not reasonable grounds, then it seems to me that their employers must be liable." The learned judge then quoted the remark of Blackburn, J., *supra*, and continued: "I think, therefore, that the railway company must accept the position that they were liable to the extent to which their servant and agent is liable,—not further than that, but to that extent."

I think, therefore, that the learned judge was wrong in holding that it was a complete answer to the case to say that these constables were special constables, immune . . . from all actions at law."

In one of the cases under the caption, *Walker v. South Eastern R. Co.* (1870) L. R. 5 C. P. 640, it appeared that a constable, who was a servant also of the railway company, after the conclusion of a scuffle in a station yard between some of the company's servants and other persons, wrongfully gave A. into the custody of a metropolitan policeman on a charge of assaulting the servants of the company, while the scuffle was in progress. By the regulations of the company any of its officers or servants who was a sworn constable was authorized to take into custody anyone whom he saw committing an assault upon another in any of the stations, and for the purpose of putting an end to any fight or affray; but he was directed to use this power with extreme caution, and not if the fight or affray was at an end before they interposed. Held, that the company was not liable for the constable's act. The ruling of the trial judge that, if the jury believed the evidence for the plaintiff, the company were liable for the acts of their servants in giving the plaintiff into custody and sending him to the police station, was held not to be sustained by the evidence. Montague-Smith, J., said:

"Assuming this plaintiff's account of the matter to be true, there was evidence that the fact of the struggle in the station yard between Antonio and Smith and Murphy, at least, so far as this plaintiff is concerned, was brought on by a wanton and aggressive act of Antonio himself; and when, according to the plaintiff's statement, he was not apparently acting in the execution of any duty for the company; and, moreover,—and this goes to the root of this part of the action,—that the subsequent giving of the plaintiff into custody by Antonio was after the struggle was over, and when the plaintiff was quietly walking away. This act of giving the plaintiff into custody, if done according to the plaintiff's statement, appears to us to have been an act beyond the scope of Antonio's employment, and in contravention of his instructions, and therefore an act for which the defendants are not liable. We are disposed to draw the inference in fact that Antonio, in giving the plaintiff into custody, was not acting within the scope of his employment by the company, or on behalf of, or for the benefit of, the company." In the other case, under the same caption, the evidence was that B. refused to leave a station yard of the company, and a struggle thereupon ensued between him and the servants of the company, during which he was wrongfully given in charge by a constable of the company, employed under the above rule. Held, that there was "some evidence fit to be laid before the jury that the servants of the company were acting within the scope of their employment, and on behalf of and in pursuance of the authority given to them, by the company, although they may have committed abuse and excess in the exercise of their duty."

² In *Wood v. Nat. British R. Co.* (1899) 1 Sc. Sess. Cas. 5th series 562, an action by a cabman for assault and illegal arrest, the pursuer averred that, after he had set down a person whom he was engaged to drive to one of the defenders' stations, he was ordered to move on by one of the constables in the defenders' employment, who told him that only cabs belonging to a particular firm were allowed to ply for hire in the station; that, while he was driving

Wales.³ In two of the Canadian provinces, on the other hand, decisions have been rendered which proceed upon the theory that a party who procures the appointment of a special constable, cannot, except on the ground of an explicit direction given *ad hanc vicem*, be held liable for his tortious acts so far as they have reference to his official functions.⁴

towards the exit from the station, he was engaged by another passenger, and while he was putting a box belonging to the passenger on the cab, the constable came up and knocked it out of his hands; that, the passenger having gone off, "the pursuer then mounted his cab with the intention of driving off from the said railway station, when the said" constable, along with another constable, also in the defenders' employment, "jumped up on the pursuer's cab, seized him, and dragged him heavily to the ground," and then, without any warrant marched him in their custody to the police station, and there charged him with committing a breach of the peace. Discussing the contention that these averments showed that the arrest was not within the scope of the employment of the constable, Lord Macdonald said: "To begin with, that, of course, is a matter of fact depending upon the exact circumstances of the case. But further, I think it can hardly be suggested with any show of reason, that if constables are in a railway station, and somebody commits what they think is a breach of the peace, it is not their province to stop the breach of peace, and if they cannot do so otherwise, to take into custody the person who commits it and bring him before a magistrate. That is what is done every day in other places than railway stations, and one does not see why it should not be done now in a railway station. It might be overzeal in particular cases to take a person to the police station, if the person is known to be respectable and quite law-abiding, and could easily be summoned; but it cannot be said not to be within the scope of a constable's duties to arrest a person and take him to the police station if the constable thinks that the proper course in the circumstances."

See also *Hill v. North British R. Co.* (1903) 11 Scot. L. T. 103, where it was taken for granted that a railway policeman was acting within the scope of his employment in arresting the plaintiff

on suspicion of being in possession of stolen goods.

³ In *Brockstayne v. Smith* (1882) 3 New South Wales, L. R. 275, wharfingers by whom the appointment of a special constable had been procured, under §§ 12, 14, of the police act, were held liable for a wrongful arrest made by him. "There is abundant authority for holding that, where persons apply to have a special constable appointed for the protection of their property of (which appointment confers the power of arrest), and where an arrest takes place without cause, the persons employing the constable are liable. . . . Here the defendants did not exactly set the law in motion; but they had this constable appointed to act for them. If they got him clothed with large powers for the protection of their property, it is the same as if they exercised those powers themselves." The principle was deemed to be clear that "where a servant is appointed for the purpose of arresting, at his discretion, any person suspected of interfering with his employer's property, the employer is liable if he arrest a person without cause."

⁴ By §§ 300, 301 of the Canadian railway act, it is provided in effect that certain officials may appoint any person recommended by an agent of a railway company "to act as constable for the preservation of the peace and for the security of property against unlawful acts on the railway and in its vicinity, and that the appointee shall have the full power of ordinary constables in regard to the apprehension of offenders." It is also provided that a constable so appointed may be dismissed by the company or any "clerk or agent" thereof. In *Dennison v. Canadian P. R. Co.* (1903) 36 N. B. 250, where a constable appointed in pursuance of this statute had wrongfully arrested a passenger, the company was held not to be liable.

In *O'Donnell v. Canada Foundry Co.* (1905; Div. Ct.) 5 Ont. Week. Rep. 215, the liability of the defendant company for an arrest, made by a special constable,

But this position was apparently taken without any adequate examination or analysis of the English authorities with which it manifestly conflicts, and it is perhaps not to be regarded as representing the definitive opinion of the Canadian courts.⁵

The nature and extent of the liability arising from the super-addition of the functions of a special constable to those of an employee of an ordinary description has, so far as the author knows, not yet been considered in any part of the British Empire except Ontario. In the case cited below, the court proceeded upon the principle that the right of action depends upon whether the act complained was the one which pertained to his duties as a police officer or to his duties as a servant.⁶ This decision is in harmony with

ble detailed at its request by the high constable of the county to protect property and persons against "picketers," during a strike of its servants, was denied on the ground that no direction had been given to the appointee by the company after the performance of his duties was begun, and that he was allowed to follow such methods as he deemed expedient in executing those duties.

⁵ It should be observed that the cases cited in this and the following note were decided before the *Lambert Case*, note 1, *supra*.

⁶ *Thomas v. Canadian P. R. Co.* (1906) 14 Ont. L. Rep. 55, 8 Ann. Cas. 324. There a watchman in the defendant's employ, who had been appointed a constable under the Dominion railway act, had arrested the plaintiff about half a mile from the railway line, and laid against him a charge of having broken into a freight car with intent to steal. An action for false arrest and malicious prosecution was held not to be maintainable, for the reasons (1) that the watchman, in his capacity as such, had no authority, express or implied, either to arrest or prosecute the plaintiffs under the circumstances; and (2) that, as constable, he was to be regarded as an officer of the law, and not as a servant of the company. Discussing the position of the tort-feasor in his capacity of constable, Mulock, Ch. J., said: "Jardine was at the same time watchman for the defendants and constable appointed under the statute, with such duties and powers as the act conferred upon him. This dual position involves a consideration of his implied

authority in each capacity. As watchman, deriving authority from the company, it was his duty to protect the property on their premises which they had intrusted to his care, and he was thus clothed with implied authority from them to do such reasonable acts as he might, on the exigency of the moment, deem necessary, in order to prevent injury to their property. If, therefore, he had found the plaintiffs on the premises of the defendants, endeavoring to steal the property placed by them under his charge, it would have been within the scope of his authority, as their servant, to arrest them if he deemed it advisable to do so, in order to perform his duty as watchman, of preventing injury to the property in question. But such was the limit of his implied authority, and any acts of his in excess of such authority would not bind the defendants. *Poulton v. London & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 540, 8 Best & S. 616, 36 L. J. Q. B. N. S. 294, 17 L. T. N. S. 11, 16 Week. Rep. 309; *Lyden v. McGee* (1888) 16 Ont. Rep. 105, 108. . . . Here the arrest was made after the attempted robbery, and on a public street, some distance from the defendants' premises, and on the following day Jardine swore to an information charging the plaintiffs with having endeavored to break into a freight car with intent to steal therefrom. There was no evidence that anything, in fact, had been stolen. The defendants' property was safe before the arrest. Therefore, that act and the subsequent events complained of were not in the interest of the company, either for the purpose

the American authorities cited in § 2476, *post*; but, as it involves the same doctrine as that applied in the other Canadian cases referred to under the last paragraph, it is open to the same general criticism as they are; *viz.*, that it is apparently not consistent with the English precedents.⁷

of preventing a theft or of recovering stolen property, but were simply punitive in their character, in vindication of the law,—an object in which the company, in common with the general public, was interested. Under the railway act the company had no authority to do what Jardine has thus done, and it ought not to be inferred that the company had conferred on him authority to do what it could not itself lawfully do. *Allen v. London & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week. Rep. 127, 11 Cox, C. C. 621; unreported case of *Jones v. Duck*, *The Times*, March 16th, 1900. I therefore think that, as watchman, Jardine had no implied authority from the defendants, either to arrest or prosecute the plaintiffs, and that the defendants are not liable therefor. . . . There was no evidence that the defendants gave any instructions or directions to Jardine in the discharge of his duties as constable at any time. On the contrary, they appear to have wholly abstained from interfering with him, leaving him to perform, in accordance with his own judgment, the duties cast upon him by the statute. Thus, Jardine having no express authority from the defendants to make the arrest and lay the information, they would not be liable unless an implication of authority would arise because of their having brought about his appointment as constable.” The learned judge then referred to some of the American cases which proceed upon the doctrine that “peace officers, these latter in the exercise or nonexercise of their police powers, are not servants or officers of the municipalities which may have appointed them, but which have no control over them in the discharge of their duties,” and proceeded thus: “For the like reason such peace officers appointed on the recommendation, under the authority of competent legislation, by a railway company, must be regarded as officers of the law, and not as servants of the company. Under the act in question, whilst the railway may apply to the authorities to appoint constables, and may in that connection make recommendations of persons for appointment, it has no power to appoint, the act vesting that power in justices of peace, members of the judiciary, and other functionaries. The statute declares what shall be the duties, powers, and privileges of these constables, and imposes upon them the obligation of performing their duty, under heavy penalty in case of neglect, and provides for their dismissal by any county court, superior court judge, etc.; the only interference allowed by the statute to the company being to dismiss ‘any such constable who is acting on such railway.’ Thus, a constable, on his appointment, derives the authority from the statute, not from the company, and is bound by the statute, even against the wishes of the company, to perform the duties cast upon him by the statute. Unless, therefore, the company should actively interfere by directing his movements, he is no more an agent of the company than would he be if, at the request of a private citizen, he were detailed by his superior officer to guard a man’s private property. There is no evidence to show that in either of these cases the defendants exercised any control over Jardine’s action as constable, and therefore, is held in *O’Donnell v. Canada Foundry Co.* [see note 4, *supra*] they are not liable therefor.”

⁷ Upon the facts the *Thomas Case* may possibly be reconciled with the English authorities on the narrow ground that the place where the arrest was made was outside the area within which the tort-feasor was empowered to act. But it is evident from the lengthy judgment of Mulock, Ch. J., that he did not rely on this consideration alone. It should be observed in passing that the American cases which he cites with regard to the nonliability of municipalities for the torts of police officers are wholly irrelevant. The question of dual capacity is in nowise involved in those cases. They merely illustrate the

2476. Same subject. American decisions.—The liability of defendants in respect of the torts of special policemen appointed at their request has been considered in the American cases with reference to the following situations:

(1) The commission of torts by persons appointed merely as constables by public authorities acting under general police acts, or under statutes applicable only to ascertain kinds of business or certain localities.¹

general rule that a municipality is not liable to third persons for injuries caused by those torts of employees which are incidental to the discharge of its governmental functions.

¹ The following will serve as examples of statutes belonging to the second of these classes.

By Maryland Pub. Gen. Laws, art. 23, §§ 402, 403, it is enacted that, upon the application of any corporations owning or using a railroad, steamboat, canal, colliery, or rolling mill, the governor may commission such persons as he may designate to act as policemen for the protection of their property, and the preservation of good order. By § 406, it is provided that the compensation of the appointees is to be paid by the applicant; and by § 407, that the removal of appointees shall be effected by filing a notice in the clerk's office where the commission is recorded, that their services are no longer required.

By Massachusetts Stats. 1874, chap. 372, and Stats. 1878, chap. 244, provision is made for the appointment of railroad police in the city of Boston, and for the appointment of persons to act as police officers to preserve order and to enforce the laws and ordinances of the city in and about any place of amusement, place of public worship, wharf, manufactory, or other locality specified in the application.

By New Hampshire Pub. Stats. chap. 160, § 32, it is provided that railroad police officers may preserve order within and about the premises and upon the cars of the corporation upon whose petition they were appointed; they may arrest without a warrant all idle, intoxicated, or disorderly persons frequenting the premises or cars, and obstructing or annoying by their presence or conduct, the traveling public using the same, and all persons committing thereon any offenses known to the laws of the state,

and may take the persons so arrested to the nearest police station, or other place of lawful detention in the county where the offense was committed.

By the New Jersey railroad and canal act, §§ 20–27 (Gen. Stat. p. 2671), it is provided that the governor, upon the application of any railroad corporation, may appoint persons designated by such corporation, or so many of them as he may deem proper, to be policemen, and shall issue to such person or persons so appointed a commission to act as such policemen; that every person so appointed shall, in the counties through which such railroad may run, possess all the powers of policemen and of constables, in criminal cases, of the several cities, wards of cities, and townships in such counties; the compensation of such policemen shall be paid by the company upon whose application they are appointed; and that, whenever the company shall no longer require the services of such policemen, it shall file a notice to that effect in the office of the Secretary of State, and thereupon the power of such policemen shall cease and determine.

By § 58, of the New York railroad law, it is provided that the governor of the state may appoint any conductor or brakeman on any steam railroad as policeman with all the powers of policemen in cities and villages, for the preservation of order and the public peace, and the arrest of all persons committing offenses upon the land or property of the corporation owning or operating such railroad; and he may also appoint on the application of such corporation, or of any steamboat company, such additional policemen designated by it as he may deem proper, who shall have the same powers.

The Greater New York charter (Laws 1897, chap. 378, p. 109), § 308, author-

(2) The commission of torts by ordinary employees invested with the powers of constables, either through the operation of some enactment applicable to all employees of a certain description, or as the result of a special request made by their employers that such powers shall be conferred upon them.

It will be convenient to review separately the cases which relate to each of the situations.

2477. Same subject. American decisions further discussed.—The doctrine applied in some of the American states with reference to the former of the situations specified in the preceding section seems to be virtually the same as that adopted in England,—*viz.*, that all the torts committed by a special policeman within the scope of his employment are imputable to the person procuring his appointment.¹

In other states a rule has been applied which may be formulated

izes the appointment of patrolmen to do special duty at any place in the city of New York, upon the persons or corporations by whom the application is made paying in advance such patrolman's salary. As such patrolmen, the officers are "subject to the orders of the chief of police, and shall obey the rules and regulations of the police department, and conform to its general discipline, and to such special regulations as may be made, . . . and shall, during their term of holding their appointment, possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen, . . . [and] may be removed at any time by the police board." The earlier enactment of the same tenor is contained in N. Y. Laws 1884, chap. 180, § 269.

¹In *Sharp v. Erie R. Co.* (1906) 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, the plaintiff's intestate, who had been stealing a ride in a freight car, was shot outside the premises of the defendant's railway company, while he was trying to escape from the pursuit of a special policeman whose duties were to protect its tracks and property. The element with reference to which the right of recovery was mainly considered was the locality of the homicide. See § 2480, note 2, *post*. But the general question of the defendant's responsibility for his acts was then referred to by the court: "A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and

policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property. And, hence, in such a case the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct; but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct."

The *Sharp Case* was followed in *Parke v. Fellman* (1911) 145 App. Div. 836, 130 N. Y. Supp. 361, where the facts and conclusions of the court were stated thus: "Whiteside was a special officer of the defendant corporation, employed, as appears, to preserve order on the platform. It was in the course of his regular duty to arrest disorderly persons and disturbers of the peace, and his act in arresting plaintiff was in the line of his duty, and his employer is responsible for his act. The fact that he was also commissioned as a police officer, if such be the fact, does not relieve his employers for [*sic*] his unlawful acts committed in the course of his duty."

In *Kastner v. Long Island R. Co.*

thus: In a suit for an injury resulting from the wrongful act of a special constable whose appointment was procured by the defendant, the plaintiff cannot succeed unless the evidence shows affirmatively that the act was either incidental to the discharge of functions which the constable was empowered to undertake in behalf of the defendant, or was responsive to a request made or direction given *ad hanc vicem* by the defendant or by someone authorized to represent him in regard to the subject-matter. In every instance, therefore, the liability of the defendant is a question of fact, to be determined by the jury under appropriate instructions.² The decisions under this

(1902) 76 App. Div. 323, 78 N. Y. Supp. 469, 12 N. Y. Anno. Cas. 77 (§ 2480, note 2, *post*), a similar rule was laid down.

In *Scipio v. Pioneer Min. & Mfg. Co.* (1910) 166 Ala. 666, 52 So. 43, where a special deputy sheriff, employed during a strike, pursued into plaintiff's house a man whom he was attempting to arrest, and committed an assault on plaintiff, the evidence as to his agency and the scope of his authority was such as to justify different inferences. Held, that the defendant's liability was a question for the jury.

² (a) *Torts of special policemen on railways.*—In *Pennsylvania R. Co. v. Kelly* (1910) 30 L.R.A. (N.S.) 481, 101 C. C. A. 359, 361, 177 Fed. 189, a railway company was held not to be liable for an unjustifiable assault committed upon a street leading to its pier by a special patrolman, appointed under a provision in the New York city charter (see preceding section, note 1), to guard its property and preserve order upon its premises. The act complained of was done by the patrolman in the performance of the functions of regulating the traffic at the place in question.

In *Chicago, R. I. & P. R. Co. v. Nelson* (1908) 87 Ark. 524, 113 S. W. 44, the plaintiff was a passenger who had been arrested for trying to gain access to a train upon a portion of a ticket already used. The grounds upon which the liability of the defendant was denied were thus stated: "Bourland was an ordinary policeman, appointed and sworn as such and in the same manner. The railroad company paid one half of his salary and the city the other half. Yet he was not employed by the company or under its control. Hawkins, the

chief of police, testified that he considered that it had some control over him because it paid one half of his salary, but there is no evidence that it had or exercised any. No such act was shown. It had no power to remove him and was not responsible for his acts. He was stationed at the depot to arrest offenders and protect life and property, as an ordinary policeman, and received his instructions from the chief of police, reported every day to police headquarters, and exercised powers vested in him by law, and not by employment of the railroad company. The only reasonable inference is that it paid one half of his salary to induce the city of Little Rock to station a policeman at its depot, with the same effect had it not paid any part of the salary.

In *St. Louis, I. M. & S. R. Co. v. Morrow* (1909) 88 Ark. 583, 113 S. W. 173, an action against a railroad company for the act of a town marshal and his deputy in ejecting the plaintiff, a trespasser, from a train and shooting him, the evidence showed that the men who injured plaintiff were not employees of the company, and that it had merely issued to them a pass to encourage them to discharge their official duties as to the property of the company. Held, that the trial court had erred in refusing a request for an instruction, that the fact of the pass having been issued for this purpose, or as special compensation for special attention to things in the line of their duty, did not constitute them agents of the company.

In *the Toledochester Beach Improv. Co. v. Steinmeier* (1890) 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188, the evidence showed that, while the superintendent of the defendant's public resort, at

which there was a landing where excursionists disembarked from steamers, was upon an adjacent public landing, endeavoring to secure some driftwood which was floating round the two landings, a quarrel had arisen between him and the plaintiff, who, upon approaching the public landing in a boat, found it obstructed by the timber, and the plaintiff had, upon the pretense of his having assaulted the superintendent, been arrested, at the superintendent's request, by a special policeman appointed upon the defendant's application under the Maryland statute referred to in the preceding section. Held, that the defendant was not liable for the arrest so made. The court said: "This company was not bound for Fletcher's acts simply because appointed by the governor at its designation, nomination, or request, and because it paid his salary. He was undoubtedly a state officer, and whenever he attempted to enforce the criminal laws of the state, he did it in violation of his oath as a state officer and in the exercise of his common-law power as such officer; and the company had no quasi judicial power to order him to arrest anyone; and certainly none to restrain him in the exercise of his office when his sworn duty required him to do anything of the kind. The company needed such officer at command because neither it nor its officers had the power with which the law clothed him."

In *Deck v. Baltimore & O. R. Co.* (1904) 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650, the evidence was to the effect that the plaintiff, together with other men, had been stealing a ride on a freight train, and behaving in a disorderly manner; that, when the train stopped at a certain place, these trespassers had got off, and were told by a special railway policeman that they were under arrest; and that the policeman had then shot the plaintiff while he was standing a few feet away from the track. Held, that it was error to instruct the jury that there was no legally sufficient evidence to show that the railway company was responsible for the assault on the plaintiff. Discussing the question whether the policeman was acting as an employee of the company or as a commissioned officer of the state when the injury was inflicted, the court said: "It appears to be clear from the testimony that he was

employed and paid by the defendant at the time indicated, and that he was then acting as policeman and detective. As we have already said, it must be assumed that he had some implied authority and duties, even if none were expressly proved; and it certainly is not assuming very much to infer from the general nature of his employment that it was his duty to remove trespassers from the train. It must be remembered that, so far as the evidence shows, there was not an actual attempt to arrest the plaintiff, but he was shot by the detective or policeman a few moments after he jumped from the train, and before he had gone more than 10 or 15 feet from it." With regard to the burden of proof, the court was of opinion that, under the circumstances of the case, it was not incumbent on the plaintiff to offer direct and affirmative testimony to establish the fact that the policeman was present at the place in question, not on any business of his own, but for the purpose of performing his duty, which, as the evidence showed, was "to look after all depredations on the company's property, such as robbing cars, breaking into trains, attempting to derail trains, and all violations of the law along the line of the road." The court distinguished *Tolechester Beach Improv. Co. v. Steinmeier*, *supra*, on the ground (1) that the plaintiff sued in respect of a wrongful arrest, and that the principle which precludes recovery in such an action unless express precedent authority or subsequent ratification is established was not applicable in cases where the claim is for an assault; (2) that the arrest in question was not made on the defendant's premises, nor for the purpose of preserving its property; (3) that the evidence only showed that the arrest was ordered and made because of plaintiff's assault; and (4) that the officer who made the arrest, although paid by the defendant, was simply "in the execution of the criminal law upon his own view of the affair, without warrant, and in discharge of what he supposed was his duty at common law, and that his act in no way enured to the benefit of the defendant." On the second appeal (1906) 102 Md. 669, 62 Atl. 958, a different state of facts was presented upon the record, all the witnesses on both sides having testified that the tort-feasor, when he fired the-

shot, was in the act of arresting the trespassers for a breach of the criminal law. As there was no evidence to support the hypothesis that, on the occasion when the plaintiff was injured, the tort-feasor attempted or was in the act of driving trespassers from a train of the defendant, it was held to be error to instruct the jury, at the plaintiff's request, that he was entitled to recover if they found that the shot was fired by the tort-feasor while thus engaged within the scope of his authority as the defendant's special officer. The court said: "By the plaintiff's own evidence it appears that he and his companions were guilty of a criminal act, and if the testimony of the defendant's witnesses be true, they were a band of reckless and desperate lawbreakers. Steiner was a state officer, appointed by the governor under the law, and held a commission from the state. He was also an employee of the defendant company; but whether he was acting as an employee of the company at the time the injury was inflicted, or as a commissioned officer of the state, in the exercise of the powers of his office in attempting to arrest, without warrant, the men on the train, who were confessedly violators of the criminal law of the state, were questions which should have been submitted to the decision of the jury. From what we have said it is manifest that the prayer clearly misstated the real act and purpose of Steiner, as shown by the evidence. The legal consequence which would follow from his acts done solely in one capacity would be quite different from that which would result from acts done in the other."

In *Baltimore, C. & A. R. Co. v. Ennalls* (1908) 108 Md. 75, 16 L.R.A. (N.S.) 1100, 69 Atl. 638, plaintiff, having purchased a basket of groceries, went to defendant's pier to ship them to his wife, and was informed that the basket would have to be covered. He was told that he might find something with which to make a cover on the wharf; and while searching for such material he was charged with having stolen the groceries from defendant by a policeman appointed under the same statute as the one involved in the preceding case. The policeman presented plaintiff to defendant's superintendent, who told him to place plaintiff under arrest; whereupon plaintiff was turned

over to the city police, and after being taken to the station, where he satisfied the captain that he had purchased the groceries, was discharged. Held, that the plaintiff was entitled to recover in an action for false imprisonment. The court said: "In this case there was undoubtedly some evidence that he was acting as an employee of the company. He testified that he asked the general superintendent what he must do, and when he told him to put Ennalls under arrest, he turned him over to the city policeman. He was obeying the orders of the superintendent of the company, and said that part of his duties was to enforce the rules and orders of the company. Without repeating all his testimony, we are of the opinion that the evidence, . . . 'was amply sufficient to have taken the case to the jury upon the question as to whether he was acting at the time as an employee of the appellant, and within the scope of his employment.'" "It is manifest that both Fischer and the general superintendent were acting under the theory that the appellee had stolen the groceries from the appellant and was in the act of carrying them away. . . . There ought not to be any question about the appellant being responsible for such action of Fisher, although he was commissioned by the state, if a corporation can be held in such a suit for anything short of express precedent authority or subsequent ratification. It was not intended to hold in *Steinmeier's Case*, that a corporation could not be responsible for an arrest made by a policeman commissioned by the governor under this statute. On the contrary, it was there said: 'For the purposes of this decision, and in support of our view, it is not necessary for us to hold that Fischer was in no sense an officer of the company, and that, if called on to enforce regulations and by-laws of the company, and he did so purely because of his relations to the company, the company would not be answerable for what was wrongfully done in pursuance of that authority, but within the scope of his employment.'"

In *Baltimore & O. R. Co. v. Strube* (1909) 111 Md. 119, 73 Atl. 697, where damages were claimed in respect of excessive violence used by a special officer in making a lawful arrest, he testified he was in defendant's employ at the time when the arrest was made, that his

duty was to look after defendant's property, with power to arrest trespassers, and that he was arresting plaintiff for trespass when he committed the assault complained of. The question whether he acted within the scope of his employment as an agent of the defendant, or solely under his commission as an officer of the state, was held to be for the jury. It was also held that instructions to the effect if the officer, while acting within the scope of his authority, arrested plaintiff while walking on defendant's tracks, and in making the arrest, and while plaintiff was under arrest, used unnecessary force and inflicted unnecessary indignities on plaintiff, he was then entitled to recover, was correct. It was furthermore held that a request for an instruction that if the officer was solely engaged in the performance of his duties as a police officer, and not as defendant's servant, or if the assault occurred as the result of a personal argument or altercation between plaintiff and the officer, plaintiff could not recover, was properly refused, because it eliminated the question whether the altercation resulting in that assault arose out of the performance of the officer's duty as defendant's servant. The court was also of opinion that, as it appeared that the assault was committed within a few moments after the arrest, requests for instructions founded on the theory that as soon as the arrest was completed, the tort-feasor lost his dual capacity of officer and agent, ceased to be an employee of defendant, and became only an officer of the state, were properly refused, for the reason that "the arrest and the assault must be treated as so merged together into one transaction as to be scarcely separable for practical purposes, even though theoretically they could possibly be regarded as distinct acts."

In *Philadelphia, B. & W. R. Co. v. Stumpo* (1910) 112 Md. 571, 77 Atl. 266, the nonliability of the defendant for an arrest made by a policeman in a public street, at the instance of a track foreman who accused the plaintiff of making threats against him, was affirmed on the ground that there was no evidence of any violation of the law by the plaintiff on the company's premises, of which it or anyone acting for it could complain, the only charge laid against the plaintiff being the carrying of concealed weapons.

In *Hirst v. Fitchburg & L. Street R. Co.* (1907) 196 Mass. 353, 82 N. E. 10, the inference that an assault committed by a policeman upon a visitor to defendant's skating rink was committed in his capacity of defendant's servant was held to be warrantable, where the evidence showed that the policeman was employed and paid by the defendant; that, after the skating rink was built, he collected tickets at the main entrance; that, on the day in question, he did patrol duty in the forenoon, and in the afternoon was sent to the skating rink, where he collected tickets; that the manager of the skating rink gave him instructions in regard to letting in disorderly persons and in regard to putting people out; and that in quelling the disturbance he felt that it was his duty under his appointment and "under the managers of the rink to go in and see what they were doing." As to the effect of the special provisions regarding liability which are inserted in the Massachusetts statutes, see § 2481, *post*.

In *Foster v. Grand Rapids R. Co.* (1905) 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479, an action against a street railway company for an assault upon a passenger by a special deputy sheriff, who was paid by the company, and whose duty it was to keep order in and around its pleasure grounds, to arrest persons violating the law upon the grounds and in the cars which conveyed passengers to them, to ride upon the cars and prevent disturbances, the evidence showed that plaintiff had refused to pay his fare, that the conductor told him that if he did not pay, he would put him off, and that the deputy then interfered, and in the course of the ensuing altercation struck plaintiff. From the testimony of the deputy sheriff himself and also that of the conductor, it appeared there was no attempt or intention to arrest plaintiff for a breach of the peace, but only to put him off the car for the nonpayment of his fare. Held, that the only reasonable conclusion from this evidence was that the conductor either expressly or impliedly called upon the police officer to assist him in ejecting the plaintiff, and that the officer consequently did not, in his assault upon the plaintiff, represent the public, but the defendant. The public authorities in the present case appointed deputy sheriffs, with the

same powers and duties as they would exercise in any other place. When acting purely in their capacity as police officers, the defendant is not responsible for their acts. Only when the defendant, through its authorized agent, has employed or directed such police officers to act for it, does it become responsible. "As a peace officer, Shinski's sole duty was to preserve the peace, and to arrest those who were engaged in a breach thereof. It was not a part of his duty to the public to assist in the removal of passengers who refused to pay their fares, unless the removal was accompanied by such disturbance and violence as to amount to an actual or threatened breach of the peace. Neither under the plaintiff's nor the defendant's testimony was there any disturbance before the assault was made. The car had not stopped, and the court correctly instructed the jury that the defendant's servants had no authority to remove plaintiff from the car until it had stopped. Plaintiff had not refused to leave the car for nonpayment of fare. Under the defendant's own showing, all that had been done prior to the seizure of plaintiff by Shinski was the demand for fare, the assertion by plaintiff that he had either tendered or paid fare, and the statement by the conductor that he would have to pay his fare or get off."

In *Brill v. Eddy* (1893) 115 Mo. 605, 22 S. W. 488, 8 Am. Neg. Cas. 471, a policeman who was authorized to make arrests for violations of ordinances of the city took hold of a boy who was riding on a train in violation of such ordinances, and pulled him from the car. The policeman had the authority to arrest the boy for the offense, but he did not intend to arrest him, and only intended to take him off the car and put him out of the yard. The policeman was also an employee of the railroad company, and charged with the duty of keeping boys off the yard and away from the company's property. Held, that the company might properly be found liable for injuries resulting to the boy from his act. The court said: "Under the ordinance before mentioned, McMahon, as a police officer, had a right to arrest the boy on view for hanging to the car; and if the evidence tended to show that he committed the negligent act when making or attempting to make an arrest, it would follow from what has been said that the question whether

he acted under the orders of defendant or their authorized agent would be one for the jury. But there is no such evidence. His evidence as well as all the circumstances in the case show that he did not intend to arrest the boy. His only purpose was to take the boy off the car and to drive him out of the yards,—a thing not within the line of his duties as a police officer, but a duty devolved upon him by the defendants. He was their paid servant, and, as such, charged with the performance of duties other than those pertaining to the office of a policeman. At the time of the accident he was engaged in enforcing the rules and regulations prescribed by the defendants. In attempting to remove the boy from the car he was not doing or intending to do any act devolved upon him as an officer of the law; and the fact that he had been appointed a special policeman has nothing whatever to do with this case."

In *Tucker v. Erie R. Co.* (1903) 69 N. J. L. 19, 54 Atl. 557, the liability of the defendant for an unwarranted arrest made, and a subsequent malicious prosecution instituted, by a railway policeman appointed under the New Jersey statute referred to in note 1 to the preceding section, was denied on grounds thus stated: "It is plain, from a reading of the provisions of this statute, that, although these men were appointed on the application of the defendant company, received their compensation from it, and were subject to be divested of their powers by its act, they were nevertheless state officers, charged with the performance of public duties. They were, in law, police officers—constables—authorized to arrest persons guilty of criminal offenses or breaches of the peace, not only in cases where the property of the company was involved, but in every case where the crime was committed or the peace broken within the boundaries of any of the counties through which the company's railroad ran. For the proper discharge of their official duties, as well as for the proper exercise of their official powers, they were responsible, not to the defendant company, but to the state. *Healey v. Lothrop* (1898) 171 Mass. 263, 50 N. E. 540, 4 Am. Neg. Rep. 283; *Tolchester Beach Improv. Co. v. Steinmeier* (1890) 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188. In order, therefore, to render the defendant com-

pany legally responsible for the unwarranted arrest made by them, and the subsequent criminal prosecution maliciously instituted by Dwyer, it was necessary to show that their action was instigated by the company or by some of its officers or employees; that what they did was done by them as agents of the company, and not solely of their own volition as peace officers. *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590. No such evidence was offered. On the contrary, the case made by the plaintiffs, and established as true by the verdict of the jury, under the charge of the court, was that their arrest was made by Dwyer on his own responsibility, without consultation with, or instruction from, anyone, and without the existence of any facts to justify him in his action; that this was equally true of the action of Dwyer, Flynn, and Delurey in taking the plaintiffs before the magistrate; and that the subsequent prosecution was maliciously instituted by Dwyer, and was attempted to be supported by evidence manufactured by him, with the assistance of Flynn, for the purpose of making it appear that the plaintiffs were guilty of the charge which Dwyer had made against them."

In *Texas & N. O. R. Co. v. Taylor* (1903) 31 Tex. Civ. App. 617, 73 S. W. 1081, an action for an assault committed in removing the plaintiff, a licensee, from the platform at a railway station, the evidence showed that the city authorities of B. had, at the special request of appellant, commissioned T., the assailant, to act as a policeman at the station; that the entire salary was paid by the company; that he was subject to the orders of the company's local agent, P., from whom he received orders and to whom he reported, and that he had been ordered by P. to keep idlers and persons without tickets away from the depot. T. himself testified that he was not acting as policeman in what he did to plaintiff, as the latter had done nothing for which to be arrested. His commission as a peace officer empowered him to arrest for offenses committed in his presence, but the duty which more frequently arose was to obey the orders of P., issued in behalf of the company. Held, that the evidence was amply sufficient to warrant the conclusion that the assault upon the plaintiff had been committed by T. in the capacity of agent for the company, and not

in the discharge of his duties as a policeman. The court said that a different conclusion would have been indicated if the action had been brought for an arrest made for an offense committed in the presence of T.

In *McKain v. Baltimore & O. R. Co.* (1909) 65 W. Va. 233, 23 L.R.A. (N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634, the defendant was held not to be liable for an arrest made by a special policeman for an assault alleged to have been committed upon his wife while she was rightfully in a station, awaiting the arrival of a train. After citing some earlier cases, the court proceeded thus: "The import of these decisions is that such appointees, although paid for all their services by the persons at whose instances they are appointed, are not servants or such persons in respect to all the acts they perform by virtue of their offices; but only in respect to services rendered the company, such as defending or preserving its property. The line of distinction, sometimes hard to recognize under the circumstances of the particular case, marks the point at which the act ceases to be one of service to the employer, and becomes one of vindication of public right or justice, the apprehension or punishment of a wrongdoer, not for the injury done to the employer, but to the public at large. . . . Such officers frequently perform acts or services directly, immediately, and primarily beneficial to their employers, and at their instance and under their direction. Such special employment may include an express direction to arrest or prosecute all persons whom the officer may suspect of offenses against the property or rights of his employer. If there is no such express direction, it may be inferred from the nature of the duties imposed or the services to be rendered; and, if so, the authorization or instigation is established by way of implication. In such cases the relation of master and servant is made out, and then the question is whether the act done was within the scope or course of the servant's or agent's employment. . . . But the direction or instigation need not be in express terms. It suffices that the officer in the employment of a private person or corporation had implied authority or direction from the employer to do the act. In other words, if the act done was within the scope of

head all take for granted a doctrine which has been explicitly announced in some of them, *viz.*, that the person at whose request a

the duty imposed upon him in favor of the employer by his contract of service, the principle of *respondet superior* applies."

In *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, the duties of a special railway policeman were, according to the statement of a witness for the defendant, to investigate all claims and robberies, perform any work directed by the agency by which he was employed, keep order on trains, when there, and perform police duty on trains necessary for the protection of passengers. Witnesses for the plaintiff testified to his frequent, almost constant, presence on the trains of the defendant company, and his enforcement of railway rules relating to the conduct of passengers and his having made arrests on the trains for criminal conduct. Held, that the capacity in which the policeman was acting when he killed the plaintiff's decedent was a question for the jury. The court said: "His employment by the company was established, though it was indirectly procured through the detective agency. As such servant he customarily enforced or aided in the enforcement of the rules and regulations of the defendant. On the occasion of the killing he responded quickly and eagerly to the call of the train porter, when it was supposed his services would be needed for the purpose of enforcing payment of chair-car fare. The evidence leaves it uncertain and a question for the jury whether Layne, at the time he was killed, had committed any breach of the peace or done any unlawful act for which he could have been arrested. According to the testimony of the witnesses for the plaintiff, he had not behaved in a riotous or disorderly manner or done any other unlawful act. He had merely asked what was the matter, and demanded a receipt for the chair-car fare paid by his brother."

For a case in which exemplary damages were held to be recoverable for the arrest of a passenger by a special officer, see *Davis v. Chesapeake & O. R. Co.* (1906) 61 W. Va. 246, 9 L.R.A. (N.S.) 993, 56 S. E. 400.

(b) *Torts of special policemen elsewhere than on railways.*—In *Hershey v.*

O'Neill (1888) 36 Fed. 168, the defendant was held not to be liable to a person whom a special patrolman, appointed under the New York statute (see preceding section, note 1), as to special patrolmen, for duty in a store, had arrested upon information furnished by the defendant's clerk, without his knowledge or authority. The court, after giving a *résumé* of the provisions of the statute in question, proceeded thus: "Kenney, therefore, possessed all the common-law and statutory powers of constables, except for the service of civil process. It was made his duty by law at all times of day and night to prevent crime, detect and arrest offenders, protect the rights of persons and property, and, with or without warrant, to arrest all persons guilty of violating the law. He was, it is true, appointed for duty in the defendant's store, and was paid by the defendant. In all other respects, so far as this controversy is concerned, he was as much a member of the metropolitan force as any patrolman. It was the intent and purpose of the law to invest him with all the rights, powers, privileges, and immunities of a regular policeman. If this were not the object, if the status of the person so appointed remains unchanged, if the relations of master and servant still exist, it is not easy to see why the act was passed." 36 Fed. 171.

In *Tyson v. Joseph H. Bauland Co.* (1906) 186 N. Y. 397, 9 L.R.A. (N.S.) 267, 79 N. E. 3, where a special officer appointed under the same New York statute at the request of a storekeeper, and paid by him, arrested the plaintiff upon suspicion of her having stolen from a counter a satchel placed there by a customer, the action was held not to be maintainable. The court said: "Here, however, the act was done by the policeman, not in the protection of his master's property, not in the discharge of the master's duty to maintain peace and order on the premises, but solely on the personal complaint of Mrs. Gillin, whose property had been stolen. Neither the defendant nor any of its employees instigated the arrest, or seem to have taken any part in it, except that, when the altercation occurred between Mrs. Gillin and the plaintiff as

special constable is appointed cannot be charged with liability for all his misfeasances on the mere ground of his procuring the appointment and paying the compensation of the appointee.³

The circumstance that the given tort was not committed for the purpose of preserving the property of the defendant, or otherwise protecting his interests, is apparently so far significant that, if the tort is shown to have been one of this character, a verdict imputing liability to the defendant would usually be treated as unwarranted in every jurisdiction.⁴

to the theft, the floorwalker called the police officer to the scene. The appellant owed Mrs. Gillin no duty as to the matter. . . . It is urged by the learned counsel for the respondent that, however this may be, the appellant assumed to protect the persons and property of its customers, and has so admitted in its answer. But in what manner did it seek to protect its customers? Not by assuming to arrest by its servants or employees any offender, but by obtaining the constant presence on the premises of a policeman, a public officer both empowered and enjoined by law to arrest offenders, and for that purpose paying his salary. In his conduct in matters not relating to duties and obligations or property of the appellant, he is not to be considered as acting as its servant, but as an officer of the law. The learned trial judge seems to have been of this opinion, for, in response to a request by the appellant, he expressly charged that the acts of O'Reilly in connection with the arrest of the plaintiff were performed in his capacity as a police officer of the city of New York. But a further request to charge that for such act the appellant was not liable he refused, to which refusal the defendant duly excepted. This exception presents a question of law, which is before us for review. In our opinion the refusal of the learned trial judge to charge this request was manifest error. The appellant was liable only for acts committed by O'Reilly as its employee, not in his conduct as a police officer. If it be assumed that, under the evidence, the jury might have found that O'Reilly acted as the employee of the appellant, that would not cure the error of the court in refusing the appellant's request to charge. The jury, to say the least, might have found that O'Reilly, in mak-

ing the arrest of the plaintiff, acted as a police officer, and the appellant was entitled, in such event, to the specific charge that for his act as a police officer it was not liable."

In *Adler v. White City Constr. Co.* (1909) 147 Ill. App. 20, a special patrolman at the defendant's place of amusement had been directed by the head waiter to remove from the premises one of the assistant waiters, who had been discharged for misbehavior. The right of the waiter so expelled to recover in an action for assault was denied on the ground that the evidence showed that the illegal acts complained of were committed without the knowledge of any agent of the defendant, and that there was no testimony from which it could be inferred that the patrolman was employed in any other capacity than as a policeman, or that the defendant possessed or had exercised any control over him as a policeman or otherwise, or that such officer was charged with or had ever performed while in the service of the defendant duties other than those pertaining to the office of a policeman, or that in doing what he did he was enforcing any regulation or by-law of the defendant, or any order of any of its officers or agents.

³ *Pennsylvania R. Co. v. Kelly* (1910) 30 L.R.A.(N.S.) 481, 101 C. A. 359, 177 Fed. 189; *Hardy v. Chicago, M. & St. P. R. Co.* (1895) 58 Ill. App. 278; *Adler v. White City Constr. Co.* (1909) 147 Ill. App. 20.

⁴ The importance ascribed to this element is indicated by the argument of the court in *Tolchester Beach Improv. Co. v. Steinmeier*, cited in note 1, *supra*, and the comments upon that case in *Baltimore, C. & A. R. Co. v. Ennalls*, cited in the same note.

On the other hand, it seems clear that a plaintiff cannot recover merely because the tort was committed for that purpose. Having regard to the fact that the protection of property is one of the normal functions of a police officer, such a consideration cannot be treated as conclusive proof of the capacity in which he does an act which has such protection for its object.

In his official capacity, a special policeman has nothing to do with arrests under civil process. If he makes or participates in such an arrest, the party at whose instance he was appointed is not responsible for his act.⁵

2478. Same subject. American decisions further discussed.—An ordinary servant who has been invested in either of the two ways mentioned in § 2476, *ante*, with the powers of a police officer, ac-

⁵ *Taylor v. New York & L. B. R. Co.* (1910) 80 N. J. L. 282, 39 L.R.A.(N.S.) 122, 78 Atl. 169, L., a tort-feasor was employed to preserve order about the defendant's station, one of his duties being to see that the hackmen kept their proper places. The plaintiff had for ten years or more been engaged in driving hacks during the summer seasons at Asbury Park. Repeated suits were brought against him by the railroad company in the justices' courts, and one of these resulted in the judgment upon which the body execution in question was issued. L. appeared as a witness for the company in each of those cases, and it was he who made the necessary affidavit to show that the plaintiff was not a freeholder, in order that the justice might issue the execution. L. was not only present when the arrest was made, but, according to one view of the evidence, he might be deemed to have acted as a volunteer in the arrest, in the sense that he was not requested by the constable to lend assistance. It was also L. who produced the handcuffs, which, as the jury might believe, were not needed except for their intimidating effect. The court was of opinion that from this and other evidence the jury might well infer that a somewhat systematic campaign was being conducted by the railroad company in the effort to secure observance by the hackmen of the company's regulations respecting the mode in which they should ply their trade; that L. was especially charged by the company with the conduct of this campaign; and that

the arrest of the plaintiff was only one step in its prosecution. The conclusion arrived at was that, as there was "evidence justifying the inference that in what Lankinau did about the plaintiff's arrest he was acting within the scope of his authority as agent for the defendant company, and the evidence justifying the further inference that he participated in the act of the constable in taking the plaintiff to Long Branch, in excess of the warrant of the writ of execution, it was proper to submit to the jury the question of defendant's liability." The court said: "In our opinion, if railway policemen, appointed and commissioned under the act of 1904, are employed by the railroad company, or any other corporation or person, in matters aside from their duties under the statute, the principal may be held answerable for what they do, the same as in other cases of agency. Their commissions as railway policemen cannot be made a cloak to shield the company from responsibility for what may be done by such agents under the employment of the company aside from the strict and proper performance of their duties as officers under the act." The case of *Tucker v. Erie R. Co.* (1903) 69 N. J. L. 19, 54 Atl. 557, note 1, *supra*, was distinguished on the ground that the plaintiffs there were arrested upon a criminal charge, and that all that was done by the railway policemen in regard to the arrest and subsequent prosecution was done in the line of their duty under the governor's commission.

quires a dual capacity, and his master cannot be held liable for any of his torts except those which he commits in the character of a servant. As in the class of cases reviewed in § 2477, *ante*, the question whether a given tort is imputable to the master depends upon whether it was done in furtherance of the master's business or for the purpose of enforcing the criminal law. The legal quality of the tort is therefore a matter which is primarily for the jury.¹

1 (a) *Torts of servants of railway companies.*—The Alabama code 1896, § 3457, invests conductors of passenger trains with the powers of police officers, and authorizes them to eject passengers who are disorderly or use profane, vulgar, or obscene language, using only such force as may be necessary to accomplish the removal. In *Moore v. Nashville, C. & St. L. R. Co.* (1903) 137 Ala. 495, 34 So. 617, demurrers were held to have been properly sustained to pleas which alleged disorderly conduct on the part of a passenger as a justification for ejecting him from a railway car, but which did not state that the conductor used only such force as was necessary to accomplish his removal, and also to a plea which in substance averred merely that the conductor, at the time he was ejecting the passenger, was acting as a police officer of the state.

In *Baltimore, C. & A. R. Co. v. Twilley* (1907) 106 Md. 445, 67 Atl. 265, a passenger on an excursion train was arrested for disorderly conduct by a machinist in the regular employ of the railway company, who had, at its request, been appointed by the authorities of a town as a special officer for one day. He testified that he understood he was to act as a police officer, if he was needed, either for the town or for the defendant, and that on the day in question he was paid his usual wages. Held, that it was a question for the jury whether, in making the arrest, he had acted in the exercise of his powers as a special officer, or within the scope of his duty as an employee of the company.

The same doctrine was affirmed in *Philadelphia, B. & W. R. Co. v. Green* (1909) 110 Md. 32, 71 Atl. 986.

In *Krulevitz v. Eastern R. Co.* (1887) 143 Mass. 228, 231, 232, 9 N. E. 613, where a railway conductor, instead of arresting a passenger for refusing to pay his fare, as he might lawfully have

done in his capacity as a police officer under the statute, directed his arrest by officers at the end of the passenger's journey, it was held that the company would be liable if the arrest was, in point of fact, wrongful. The court, after stating the circumstances under which the arrest was made, proceeded thus: "This was not necessarily, and as matter of law, an arrest by the conductor in his capacity of railroad police officer. The jury were given to understand that they might take this view of the facts, which would regard the conductor's request as made in his capacity of officer, and the other officers as his servants. But it was also possible to find that the request to the officers was made by the conductor only in the capacity of conductor; in other words, that he simply made a complaint to them, just as he might have done if he had not been an officer himself. . . .

This was the view taken by the jury, and it follows that the arrest was not justified by the statute. The statute does not authorize an arrest by officers not present when the offense is committed, upon complaint by a conductor. Pub. Stat. chap. 103, § 18. It was not denied that the conductor caused the arrest to be made, or that he was acting within the scope of his employment so far as to make the defendant liable for his tort. The only question was in what capacity he acted. If the arrest was unlawful, it was an assault and a false imprisonment by the defendant."

In *Rand v. Butte Electric R. Co.* (1910) 40 Mont. 398, 107 Pac. 87, the grounds upon which the trial judge was held to have properly refused to direct a verdict for the defendant railway company in an action for an assault committed upon a passenger by employees who had been appointed as deputy sheriffs to keep order at a pleasure resort were thus stated: "The evidence shows beyond question that they [the tort-

feasers] were made deputies so that they would be able to enforce order by a show of legal authority while engaged in the discharge of their ordinary duties as employees of the company. It justifies the finding that at the time they put the plaintiff on the car, they were acting under the direct orders of Wharton. We understand the rule of law to be that a public officer cannot engage as such to guard the property of a private individual or corporation, and that the latter cannot claim freedom from liability for his wrongful acts while engaged as its trainman or in other like capacity, on the ground that he is a public officer. If the wrong was done by the officer as such, his employer is not liable even if he exceeds his authority; but if it is done during the course of his duty as employee, then the employer is liable even if it is done in excess of authority."

In *Texas & N. O. R. Co. v. Parsons* (1908) 102 Tex. 157, 132 Am. St. Rep. 857, 113 S. W. 914, affirming (1908) — Tex. Civ. App. —, 109 S. W. 240, a railroad company induced the sheriff of a county to station a deputy at its railroad yard upon its agreeing to pay him therefor. The company paid the compensation by monthly checks to the sheriff, who assigned them to the deputy. The deputy and the yard master testified that the latter had no control over him, and that he did not get any instructions as to his duties from any other agent or employee of the company. The services performed by the deputy were for the private benefit of the company. The sheriff did not give the deputy any instructions as to guarding the property, further than that he was to see that the law was not violated. A verdict finding the defendant liable for his act in shooting a man supposed by him to be one of a party of trespassers whom he was ejecting from the railway premises was sustained. The court argued thus: "The sheriff had no authority to appoint or to detail deputies to act as guards and watchmen over the property of the railroad. *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881. In that case the court said: 'An officer of the law cannot engage as such officer to guard the property of a private individual or corporation not in the custody of the law.' We do not mean to say that an

officer may not watch property to prevent threatened injury. It follows that whatever authority Futch had to guard and watch over the property of the railroad company, and to expel from its premises trespassers thereon, must have been derived from the company, and not from the sheriff. Futch testified that he had authority to expel persons who were trespassing upon the property of the company, and that he had exercised that authority during his stay there, and it appears from the testimony that he had been so engaged continuously for about two years' time. During the time that Futch was so engaged, the railroad company had paid his monthly wages without objection. It does not appear that there was any business to be transacted by Futch at that time and place, except that which pertained to the property of the railroad company, except that on a few occasions one of the deputies may have served a subpoena or some process from the court. From the continued performance of this service for the railroad company for two years, which he could not have done as deputy sheriff, and the payment for the services by the railroad company, the conclusion is natural that Futch was employed by the railroad company to serve it as a guard and watchman over its property, and that while so engaged he was acting as its agent and servant. Notwithstanding Futch was both deputy sheriff and watchman for the railroad company, it does not follow that the railroad company would be responsible for his acts done in his official character. It therefore becomes necessary to inquire in what capacity Futch was acting at the time the shot was fired. When Futch was called to remove the men from the car, he might lawfully have arrested them for violation of the statute against unlawfully riding in such cars (*Laws 1859, chap. 113, p. 178*). Futch testified that when he ordered the men to get out of the car, he told them that he did not intend to arrest them, and did not arrest them for any violation of the law, but that he intended to put them off the company's property, which he could not have done as deputy sheriff, but was authorized to do for the corporation. It therefore appears that at that time he was acting as the agent and servant of the railroad company. . . . The facts stated by Futch show

that at the time he fired the shot, he did it for the purpose of compelling the man at whom he fired to return to the parties that he had under control, and whom he was putting off the yards. Futch believed that the unknown man was one of the party that he had started to put off the yard, and, so believing, he had ordered him to rejoin the company in order that all might be put off the grounds; and upon his refusal to do so, he fired at him. Futch's evidence does not show that he had at any time abandoned the purpose he had when he started with the men from the car to take them down the track to the end of it and across the bridge. To do this he sought to keep them together. The fact that he was mistaken as to the unknown man's relation to the other does not affect his relation to the railroad company."

In *Missouri, K. & T. R. Co. v. Warner* (1898) 19 Tex. Civ. App. 463, 49 S. W. 254, where a station master who had, at the request of the railway company, been appointed a special policeman, a finding of the jury that, in arresting a man who was selling tickets on the station platform, he was acting within the scope of his authority, was held to be proper.

In *Texas & N. O. R. Co. v. Taylor* (1903) 31 Tex. Civ. App. 617, 73 S. W. 1081, where a railroad policeman who had been ordered to keep out of a certain station everybody who had no ticket used an unreasonable amount of force in ejecting a person who had gone to the station to assist in putting a passenger on a train, but did not attempt to arrest him, the evidence was held to justify a finding that he acted as agent of the company.

(b) *Liability for torts of other classes of servants.*—In *Wells v. Washington Market Co.* (1890) 8 Mackey, 385, it was held that an action against a market company for false arrest by a man in the company's employ could not be maintained where the employee had no authority from the company to make arrests, and made the arrest in his character as a special officer of the metropolitan police force, and not as agent of the company. The court very clearly expounded the *rationale* of the situation as follows: "I suppose there can be no doubt at all, if he had been an officer regularly employed by the district authorities, and had simply been

detailed for service at the market, the company would not have been in the slightest degree responsible for any abuse of his authority as such officer. The only thing that is apt to leave some confusion in our minds is this dual employment by him, in the character of agent of the company and agent of the public. There may be some difficulty in discriminating between the two, and between the acts he does in one character and in the other; but still there is no doubt he can perform some duties in one character that he cannot in the other. Under his authority as a mere agent to keep order and collect rents in the market, he certainly has no authority to make arrests for crime. He could only do that by virtue of his authority of a police officer, and acts he does of that description ought to be attributed to that character alone in which he could do them. . . . The commissioners had no means at their command to detail and pay an officer for special duty at the market, and it was reasonable enough that the market company, if they desired such services, should pay the salary of the party employed. They already had persons in their employ, and it was suggested to them by the commissioners that one of them could be commissioned; and I presume his compensation as agent in the discharge of his ordinary duties was all the compensation he received. Now, it is true that in such relation to the defendant, the officer perhaps had more inclination to show superserviceable zeal in behalf of the interests of the company. Nevertheless, his appointment under these circumstances did not change in the slightest degree his duties and his responsibility as an officer of the metropolitan police force; and we consider this arrest to have been made in virtue of that authority, and not as the agent of this company, and they ought not to be held responsible."

In *Dickson v. Waldron* (1893) 135 Ind. 521, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the plaintiff, when visiting the defendants' theater, was first assaulted and then arrested by the doorkeeper, upon whom the power of a special police officer had, at the defendants' request, been conferred by the authorities. The right of recovery under these circumstances was discussed as follows: "Whether, at the time of the injuries complained of,

Kiley was acting as a policeman or as agent of appellants, must depend upon the acts done by him. Because he was a police officer, it does not follow that all his acts were those of a policeman; and because he was an agent of appellants, it does not follow that all his acts were those of such agent. Even if he were a regular patrolman, called in off the street by appellants or their agents to aid in enforcing the regulations of the theater, he would, for such purpose, be only an agent of appellants; and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater he should discover appellee in the act of violating a criminal law of the state or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a public officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible. *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590. In this case, however, such questions do not arise. . . . Kiley's acts as a policeman were committed after he had assaulted and beaten appellee. It could not be seriously contended that Kiley could do no wrong as a janitor and doorkeeper, but that every wrong done by him should be charged to his official character. This would enable a proprietor to have all his employees commissioned as police officers, and thus escape all liabilities for their misconduct to his patrons. It is a question whether appellants should not be held liable for all the acts of Kiley, whether as special policeman acting only for his employers or as janitor or doorkeeper, all being within the scope of the business of his employment; but, as we have seen, such question is not before us. The verdict of the jury is in favor of the appellee on the charge of assault and battery, and the evidence, as well as the findings of the jury, show that all assault and battery committed upon appellee was committed before Kiley exercised any of his powers as police officer, and before he made the arrest of appellee. If appellee had attempted to resist arrest, or if he had attempted to get away after arrest, and he had received his injuries in consequence of such attempts; or if he had even committed any crime for which he

should be arrested,—there might be some reason in appellants' contention on this point. But, on the contrary, it is clear that appellee was innocent of any wrongdoing for which he should be arrested; he never even struck back at either of his assailants. He neither resisted arrest, nor tried to get away when arrested." "Here, the matter was about the master's business, and the servant of necessity must be the judge as to whether the conduct of appellee was such as to require his removal; and if a mistake was made, and an inoffensive patron of the theater was unjustly attacked and injured, the master must respond." A further point taken on behalf of the appellants was thus dealt with: "Counsel also argue that because Kiley was appointed special policeman by the Board of Metropolitan Police Commissioners, under the statute of the state, therefore this case is widely different from the cases cited in support of the opinion, in which police powers are conferred by law upon a particular class of persons in a particular line of employment, as, for instance, conductors on railway trains. Counsel say that such persons are not appointed by any public official, and that their choice and selection, their employment and discharge, are entirely within the power and control of the persons who are their superiors, and who are engaged in carrying on the business with which such appointees are connected. And counsel conclude that the reason for the difference between such appointees and special police officers is founded upon the principle that the person who selects another to act for him is bound to select one who will do no wrong. When police powers are conferred by law upon a particular class of persons in a particular line of employment, it is difficult to see why a different rule should apply from that which obtains when such powers are conferred by a public official who himself derives his authority also from the law. In the one case, the law confers the powers directly; in the other, the powers are conferred by an official authorized by the law itself to do so. In both cases the selection is made by the person for whom the officer is to act; as in this case, Kiley was selected by the appellants, and they expressly bound themselves that they would be responsible for his acts,—in other

Under some enactments the liability of the defendant for the torts of a servant upon whom he confers the powers of a public officer is a necessary inference from the terms in which they are expressed.²

A distinction has been taken between statutes of which the effect is to confer upon servants the ordinary powers of police constables, and statutes which merely declare servants to be "conservators of the peace," with power to arrest and deliver persons guilty of certain offenses to the custody of an officer. Enactments of the latter description are regarded as effecting merely an enlargement of the powers of the servants in their capacity of servants, and not as giving them the status of public officers.³

words, that he would do no wrong. Kiley, by this appointment, was not 'made appellants' agent without their consent,' but was appointed police officer for their house at their special instance and request, as the record shows. He received his pay from, and was employed solely by, appellants, and they might discharge him at any time."

In *Southwestern Portland Cement Co. v. Reitzer* (1911) — Tex. Civ. App. —, 135 S. W. 237, where a deputy sheriff employed as a watchman in a building had wrongfully arrested the plaintiff on a charge of stealing tools which belonged to persons working for his employer, the arrest was held, as a matter of law, to have been made by the deputy in his capacity as a servant of the defendant. This decision seems to be opposed to the general current of authority.

In *Tolchester Beach Improv. Co. v. Scharnagl* (1907) 105 Md. 199, 66 Atl. 916, the plaintiff, a passenger on a steamboat operated by the defendant company, was arrested by an employee commissioned by the governor of the state as a policeman, under the Maryland Code 1904, art. 23, § 403, for the protection of the appellant's property and for the preservation of peace and good order on its premises. In his capacity of employee, "he undertook the enforcement of all rules, orders, and regulations of the appellant among the passengers on the boat, and as special officer he enforced all orders, rules, and regulations that the company might promulgate and communicate to him, connected with the proper deportment of passengers." Held, that this state of facts was sufficient to have taken the case to the jury upon the question

as to whether he was acting at the time as an employee of the appellant, and within the scope of his employment.

² By § 902 of the Georgia Penal Code of 1895 (Penal Code 1910, § 925) it is declared: "Conductors of a train carrying passengers are invested with all the powers, duties, and responsibilities of police officers while on duty on their trains: Provided, nothing herein contained shall affect the liability of any railroad company for the acts of its employees." This provision was applied in *Seaboard Air-Line R. Co. v. O'Quin* (1905) 124 Ga. 359, 2 L.R.A. (N.S.) 472, 52 S. E. 427; *Mason v. Nashville, C. & St. L. R. Co.* (1911) 135 Ga. 741, 33 L.R.A. (N.S.) 280, 70 S. E. 225 (only point disputed was whether the defendant should be held not liable on the ground that the assault complained of was provoked by insulting words. See § 2454, a, ante).

³ In *King v. Illinois C. R. Co.* (1891) 69 Miss. 245, 10 So. 42, it was held that a railroad company was responsible for an illegal arrest made by a station agent in the exercise of the authority conferred upon station agents by the Mississippi act of February 22, 1890. The court said: "The act cited creates the power and the duty prescribed to be exercised and performed by depot or station agents as such and for their principals. Under the act they are neither more nor less than depot or station agents, with the additional power and duty prescribed by it to be exercised and performed for and in behalf of their employers. The language . . . [used] excludes the theory that they are made officers, for it provides that they shall 'arrest and deliver to the custody of the most convenient sheriff or

The mere fact that servants of a specified description are invested by a statute with authority to take certain steps with regard to the restraint of persons who are guilty of misconduct which, in the same statute, is declared to be a crime, does not render those servants public officers in such a sense that acts done by them in the assumed exercise of the authority so conferred upon them are not imputable to their employers.⁴

constable or other proper officers, etc., thus showing that the power devolved on them is to be exercised at their place of business and in their capacity as its supervisor. The act is a part of the scheme of railroad supervision by the state, and its effect in the matter now being considered is to make it the duty of railroad companies through their depot or station agents to preserve order in the waiting rooms in their respective stations. It is made a company or corporate duty to be performed by the designated representative of the company, and for the performance or non-performance of which the company is responsible. Neither the company nor the agent can avoid or shift the responsibility. It is fixed by law, and is not dependent on the action of the company or the view of its officers or agents." The court was of opinion that the authority conferred upon depot agents to arrest those guilty of "disorderly conduct" in waiting rooms did not justify the arrest of a passenger who was a stranger, and who, after failing to find the gentlemen's water-closet, outside the main depot building, had resorted, under the compulsion of necessity, to the water-closet designated for "ladies only," and opening into the ladies' division of the general waiting room. On a subsequent appeal of this case, it was laid down that a railroad company is liable for the act of its depot master in making a wrongful arrest in the discharge of his duty as depot master, although he may never have been instructed to arrest anyone, and may have been the agent also of another company.

⁴In *Wolfe v. Georgia R. & Electric Co.* (1907) 2 Ga. App. 499, 58 S. E. 899, a railroad company was held to be liable for wrongful acts committed by a conductor in carrying out the law which requires the separation of white and colored passengers (Penal Code, § 527; Laws 1890-91, No. 751, § 2), and which

invests conductors with police powers in regard to enforcement of its provisions, the court said: "In no case where a passenger is mistreated can the fact that the servant of the company was carrying out the provisions of the Penal Code be used as a defense, unless it appears that such servant was acting outside the scope of his authority. The conductor acts at the peril of his employer. The police power, the duty of executing the law requiring the separating of the races, is not placed upon the conductor as an individual, but upon a particular agent of the company, to enable the carrier to better perform its duty of protecting its passengers,—of protecting them not only from assault and physical injuries, but also from abuse and insult. The particular officer of the company who shall discharge this duty is selected and named only because the artificial body has no hands save those of its servants." A similar decision was rendered in *Georgia R. & Electric Co. v. Baker* (1907) 1 Ga. App. 832, 58 S. E. 88.

By Iowa Laws 1909, chap. 141, it is provided (§ 1) that persons who shall drink intoxicating liquors on railway cars, or use profane language thereon, shall be guilty of a misdemeanor; and (§ 2) that conductors may refuse to permit passengers to enter the cars when intoxicated, or may eject such persons at regular stopping places. In *Heggen v. Ft. Dodge, D. M. & S. R. Co.* (1911) 150 Iowa, 313, 130 N. W. 148, it was held that a conductor who used excessive violence in dealing with an intoxicated passenger while on a car was acting as the agent of the railway company. The court said: "The statute does not impose any duty upon a conductor, nor does it declare that, in exercising any authority which the statute purports to give him, he is a public officer. It purports to authorize acts by a conductor which may be somewhat broader in scope than those which he

2479. Responsibility as affected by the illegality of the appointment of the officer in question.—Some cases proceed upon the doctrine that all the torts, whatever may be their quality, of a person acting in good faith as a special policeman, but not legally invested with the powers and functions of such an officer, must be taken to have been committed by him as a mere servant of the party who applied for his appointment.¹

2480. —by the locality of the tort complained of.—The terms upon which a special policeman is appointed are usually such as to limit the exercise of his powers to a certain area. For wrongful arrest made by him at a place which was clearly outside that area, in respect of an offense previously committed, the party at whose request he was appointed cannot be held liable, even though the act was of such a description that, if the element of locality were ab-

would be justified in exercising as the agent or servant of a common carrier of passengers; but it does not purport to relieve the railroad company of any liability on account of his misconduct in attempting to exercise his authority. Of course, if the act of the conductor is one authorized by statute, although it is beyond the scope of the acts which a conductor would otherwise be authorized to commit, then the defendant is not liable; but if the act of the conductor is unauthorized by law,—that is, not authorized by the statute,—nor within the rightful scope of his powers and duties as a conductor of a passenger train, then the defendant must necessarily be liable for his conduct to the same extent as though no such statute had been passed. Now the authority of the conductor under the statute is to prevent a passenger entering the car who is in a state of intoxication, and to eject from the car at any station or regular stop a person found in a state of intoxication, or drinking intoxicating liquors as a beverage, or using profane and indecent language. It is not pretended that the violence used by the conductor of which plaintiff complains was in preventing him from entering the car, nor in ejecting him from such car at a station or regular stop. The difficulty between the plaintiff and the conductor related to the conduct and behavior of the passenger while in the car and being transported. With respect to this matter, the conductor acted solely as the servant and agent of the defendant."

¹In *Union Depot & R. Co. v. Smith* (1891) 16 Colo. 361, 27 Pac. 329, the ground upon which the defendant railroad company was held to be liable for the wrongful arrest and detention of a person by an agent in its employ was that he had been appointed as a special policeman by the mayor of a city, who, under its existing charter, had no power to make such an appointment.

In *Norfolk & W. R. Co. v. Galliher* (1893) 89 Va. 639, 16 S. E. 935, a railroad company was held liable for the unjustifiable arrest of a person applying at its ticket office for a ticket, by a watchman sworn in as a special policeman without authority of law.

In *St. Louis, I. M. & S. R. Co. v. Hackett* (1894) 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881, where a night watchman employed to guard the property of a railroad company shot the plaintiff, the contention that it was not liable because the tort-feasor was also a deputy sheriff was rejected on the ground that a deputy sheriff, as such, cannot lawfully undertake to guard property which is not in the custody of the law, and, consequently, whatever authority he possessed in respect of protecting the property of the railroad company in question must have been derived from it.

In *Cordner v. Boston & M. R. Co.* (1904) 72 N. H. 413, 57 Atl. 234, this aspect of the circumstances involved was overlooked by the court. See § 2480, note 1, *post*.

stracted, the aggrieved party would have been entitled to recover.¹ But the restricted area is not necessarily coextensive with the master's premises. Accordingly, where the given tort was committed at

¹In *Cordner v. Boston & M. R. Co.* (1904) 72 N. H. 413, 57 Atl. 234, the plaintiff, while he was traveling on an electric car not belonging to the defendant, was arrested on a charge of theft by a conductor for whose appointment under the New Hampshire enactment mentioned in § 2476, note 1, *ante*, an application had been made, but who had never been formally commissioned by the authorities. Discussing this state of facts, the court said: "Assuming that this constituted him an officer *de facto* [*Jewell v. Gilbert* [1885] 64 N. H. 13, 10 Am. St. Rep. 357, 5 Atl. 80], or if not, that the defendants are estopped to deny that he was such officer, and was appointed upon their petition, how does the fact affect the scope of his service for the defendants? Manifestly, it could not modify or enlarge the ordinary service of the employee beyond the inclusion within the service of a performance of the duties imposed by law upon railroad police officers; and it is doubtful if it would have effect even to that extent. *Healey v. Lothrop* (1898) 171 Mass. 263, 50 N. E. 540, 4 Am. Neg. Rep. 283; *Hardy v. Chicago, M. & St. P. R. Co.* (1895) 58 Ill. App. 278. . . . The object of the statute is the preservation of order upon and about the premises and upon the cars of railroad corporations. The duties prescribed and the powers conferred are confined to those places, and relate solely to offenses there committed. The object is to be attained by taking notice of offenses immediately upon their commission. The employees of the corporation are clothed with the powers of police officers, because they are likely to be present at the time police services are needed. The provision that the arrest may be made without warrant shows that the circumstances in view of the lawmakers were those which will justify such an arrest. In short, the statute confers authority upon railroad police officers to arrest offenders upon the premises and cars of their corporations, upon view of offenses there committed. Even if Hoyt must be regarded as a railroad police officer, so far as the defendants are concerned, his arrest of the plaintiff was an act that

was outside the duties of the office. The statute did not make it his duty, nor authorize him, to arrest without warrant a person for an offense which the person was suspected of having committed at an earlier time, though it was committed upon the defendants' premises and the suspected offender was at the time of the arrest a passenger upon one of their cars. Such cases are governed by the provisions of law relating to offenses generally, rather than by the provisions made for the special protection of the traveling public."

In *Tolchester Beach Improv. Co. v. Steinmeier* (1890) 72 Md. 313, 319, 8 L.R.A. 846, 20 Atl. 188, the facts of which are stated in § 2477, note 2, *ante*, one of the grounds upon which the liability of the defendant company was denied was that the order of its superintendent for the arrest of the plaintiff was given to and executed by the special policeman outside its premises.

In *Pennsylvania R. Co. v. Kelly* (1910) 30 L.R.A. (N.S.) 481, 101 C. C. A. 359, 177 Fed. 189, it was held that where a special policeman was employed by a railway company to guard its property and preserve order upon its premises, and intrusted with the duty of controlling the movement of vehicles and the regulation of traffic at a pier, the company was not liable for an assault committed by him on a teamster who was driving toward the pier, but was still on the public highway when he was assaulted. With all deference, the present writer ventures to express the opinion that the conclusive significance here ascribed to the element of locality was unwarrantable, in view of the fact that the aggrieved party was about to enter the company's premises, and had apparently reached a point at which the policeman might well have deemed himself warranted in exercising his function of controlling the traffic.

In *Thomas v. Canadian Pac. R. Co.* (1906) 14 Ont. L. Rep. 55, 8 Ann. Cas. 324, where a watchman who was also a special constable arrested a supposed thief about half a mile from the railway line, the railway company was held not to be liable. See § 2472, note 13, and § 2475, note 6, *ante*.

such a short distance from the boundary line of those premises that it may be a matter of reasonable doubt whether the tort-feasor was entitled to exercise his functions at that particular place, the master's responsibility is a question of fact for the jury.²

²In *Kastner v. Long Island R. Co.* (1902) 76 App. Div. 323, 78 N. Y. Supp. 469, 12 N. Y. Anno. Cas. 77, the special officer of a railroad company testified: "My duties there were to watch these people stealing coal, and if I caught any of them, to lock them up. I had such instructions from the company." Held, that this evidence did not show, as a matter of law, that his authority to arrest was limited to the premises of the company. The court said: "It can hardly have been intended by those who gave the instructions that, if he saw persons stealing the company's coal, he was to refrain from arresting them simply because they had succeeded in getting off the land of the company before he was able to apprehend them. In any event, this branch of the case appears clearly to fall within the settled doctrine that a master may be held responsible for the acts of his servant within the general scope of his employment while engaged in the master's business, even though the servant may have disregarded some particular direction of the master in respect to the manner in which he shall discharge his duties."

In *Sharp v. Erie R. Co.* (1906) 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Rep. 448, reversing (1904) 90 App. Div. 502, 85 N. Y. Supp. 553, a person who held the offices of deputy sheriff, constable, and policeman was appointed by a railway company to protect its interests on the right of way. His duties, according to the undisputed evidence, were "to keep tramps from trains, and look after robberies that might occur at stations and on freight cars in the yards and on the tracks and in the station, and look after persons in an intoxicated condition on the company's property, and generally to look after crimes committed against the railroad company on the right of way. It was part of his duty to drive off and keep off trespassers from the company's property. His duty was not limited to keeping trespassers off the trains, where it was to the company's interest to keep them out of the

yard. That was largely committed to his discretion." In trying to arrest a boy who had been stealing a ride on a freight train, this officer pursued him outside the right of way, and then fired at him a shot which was intended merely to make him stop, but killed him. The supreme court, in sustaining a nonsuit granted by the trial judge, reasoned thus: "Wheeler's act in making this arrest was not the act of defendant's servant. Wheeler's duty to make the arrest was entirely independent of his duty to defendant. Moreover, defendant had no authority to forbid it or to restrain it. It would be a legal anomaly to hold one responsible for the act of another which he was without authority to forbid and without power to prevent. This want of power to prevent would seem conclusively to negative any inference that the act was done by authority of the defendant. The employment of a public peace officer by a private person assumes on the one hand the existence of certain powers and duties as a public officer, and correlatively is conditioned upon the existence of public duties to be exercised even against the will of the employer." The nonsuit was set aside by the court of appeals on grounds thus explained: "It is argued that the moment Wheeler passed beyond the boundaries of the defendant's premises onto the adjoining lot, where the deceased was killed, he was no longer acting as the defendant's servant, but was pursuing and seeking to arrest the boy who had committed, or was engaged in the commission of, a crime. It will be noted that the pursuit commenced when the deceased jumped from the car and was continuous until the shooting occurred. So, the question is whether, at the time that Wheeler fired the fatal shot, he was acting as the defendant's servant or as a public officer, and, further, whether that question was one of law for the court or of fact for the jury. . . . Did Wheeler, at the moment that he fired the fatal shot, put off his character as a servant of the defendant, and put on another and different character,

On the other hand, where the evidence shows that the plaintiff was arrested by a special officer on the defendant's premises in pursuance of a request made by a public officer, with reference to a matter that had occurred outside those premises, the employer is responsible or not responsible for the arrest according as the plaintiff's entry upon his premises was simply for the purpose of escaping arrest or pursuit, or for the purpose of transacting business with him.³

It has been laid down that the defendant has the onus of proving that an arrest made by a constable on his premises, or for the purpose of protecting his property, was not made by the constable as

namely, the powers and duties of a public officer? Does the fact that he crossed the boundary line of the defendant's premises in pursuit of the boy make the question one of law? If it be a question of law, the principle would be the same whether he had passed the boundary line by the distance of 2 feet instead of 50. It is obvious that there is no rule or principle of law to determine such a question, and hence it belonged to the jury. . . . A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property. And hence, in such a case, the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct; but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct."

³ In *Philadelphia, B. & W. R. Co. v. Crawford* (1910) 112 Md. 508, 77 Atl. 278, while plaintiff and a companion were on the premises of the defendant railway company, and were intending to take passage on a train, they met a policeman. After some words had passed between the policeman and plaintiff's

companion, the policeman took his companion into custody, and B., defendant's night officer, came up at the same time and arrested plaintiff. In an action for such arrest, defendant requested an instruction that if the jury find that at the time B. approached the place where the policeman was engaged in an altercation with the plaintiff and his companion, they were on a city street, and that plaintiff's companion was taken into custody while on said street, and that plaintiff undertook to escape arrest, or to go for assistance, or for any other purpose, and was taken into custody by B. at the request of the policeman, after plaintiff had gone outside the grounds controlled by defendant, the defendant would not be responsible for the act of B., although he was an employee of defendant. The court refused the request, and instructed that if the jury found that, at the time B. first undertook to arrest plaintiff, he was in the public highway, and that the actual arrest was made by him on defendant's premises, in the course of the pursuit of plaintiff begun by B. on the public highway, and not in the course of the performance of his duty as an employee of defendant, the verdict should be for defendant. Held that the substituted instruction was correct, and that the requested instruction was defective in not requiring the jury to find that plaintiff had entered defendant's property for the purpose of escaping arrest, or that he had been arrested in a pursuit begun outside of the property, and also in not requiring the jury to find that the person who arrested plaintiff's companion was a public officer.

his agent, but that, if the arrest in question was made outside his premises, and for a cause in which he has no direct interest, the person aggrieved by the arrest must show that it was made by his authority, express or implied, and was within the scope of the constable's employment.⁴ With respect to the latter part of this rule, thus formulated, there cannot well be any controversy; but it is doubtful whether the former part would be accepted as correct in any jurisdiction in which the broad doctrine has been adopted that every arrest made by a special constable is presumed *prima facie* to have been effected by him in his capacity of a public officer.⁵ For some general remarks concerning the evidential significance of the element of locality, see § 2284, *ante*.

2481. —by special provisions respecting the liability of persons applying for the appointment of constable.—By some of the statutes which relate to the appointment of police officers upon the application of the persons enumerated, it is provided that the applicant shall give bond "to be liable to parties aggrieved by any official misconduct of a police officer to the same extent as for the torts of agents or servants in their employment," and that "proceedings may be had upon such bonds in the same manner as upon the bonds of constable."¹ It has been held that such an enactment does not operate so as to render the applicant liable to an action for damages resulting from a tort committed by the appointee in his capacity as a public officer, without direction or knowledge on the part of the applicant.² On the other hand, such an action is maintainable under a statute which provides in direct terms that the applicant shall be

⁴ *Philadelphia, B. & W. R. Co. v. Stumpo* (1910) 112 Md. 571, 77 Atl. 266.

⁵ So laid down in *Foster v. Grand Rapids R. Co.* (1905) 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479, citing *Jardine v. Cornell* (1888) 50 N. J. L. 485, 14 Atl. 590, which was, however, a case of casual, not regular, employment. See § 2474, note 1, *ante*, *Brill v. Eddy* (1893) 115 Mo. 605, 22 S. W. 488, 8 Am. Neg. Cas. 471; *McKain v. Baltimore & O. R. Co.* (1909) 65 W. Va. 233, 23 L.R.A.(N.S.) 289, 131 Am. St. Rep. 964, 64 S. E. 18, 17 Ann. Cas. 634; *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103.

¹ Mass. Stat. 1878, chap. 244, § 6.

² *Healey v. Lothrop* (1898) 171 Mass. 263, 50 N. E. 540, 4 Am. Neg. Rep. 283,

was an action of tort against the keeper of a place of amusement in Boston, seeking to make him liable for an assault and battery alleged to have been committed by M., a special police officer, while on his premises. At the trial, the defendant asked the judge to direct a verdict for him, but the judge refused, and instructed the jury that the defendant, under the statute and the arrangement which he had made, became liable for the official misconduct of M. in his employment, just as for the tort of any servant. Discussing the instruction thus given, Holmes, J., said: "The only question is whether Mead was the defendant's servant. That was the ground of liability alleged in the declaration and laid down in the charge. So much of the argument for the plaintiff as turns on the supposed duty of

"liable for the official misconduct of the officer, as for the torts of any servant or agent."³

2482. —by the fact that the relation between the defendant and the person injured was that of carrier and passenger.—In some of the jurisdictions where a carrier is deemed to be under an absolute obligation to protect passengers against injuries from the wilful torts of its servants (see chap. CIII., *ante*), it has been held that its liability in respect of the misconduct of a servant in respect of a passenger is not affected by the mere circumstance that the servant was a special officer appointed at his request to maintain order on its premises.¹

the defendant to take reasonable care to protect the plaintiff from abuse by strangers has no bearing upon the case.

. . . If the statute had meant to make the officer the servant of the person who applies for his appointment and gives bond for his conduct, presumably it would have said so. But if it had said so, it would have insisted upon a fiction being treated as a fact. It is true that the defendant asked to have an officer appointed, perhaps asked to have Mead appointed, and that he paid him. But he did not appoint him, could not remove him, and could not control his official conduct, which was governed by the regulations of the police commissioners and his own sense of duty as a public officer. The statute does not call the relation that of master and servant, and goes no further than to make the defendant liable upon his bond 'to the same extent' as for a servant. The words quoted imply that the officer is not one. They mean to the same extent as in another case which does not exist. In *Dickson v. Waldron* (1893) 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1, the jury found that the wrong done was not done by the servant in the capacity of a policeman, whereas the contrary appeared in this case. The form of the defendant's undertaking, and presumably the statute also, were different from those in the present case."

³ *Horgan v. Boston Elev. R. Co.* (1911) 208 Mass. 287, 94 N. E. 386, decided with reference to Mass. Stat. 1898, chap. 282 (Rev. Stat. chap. 108, § 20), which provides for the appointment of special police officers in Boston.

The earlier case was not referred to by court or counsel.

¹ In *Brewster v. Interborough Rapid Transit Co.* (1910) 68 Misc. 348, 123 N. Y. Supp. 992, the court said: "If, by virtue of his designation as a special officer, Kellerman became a public official, his duty to the public was thereby increased; but the defendant was not relieved from the same responsibility for his acts that it would be under for the acts of any other of its employees. It would, indeed, be an anomaly if the fact that the public power had been used to designate the employee of the defendant a public officer should relieve the defendant of responsibility for the acts which its employee performs in attempting to discharge his duties to it."

In *Denver Tramway Co. v. Reed* (1894) 4 Colo. App. 500, 36 Pac. 557, 8 Am. Neg. Cas. 95, it was held that the defendant, a railway company, could not escape liability for the acts of a conductor in wrongfully ejecting a passenger, on the ground that such conductor was a conservator of the peace in respect of the act of ejecting him. The court said: "A very elaborate argument has been made on the hypothesis that the position which the conductor of a railway car holds to the traveling public is a dual one,—that he is, in one view, simply an employee of the company, and in another, a conservator of the peace. An analogy is sought to be drawn between his right to preserve the peace and the right of a police officer to make an arrest. We are unable to recognize the force of the argument, and we are not ready to concede that the railway company can

escape a liability for the acts of its servants because of any duty which that employee may owe to the public, and because he is empowered, in the discharge of that duty and in the protection of his passengers, to preserve the peace. It is too well settled to admit of argument that it is the duty of a railway company operating a railroad or a system of surface lines within the limits of a city, to safely carry its passengers, and it must respond for the unlawful and tortious acts of its servants."

In *Philadelphia, B. & W. R. Co. v. Crawford* (1910) 112 Md. 508, 77 Atl. 278, there was evidence tending to prove that plaintiff while on defendant's station ground for the purpose of taking passage on a train was arrested by defendant's night officer. Held, that the jury had been correctly instructed that, if plaintiff was on one of the approaches to defendant's station with the intention of taking passage on one of defendant's trains, he was then a passenger, and defendant was bound to exercise all reasonable care to protect him from insult, injury, and abuse, and if plaintiff, while behaving in an order-

ly manner, was, without reasonable cause, imprisoned by defendant's officer, acting within the scope of his employment, the verdict should be for plaintiff.

In *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243, it was held that the West Virginia statute of the same tenor did not operate so as to relieve the carrier from liability for false imprisonment of a passenger made or caused to be made by it. See also *Layne v. Chesapeake & O. R. Co.* (1909) 66 W. Va. 607, 67 S. E. 1103, § 2477, note 2 (a), *ante*; and *Baltimore & O. R. Co. v. Reed* (1909) 31 Ohio C. C. 521. In the cases cited, the torts complained of had relation to the maintenance of good order on the defendant's premises. The question may hereafter arise, whether the carrier's obligation is sufficiently extensive to require him to answer for an arrest made by a special officer on the ground of theft or some other offense, which has no direct relation to the conduct of the carrier's business.

CHAPTER CVI.

CIVIL LIABILITY OF A MASTER IN RESPECT OF THE CRIMINAL ACTS OF HIS SERVANTS.

- 2483. Generally.
- 2483a. Crimes involving violence to the person.
- 2484. Larceny, generally.
- 2485. Larceny committed by servants of carriers. Common-law liability of common carriers of goods.
- 2486. Same subject. Statutory liability of common carriers of goods.
 - a. English carriers act 1830.
 - b. English railway and canal traffic act 1857.
 - c. Statutes affecting shipowners.
- 2487. Same subject. Liability of carriers of passengers.
- 2488. Larceny by servants of innkeepers.
 - a. Common-law doctrine.
 - b. Doctrine in civil-law jurisdictions.
- 2489. —by servants of other descriptions of bailees.
- 2490. —by servants of masters who expressly contract to protect property against theft.
- 2491. —by servants of trustees, executors, etc.
- 2492. —by other classes of servants.
- 2493. Forgery.
- 2493a. Arson.
- 2494. Subornation of evidence.
- 2494a. Maritime offenses.
- 2495. Violation of penal statutes. Generally.
- 2496. Same subject. English and colonial decisions.
- 2497. Same subject. American decisions.

2483. Generally.—The mere circumstance that the tortious act of a servant amounts to a crime does not preclude a person to whom injury is occasioned by its commission from maintaining an action against his master.¹ On the other hand, it is clear that the master

¹“There are many acts of a servant for which, though criminal, the master is civilly responsible by action.” Jervis, Ch. J., in *Dunkley v. Farris* (1857) 11 C. B. 457. In *Dyer v. Munday* [1895] 1 Q. B. 742, it was unsuccessfully contended that the ordinary rule under which all acts done by a servant in the conduct of his employment, and in furtherance

cannot be held liable for the criminal act of a servant on the mere ground of the contractual relationship between them.² The prerequi-

of such employment, and for the benefit of his master, are chargeable to the master, although the authority that he gave was exceeded, did not hold in respect of criminal acts. Lord Esher, M. R., said: "I do not at all say that the criminal act may not be of such a character as to induce the jury to say that it could not have been done in furtherance of the master's business, or at all in the interest of the master. It may well be that the question whether the offense is a criminal one may be a material fact for the jury to consider from that point of view, but the mere fact that it is a criminal offense is not sufficient to take the case out of the general rule." Rigby, L. J., said: "I can find no authority for distinguishing in the application of this rule between tortious and criminal acts of the servant." The servant had been convicted for the assault and paid the fine, and it was urged that this operated so as to release the defendant under 24 & 25 Vict. chap. 100, providing that one convicted of assault and battery shall be released from all further or other proceedings upon payment of the whole amount adjudged to be paid, or suffering the imprisonment. This contention, however, did not prevail. Lopes, L. J., remarked that the words used in the statute "plainly indicate that it was intended that the relief afforded should apply only to the person charged. The civil remedy which existed up to that time is affected, but only so far as the person charged is concerned, and remedies against other persons are not touched."

In *The Druid* (1842) 1 W. Rob. 392, Dr. Lushington, arguing against a doctrine of which he disapproved, but which he felt constrained by the authorities to apply (see § 2378, note 8, *ante*), remarks: "It may be said that, in committing an act of wilful and malicious violence, the agent renders himself criminally responsible; but this reason, I apprehend, does not supply any solid distinction, for it may occur that the master of a ship may be criminally responsible, and yet the owners be liable for the damages, as in the case of a steamer going through a crowded roadstead in a dark night, at full speed,

and thereby occasioning a collision and destruction of both ship and crew. In such a case I conceive the master would be indictable for manslaughter and yet the owners would be responsible for the damage."

"Every species of *crimen falsi* not accompanied with force-theft, forgery and perjury, are only frauds of a deeper dye. To exonerate the principal because the fraud of his agent amounted to a felony would violate the reason of the rule *respondet superior*, deprive innocent third persons of all indemnity, expose them to the risks of fraudulent devices, most dangerous, because most difficult to detect, and leave them without any protection, other than the fear of prosecution and punishment." *Tome v. Parkersburg Branch R. Co.* (1873) 39 Md. 36, 84, 85, 17 Am. Rep. 540.

"The civil liability of the master is not affected by the fact that the servant has rendered himself criminally liable." *Southern R. Co. v. James* (1903) 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303.

The common-law doctrine that a person injured by a felony could not sue for damages until he had first instituted a criminal prosecution against the wrongdoer does not apply where a civil remedy is sought against one standing in the relation of master to the wrongdoer. *Tome v. Parkersburg Branch R. Co. supra*; *Leeman v. Public Service R. Co.* (1909) 77 N. J. L. 420, 72 Atl. 8.

See also the cases cited *passim* in the following sections.

In *Phelon v. Stiees* (1876) 43 Conn. 426, the court seems to have argued in a sense contrary to the statement in the text. If such was really the position taken, it was clearly untenable.

The statement in *Ralston v. State Rights* (1836) Crabbe, 22, Fed. Cas. No. 11,540, that the commission of a crime by the captain "cannot be imputed to his owners, or be intended to come within the employment or authority committed to him," is clearly not good law at the present day.

² In *Bradford v. Hanover F. Ins. Co.* (1900) 49 L.R.A. 530, 43 C. C. A. 310, 102 Fed. 48, it was laid down that the mere fact of the insurance agent's having employed and retained a clerk would not stop the agent from repudi-

sites to enforcing against him a claim for damages are the same as in cases where a noncriminal misfeasance is involved: that is to say, the evidence must be such as to warrant a jury in inferring either (1) that the crime in question was authorized by the master prior to its commission, or was ratified after its commission; or (2) that it was committed within the scope of the servant's employment;³ or (3) that it constituted a violation of some absolute duty to which the master was subject in respect of the party prejudiced by the theft; or (4) that the negligence of the master himself was a proximate cause of the commission of the crime.

2483a. Crimes involving violence to the person.—The civil liability of a master in respect of crimes of this description was taken for granted in all the numerous cases cited in §§ 2347 *et seq.*, *ante*.

2484. Larceny, generally.—In a large proportion of the cases in which the cause of action specifically alleged was the fraud of an employee, and the liability of the employer was determined with reference to that circumstance, one of the incidents of the misconduct of the tort-feasor was the commission of a larceny.¹ The cases of this type are reviewed in §§ 2391 *et seq.*, *ante*, where the liability of an employer for the frauds of an employee is discussed in its various phases. In the present chapter it is proposed to consider the extent of the employer's responsibility in respect of losses resulting from larcenies not accompanied by deceit.

The decision in two cases in which the larceny in question was committed by the servant of a bailee proceeded upon the ground that the

ating his act in forging the agent's name to a policy, where there was no ground for suspecting that he would abuse any confidence reposed in him, and he had not been invested with any authority, actual or ostensible, to sign the agent's name.

³ The general rule is, that "to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innholders, common carriers, and perhaps shipmasters or seamen, when goods are embezzled, are exceptions to the general rule, founded on public policy." *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168.

In *Harbison v. Iliff* (1901) 8 Ohio N.

P. 392, 10 Ohio S. & C. P. Dec. 58, the complaint alleged that the master authorized and directed a forcible entry upon premises occupied by his tenant, but the damage complained of was stated to have resulted, not from such entry, but from "wrongful mutilating, destroying, taking, and carrying away," by the servant, of certain chattels; and there was no averment as to authorization, direction, or ratification by the master, or as to facts warranting the inference that the mutilation, destroying, or taking of the goods was in any way a part of, or connected with, the servant's employment. A demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained.

¹ See, for example, *Swire v. Francis* (1877) L. R. 3 App. Cas. (P. C.) 106, 47 L. J. P. C. N. S. 18, 37 L. T. N. S. 554.

defendant could not be held liable, because the evidence showed that the property stolen, although it had been transferred to the custody of the employee, had not been transferred so as to be constructively in the possession of his employer. In one of them the servant had no authority to receive the property;² in the other it was delivered to him at a time when he was not acting in the course of his duties.³ Presumably a similar doctrine is applicable in cases where the employer is not a bailee.

² In *Russo-Chinese Bank v. Li Yau Sam* [1910] A. C. 174, 175, an action by the respondent to recover from the appellant bank moneys paid to their comprador or Chinese agent at their Hong Kong branch, for the purpose of a telegraphic transfer to the plaintiff's nominee at Shanghai, it appeared that the comprador, to the knowledge of the plaintiff, had no authority, without the express approval of the bank manager, to receive the money or to fix the rate of exchange or other terms on which the transfer was to be effected. Held, that the bank was not liable for the comprador's misappropriation of the said moneys. In delivering the judgment of the Privy Council, Atkinson, J., said: "There is no dispute in the case as to facts, and little, if any, controversy as to the law. It is undoubted that a person who deals with an agent, whose authority he knows to be limited, as the plaintiff knew in this case, does so at his peril, in this sense: that should the agent be found to have exceeded his authority, his principal cannot be made responsible. While the several authorities cited by Scrutton, *Charter Parties, from Grant v. Norway* (1851) 10 C. B. 665, 20 L. J. C. P. N. S. 93, 15 Jur. 296, 24 Eng. Rul. Cas. 258, down to *Ruben v. Great Fingall Consolidated* [1906] A. C. 439, 75 L. J. Ch. N. S. 843, 95 L. T. N. S. 214, 22 Times, L. R. 712, 13 Manson, 248, establish, in their Lordships' opinions, the proposition that, in order that the principle of 'holding out' should in any given case of agency apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been

thereby misled. In other words, if the agent be held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class; because the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorized. In their Lordships' view, there is no evidence that the fraudulent comprador had, or was believed to have, or was held out as having, any authority beyond the strictly limited one already mentioned. He was authorized to arrange the details of the negotiations for the 'telegraphic transfers' of money to be submitted to the manager for approval, but he had no authority to receive money for the purpose of such transfers until those details had been so submitted and approved of; that is, until a binding contract had been entered into by the manager on behalf of the bank, to transmit the money on the terms approved of when received. The bank had not, by any negligent or improper act on their part, allowed the comprador to be apparently invested with an authority beyond or greater than the limited authority which the plaintiff knew him to possess. Everything which he was by them permitted to do, from the beginning to the end of the business, was as consistent with the exercise of this limited authority as it was with the exercise of a wider or more general authority. There cannot, therefore, be any estoppel as against the bank in respect of any of the steps in the transaction, since they have not done or permitted anything by which the plaintiff was deceived."

³ *Manhattan Co. v. Lydig* (1809) 4 Johns. 377, 4 Am. Dec. 280, where a

2485. Larceny committed by servants of carriers. Common-law liability of common carriers of goods.—From the doctrine that a common carrier of goods is an insurer except in respect of losses attributable to the act of God or the public enemy, it necessarily follows that, except in so far as his responsibility may be qualified by statutes (see next section), or by a special stipulation,¹ he is absolutely responsible for any goods that may be stolen by his servants, whatever may be the nature of the functions which they were engaged to discharge.²

bank was held not to be liable for its bookkeeper's theft of money which a customer of the bank had delivered to him away from the bank and out of banking hours, for the purpose of having it deposited. For further information regarding this case, see § 2391, note 8, *ante*.

¹ See the quotation in the following note from the judgment of Wright, J., in *Shaw v. Great Western R. Co.*

In *King v. Shepherd* (1844) 3 Story, 349, 20 Fed. Cas. 337, it was held that the usual exception in respect of "perils of the sea" does not cover losses caused by embezzlement committed by the crew.

In *Adams Exp. Co. v. Berry & W. Co.* (1910) 35 App. D. C. 208, 31 L.R.A. (N.S.) 309, it was held that a clause in a shipping receipt by which the liability of the carrier in respect of certain goods was limited to a specified amount, which was less than their value, was applicable only to a case in which the goods should be lost through negligence; and consequently that their full value might be recovered where they had been embezzled by an employee of the carrier.

In *Joy v. Allen* (1846) 2 Woodb. & M. 303, Fed. Cas. No. 7,552, cited in *Taylor v. Brigham* (1876) in 3 Woods, 379, Fed. Cas. No. 13,781, the position was taken that the owners of a vessel in a whaling voyage, where they and the crew are shareholders in certain agreed proportions in the cargo, are not, like common carriers for others, liable for robbery, because the property is, to a large extent, their own, and there is no danger of collusion with highwaymen and pirates. Like trustees, or copartners, or directors in a company, when they are joint stockholders or depositaries or private carriers, such owners are merely bound to exercise ordinary care in selecting agents and carrying the cargo. It was accordingly held that the members of the crew were not liable to a reduction

of shares in the proceeds on account of the embezzlement or barratry of the master of the vessel. The court referred to *Sullivan v. Ingraham* (1802) Bee, 182, Fed. Cas. No. 13,595, in which it was held that the members of a crew who were absent when a portion of a cargo was embezzled were not liable to a deduction from their wages; and *Frederick v. The Fanny* (1808) Bee, 262, Fed. Cas. No. 5,077, in which all the members of a crew were required to contribute *pro rata* to make up a loss resulting from an embezzlement committed by one of them, the evidence being that they must have been privy to the misconduct of the actual criminal.

In *King v. Lenox* (1821) 19 Johns. 235, it was held that, where a ship is not put up to freight, but employed by the owner, on his own account, and the master receives goods of another person on board as part of his privilege, taking to himself the freight and commissions, the owner of the ship is not liable in case of embezzlement, or for the conduct of the master in relation to such goods.

On the other hand, in *Ward v. Green* (1826) 6 Cow. 173, 16 Am. Dec. 437, it was held that the owners of a general ship were liable for money which the master had received for transportation, without their knowledge, and without putting it on the freight list.

² In *Boucher v. Lawson* (1734) Cas. t. Hardw. 85, Lord Hardwicke, Ch. J., declared that it "must be taken for law not now to be shaken, that where there is a trading ship concerned in a voyage, it must be considered in the nature of a common carrier, and the owners are liable for the negligence or fraud of the masters. These cases depend upon two grounds: 1st, that the owners appoint the masters; and, 2dly, that the freight comes to the owners." The decision in favor of the defendants was based upon the ground that the ship in question was a general one. One of the points.

decided was that "if a common carrier should allow his driver the carriage of some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages." (per Page, J.)

In the above case reference was made to *Brandon v. Peacock*, where the master of a ship ran away with the ship, the cargo of which had been insured. The consignor of the cargo received the value of it from the insurer. Held, that the insurer might maintain an action against the owner of the ship.

In *Shaw v. Great Western R. Co.* [1894] 1 Q. B. 373, Wright, J., said: "It is clear law that a common carrier by land is, in the absence of exemption by statute, contract, or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies, and 'inherent vice' alone excepted; and he is, therefore, in absence of such exemptions, liable at common law for loss by theft, whether by strangers or by his own servants. A dictum apparently to the contrary effect, attributed to Willes, J., in *Metcalfe v. London, B. & S. C. R. Co.* (1858) 4 C. B. N. S. 307, at pp. 309, 310, was afterwards disclaimed by him in a note to *Coggs v. Bernard*, 1 Smith Lead. Cas. 9th ed. p. 368." The dictum thus referred to is found in a passage in which Willes, J., during the argument of counsel in the case mentioned, thus explained the actual effect of *Butt v. Great Western R. Co.* (1851) 11 C. B. 140: "That case has been very much misunderstood. It was not, as is assumed in some of the text-books, a case under the statute [*i. e.*, carrier's act; see next subsec.] at all. It was twice argued. On the first occasion, the replication being like this, I demurred on the ground that carriers are not answerable at common law for the felonious acts of their servants. The plaintiffs then amended by new assigning, alleging that the article was feloniously stolen by certain servants of the defendants whose names were unknown to the plaintiffs,—whereby the same was not safely and securely carried, but became and was wholly lost to the plaintiffs, as in the declaration mentioned.' The defendants again demurred, and, upon the argument, the

court suggested (and the plaintiffs adopted) a further amendment by replying a loss by felony, and that such felony arose through the gross negligence of the defendants. It was there assumed on all hands that felony did not excuse gross negligence."

The following remarks were made by Crowder, J., in the *Metcalfe Case*, *supra*: "*Butt v. Great Western R. Co.* is explained in a subsequent case of *Great Northern R. Co. v. Rimell* (1856) 18 C. B. 575. Jervis, Ch. J., there said: 'I think the judge has altogether misconceived the decision of this court in the case of *Butt v. Great Western R. Co.* because, when the defendants set up a defense under the statute, negligence has nothing to do with the question. The rule is this,—under the statute, felony by a servant is a sufficient answer to the defense set up by the carrier, and negligence has nothing to do with it; and on the other hand, under the carriers' notice, negligence is the sole question; felony is immaterial. Under the statute, felony is an answer; under the notice, negligence. That is the effect of *Butt v. Great Western R. Co.* which was a case of felony permitted or occasioned by the negligence of the defendants.'"

During the argument of counsel in the *Butt Case*, *supra*, Maule, J., observed that "*Finucane v. Small* (1795) 1 Esp. 315, is an authority that the carrier is not liable for felony, unless he has been guilty of gross negligence." Jervis, Ch. J., also stated that "if *Finucane v. Small* is good law, a replication of felony clearly would be bad." In answer to the argument that, as an insurer, the carrier is absolutely liable, notwithstanding a loss by felony of his servants, Cresswell, J., said: "If the notice is sufficient, as you seemed to concede it to be, to relieve the carrier from liability in all cases except where he has been guilty of gross negligence, it relieves him from liability for the felony of his servants, provided he has not been guilty of gross negligence."

The precise position which the judges are to be understood as having taken in the *Butt Case* with respect to the general question of liability of a carrier for the thefts of his servant is somewhat obscure, owing to the circumstance that all their dicta (no judgment was delivered) were colored by the circumstance that the only question

2486. Same subject. Statutory liability of common carriers of goods.—*a. English carriers act 1830.*—This statute, by which mail contractors, coach proprietors, and carriers are declared not to be liable for loss of certain goods above the value of £10, unless they are delivered as such, and an increased charge paid contains, in § 8, the following proviso:

“Nothing in the act shall be deemed to protect any mail contractor, etc., from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, bookkeeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.”

In order to charge a carrier with liability under this proviso, there must be reasonable evidence to satisfy the mind of the court and jury

actually discussed was the technical sufficiency of the pleadings. Upon the whole, however, having regard to the broad language used by them, and also to the fact that they cited as a pertinent authority *Finucane v. Small*, a case relating to the responsibility of a warehouseman (see § 2489, note 5, *post*), it seems difficult to avoid the conclusion that they did actually accept the general doctrine said to have been put forward by Willes, J., when he was at the bar, *viz.*, that a carrier is not liable for the felonious acts of his servants. The support which that doctrine was supposed to have derived from the remarks made by that distinguished jurist as a member of the court which decided the *Metcalf* case has been taken away by the retraction of his former opinion, which, as stated by Wright, J., was made by him as an editor of Smith's Leading cases. But that retraction does not destroy the authority, such as it is, of the *dicta* of the judges themselves in the *Butt* case. In so far, however, as those *dicta* are to be regarded as embodying the theory said to have been abandoned by Willes, J., they have been overruled by the *Shaw* case. They are clearly inconsistent with the conception of the carriers' absolute liability.

In *Bradley v. Waterhouse* (1828) Moody & M. 154, 3 Car. & P. 318, the point actually decided by Lord Tenterden—and for which alone the case is

cited in Story on Bailments, § 78, and also in Angell on Carriers, § 261—was, that the carrier was not liable for a loss by felony of his servant, where the owner of the package stolen had so endeavored to conceal the nature and character of the article as to prevent the carrier from taking any particular care of it. The plaintiff was considered to have been the person who had occasioned the loss, by his misrepresentation of the nature of the article.

For American decisions or *dicta* which sustain the statement in the text, see *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168 (*arguendo*, p. 510); *Haskell v. Boston Dist. Messenger Co.* (1905) 190 Mass. 189, 2 L.R.A.(N.S.) 1095, 112 Am. St. Rep. 324, 76 N. E. 215, 5 Ann. Cas. 796 (*ratio decidendi* was that the defendant was not a common carrier; see § 2489, note 5, *post*); *Hirsch v. American Tel. Co.* (1906) 112 App. Div. 265, 98 N. Y. Supp. 371 (similar ruling); *Rosenblum v. Weir* (1909) 132 App. Div. 929, 117 N. Y. Supp. 1146, affirming (1908) 113 N. Y. Supp. 520 (action maintainable against an express company whose receiving driver had fraudulently misappropriated goods delivered to him); *Watkinson v. Laughton* (1811) 8 Johns. 213 (master of a vessel answerable as a common carrier for the value of goods embezzled).

that the parcel was lost by means of felony.¹ This condition is satisfied if the plaintiff offers evidence "showing it to be more likely that the servants of the company stole the goods than that anyone else did."² It is not necessary that he should adduce testimony which

¹ *Great Western R. Co. v. Rimell* (1857) 18 C. B. 575, 27 L. J. C. P. N. S. 201. There a parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the waybill and the guard's parcel book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the waybill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages, the train reached London, when the parcel was missed; held, no evidence for the jury of the parcel having been stolen by a servant of the company.

In *Keys v. Belfast & B. R. Co.* (1858) 8 Ir. C. L. Rep. 167, the evidence showed that a traveling case, containing watches, which the plaintiff was carrying with him as personal luggage, was lost on the defendant's line; that he was prevented by a servant of the defendant from carrying the case in the same carriage with himself, on the pretense that the luggage van was the proper place for conveyance; that the interference of the servant was no part of his duty; that the case was not afterwards forthcoming, and that he subsequently denied all knowledge of the transaction. Held, that there was evidence to go to the jury, of a felonious taking of the goods by the servant of the carrier.

In *Gogarty v. Great Southern & W. R. Co.* (1874) Ir. Rep. 9 C. L. (Exch. Ch.) 233, reversing (1874) Ir. Rep. 8 C. L. 344, where the missing parcel had been last seen in the possession of a railway porter, Dowse, B., speaking for the majority of the court, said: "With all these facts, why am I to assume the existence of crime where mistake arising from negligence or pure accident is as probable, and, if crime is not to be assumed, a more reasonable solution of the question? It has been asked, how did this box disappear? No answer has been given to this question. Is the inability to give an answer evidence that a felony has been committed? The word

'disappearance' has been used during the argument as if it were synonymous with a felonious taking. Is this a fair or reasonable view of the case? Are there to be two kinds of criminal law, one administered in our criminal courts, and another in a civil action on a replication like the present? Are we to go out of our way to help a careless or dishonest passenger, and to make this salutary statute a dead letter? I say this advisedly, for in my opinion the affirmation of this judgment of the court of common pleas is, in effect, to repeal this statute." "It is not enough that the evidence should disclose a state of facts consistent with a felonious taking of the box. The evidence, to say the least, must disclose a state of facts rendering it more probable that the disappearance of the box was caused by the felonious act of some person." Three judges were of opinion that there was enough evidence to go to the jury.

In *Kirkstall Brewery Co. v. Furness R. Co.* (1874) L. R. 9 Q. B. 468, 43 L. J. Q. B. N. S. 142, 30 L. T. N. S. 783, 22 Week. Rep. 876, evidence showing that the defendant's station master at a place where a money parcel was missed had asked the superintendent of the police to make inquiries after a parcel porter who had absconded on the same day that the parcel ought to have been delivered was held to have been properly admitted, for the reason that the station master was authorized to put the police in motion, and that what he had said, while exercising his authority in that respect was competent evidence against the defendant.

² In *Vaughton v. London & N. W. R. Co.* (1874) L. R. 9 Exch. 93, Pigott, B., after remarking that he understood this to be the effect of the judgment of Willes, J., in the *Metcalf Case* (see next note), continued thus: "In the present case I think the evidence given was more consistent with the guilt of the defendants' servants than with that of any person not in their employment, for the defendants' servants had greater opportunities than others. That being so, there was a case for the jury the

would justify the conviction of some particular servant in criminal proceedings.³ But the mere "balance of probability" which arises from the circumstance of the carriers' servants having had a "greater facility of access and opportunity" of committing the felony is not enough to establish a *prima facie* case against him.⁴

onus of answering which was upon the defendants. They might have answered it by calling the servants towards whom suspicion was directed, but they determined not to call witnesses. They preferred to leave the matter unexplained. It is impossible, under these circumstances, to say that there was no evidence for the jury." See, however, the remarks quoted in note 4, *infra*, from the judgment of Cockburn, Ch. J., in *M'Queen v. Great Western R. Co.*

In *Boyce v. Chapman* (1835) 2 Bing. N. C. 222, 2 Scott, 365, 1 Hodges, 338, 5 L. J. C. P. N. S. 74, upon an issue that the plaintiff's goods were stolen by the defendants' porter, the plaintiff proved only circumstances of suspicion, which probably would not have insured conviction on an indictment for a felony; but the defendants having omitted to call the porter as a witness, and the jury having found for the plaintiff, the court refused to grant a new trial.

³ *Metcalfe v. London, B. & S. C. R. Co.* (1858) 4 C. B. N. S. 307. There it was proved that the goods in respect of which the action was brought consisted of articles of jewelry, etc., contained in a tin box, which was inclosed in a deal box, fastened with a padlock; that the box was brought to the company's station at Worthing, by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London; and that, when the box was delivered to the plaintiffs there by a porter of the company, it was found that the outer box had been opened, and the tin box and its contents abstracted from it: Held no evidence for the jury of felony by the company's servants. Williams, J., observed that it is "a general rule of law that every man is presumed to be innocent until proved to be guilty, and the servants of a carrier are not to be excluded from the benefit of the rule."

⁴ In *M'Queen v. Great Western R. Co.* (1875) L. R. 10 Q. B. 569, a heavy case, after having been packed by the porters on a truck and covered over, remained for some hours on a long siding to

which the public had access, and was stolen. Some of the porters were called by the plaintiff to prove delivery of the case to the company, but none were called by the company. Held, that there was no evidence of a loss by the felony of the servants of the company. Cockburn, Ch. J., said: "I quite agree with the doctrine involved in the decision of the court in *Vaughton v. London & N. W. R. Co.* (1874) L. R. 9 Exch. 93, 43 L. J. Exch. N. S. 75, 30 L. T. N. S. 119, 22 Week. Rep. 336, 12 Cox, C. C. 580 [note 2, *supra*], to this extent: that it is not necessary to show, in order to make out a replication of a felonious act on the part of the carriers' servants, that the taking was by any particular servant or servants. . . . The language of that judgment, however, I think, when we apply it to the particular facts of that case, must be understood in a much more limited sense than that which it would at first appear to have when looked at with reference only to the words and the language used. Looking at the language of that judgment, which I followed almost verbatim in the direction I gave to the jury in this case, it comes to this,—that where, in the opinion of the jury, the facts are more consistent with the guilt of the defendants' servant than that of any person not in their employ, then the carrier is called upon for an answer; and if the conduct of certain persons is impugned, and those persons are not called as witnesses, the inference would be that a felony had been committed by them. I think that proposition is not maintainable. It appears to me that the question of probability or improbability can only be considered as an element in the consideration of the general case. But in considering whether the proposition that in fact a felony has been committed by the company's servants has or has not been established, or whether the suspicion is that they have been guilty of felony rather than that a stranger or strangers have been, the greater or less degree of probability

It has been held that where a common carrier enters into a sub-contract with other parties in regard to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the true meaning of the statute.⁵

cannot be an element in the consideration of the question." Quain, J., said: "In addition to the greater facility of access, special facts must be adduced showing it was almost an impossible consequence that a felony could have been committed by the public, and that therefore it must have been committed by one of the company's servants. I fully adopt the language of Willes, J., in *Metcalfe v. London, B. & S. C. R. Co.* (1858) 4 C. B. N. S. 307, in which he said: 'The plaintiff might have shown a prima facie case, if it had happened that the box could not have been exposed so that other persons coming to the railway might have access to it.'"

For other authorities sustaining the statement in the text, see *Turner v. Great Western R. Co.* (1876) 34 L. T. N. S. 22, 13 Cox C. C. 131 and *Campbell v. North Br. R. Co.* (1875) 2 Sc. Sess. Cas. 4th series, 433, 12 Scot. L. R. 310.

⁵ In *Machu v. London & S. W. R. Co.* (1848) 2 Exch. 415, Pollock, C. B., said: "I am of opinion that this liability cannot be disposed of by introduction of the term 'agent,' or by giving a principal name to the employment of anyone employed to discharge the duty undertaken by the carrier. In the case which was put in the course of the argument, where a carrier confines himself to receiving goods and making contracts for their carriage, and avails himself of a subcontract to transfer to someone else the whole duty which he has undertaken to perform, I think that all the parties who come in under that subsequent contract, whether directly or by the subcontract,—I think that all the parties actually employed in doing the work which the carrier undertook to do, either by himself or by his servants, are his servants within the meaning of the 8th section of the act in question." Rolfe, B., said: "I think that a very large construction ought to be given to these words; they must be taken to mean bookkeepers, porters, or other servants actually employed to do what the carrier has undertaken to do. The legislature not only contemplated

that a carrier might himself carry the goods delivered to him, but that he might hand them over to another person to carry. If they were stolen by himself, he, of course, would not be protected; neither do I think he would if the person whom he had employed as a substitute were to steal them. Unless that construction be adopted, this anomaly would follow. Nothing was more common, under the old system, than for the coachman to hire the guard, or the guard the coachman; and, if a person had lost anything sent by a stagecoach, and had sued the proprietor, could the claimant be turned round by the proprietor saying, 'I did not employ the guard or coachman?' I think, therefore, that when the legislature used the word 'servant' in this section, they meant to say, the carrier being clearly liable if he steals the goods himself, and it being his ordinary duty as a carrier to carry them himself, he shall equally be responsible if any other person employed under the contract steals them." Platt, B., said: "Any person employed by a carrier to perform the contract into which he enters is a servant in the employ of the carrier, within the true meaning of this statute. Any other construction would be the parent of very dangerous consequences. These companies might let out every single part of their carriers' business, which is generally very extensive, to others, who might employ other servants under them. If we were to hold that such persons are not the servants of the company, a complete immunity would be obtained from the responsibility for every single theft that might be committed from one end of their line to the other, under the pretext that the persons by whom the theft had been committed were not their servants or in their employ. It would be an exceedingly dangerous doctrine to hold that these persons, who enjoy all the profits derived from the carriage of the goods, shall, by a subcontract unknown to the other party, get rid of their responsibility."

The above decision was followed in

But this expression cannot be construed so as to include a person who, by falsely representing that he is the servant of the carriers' agent, gets possession of goods then in the custody of the carrier.⁶

b. English railway and canal traffic act 1857.—By 7 of this statute, it is enacted, *inter alia*, that a railway company shall be liable, in the absence of a signed and reasonable contract for exemption, for the loss of any goods in the receiving, forwarding, or delivering thereof, "occasioned by the neglect or default of such company or its servants." The word "servants," as used in this provision, has been construed upon the same footing as in the carriers act discussed in subsec. *a.*⁷

It has been held that a loss of goods through theft committed by a railway company's servant, without negligence on the part of the company is not a loss "occasioned by the neglect or default of the company or its servants" within the meaning of the statute; and therefore that the company can, at common law, protect themselves against liability by a special contract, although such contract is not reasonable within the requirement of the act.⁸

Stephens v. London & S. W. R. Co. (1886) L. R. 18 Q. B. Div. (C. A.) 121, 56 L. J. Q. B. N. S. 171, 56 L. T. N. S. 226, 35 Week. Rep. 161, 51 J. P. 324, where a railway company was held liable for the value of goods which had been obtained by means of a forged order, while they were lying at one of the company's stations, and misappropriated by a man in the employ of the proprietor of the receiving office at which they had previously been delivered by the plaintiff, in order that they might be transported to the station.

⁶ *Way v. Great Eastern R. Co.* (1876) L. R. 1 Q. B. Div. 692. There certain pictures were loaded in a van in the defendant's yard, ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M., who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. The court, having power to draw inferences of fact, held that the defendants were not estopped from denying that the thief was their servant. Blackburn, J., said: "It is impossible to say that the defendants have so acted as to represent that the

thief was their servant, so as to estop them from denying it. This is a highly artificial attempt to make out a constructive liability on the part of the railway company."

⁷ In *Doolan v. Midland R. Co.* (1877) L. R. 2 App. Cas. 792, 37 L. T. N. S. 317, 25 Week. Rep. 882, 3 Asp. Mar. L. Cas. 685, where a railway company made a contract to carry animals from a port of Ireland to a town in England, on "through" tickets, which contained the condition that "with respect to any animals, etc., booked through, by them or their agents, for conveyance partly by railway and partly by sea, or partly by canal and partly by sea, the company was not to be responsible for loss of or damage resulting from "any default or negligence of the master or any of the officers or crews of the company's vessels." Held (following the *Machu Case*, note 5, *supra*), that the words "master and crew of the company's vessels," in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself; and that the condition was unreasonable and void.

⁸ *Shaw v. Great Western R. Co.* [1894] 1 Q. B. 373. There the plaintiff, when she delivered to the defendants a

c. Statutes affecting shipowners.—By § 502 of the English merchants shipping act 1894, it is declared that a shipowner shall not be liable for any loss or damage happening without his actual fault or privity to any goods on board his ship, for the theft of any gold, silver, etc., unless their true nature and value have been declared in writing at the time of shipment. This statute takes the place of certain earlier enactments *in pari materia*.⁹

portmanteau to be carried by them, signed a consignment note, on which was printed the common condition to the effect that the defendants held themselves entirely relieved from loss or damage to goods of the kinds described in the carriers act 1830, unless the articles were declared and an assurance paid as compensation for the risk incurred. The portmanteau contained things of the kinds mentioned in the condition to the value of more than £10. The plaintiff did not declare them, or pay or tender any increase of charge in respect of them. The things were stolen in transit by a servant of the defendants without any negligence on the part of the defendants. In his review of the English decisions, Wright, J., stated that "loss by theft by strangers, or by the carrier's servants, in the absence of gross negligence, was a risk of the road against which the contract or notice at common law protected the carrier, entirely apart from the act of 1830; and notwithstanding § 8 of that act, which merely excepted theft by the servant out of the protection given by the mere force of the statute itself, and not out of protection obtained by contracts not depending upon the statute for their validity." The learned judge stated that by the end of 1852 it had become settled by a series of decisions "that the protection afforded by these contracts or notices 'brought home' to the customer might extend to negligence, however great; and that it made no difference whether the pleader alleged the negligence to be 'gross' or not. After those decisions the carriers' contracts or notices, when 'brought home,' protected them from everything except wilful acts, such as the conversion of the goods by the carrier himself, or by his agents for that purpose, or wilful misdelivery amounting to a renunciation of the character of bailee. . . . It was to correct this state of the law that the railway

and canal traffic act of 1854 was passed." After having quoted the provision of the statute, the learned judge continued: "These words are completely apt to describe every form of negligence, including theft by the company's servants, if occasioned or facilitated by negligence, and any default within the scope of the servants' employment; but they are not apt to describe theft without the company's negligence. For very many years carriers had been allowed to exempt themselves from liability for all risks of the road not occasioned by negligence, including theft by their servants,—*Butt v. Great Western R. Co.* (1851) 11 C. B. 140,—subject only to the express enactments of the act of 1830, and there is nothing to indicate that the law in this respect was thought to require amendment in respect of theft or any other of the risks of the road. If it was intended to make the companies liable for theft without their negligence, there is a strong contrast between the inaptitude of the words used in 1854 and the direct language of §§ 4 and 8 of the act of 1830. Having regard to the terms of the railway and canal traffic act, and to the history of the law, and the occasion for the act, it seems most reasonable to hold that it extends only to negligence, or default in the nature of negligence, or within the scope of the servants' employment. The company, therefore, as regards theft without negligence, are left in the same position in which they had been at common law for at least a hundred years in relation to such theft, and that is, that, subject in the case of the valuables specified in the act of 1830 to the provisions of § 8 of that act, they can, by contract or notice 'brought home,' exempt themselves from liability for such theft."

⁹ After the doctrine as to liability of shipowners for goods embezzled by their servants had been enunciated in *Boucher v. Lawson* (§ 2485, note 2,

By U. S. Rev. Stat. § 4283 (act of Congress March 3, 1851, 9 Stat. at L. 635, chap. 43, U. S. Comp. Stat. 1901, p. 2943), it is provided that the liability of the owner of a vessel for any embezzlement, loss, or destruction by any person, of any property, goods, or merchandise shipped, or for any act, etc., done, etc., without the privity of the owner, is limited to the value of his interest in the vessel, and her freight then pending.

2487. Same subject. Liability of carriers of passengers.—It is settled law that a carrier of passengers is subject to the responsibilities of a common carrier of goods, so far as regards that portion of their baggage which is delivered into his exclusive custody.¹ In this point of view, his obligation to indemnify a passenger for the value of such baggage, if it should be stolen by one of his servants, is clearly absolute.² In respect of amount, his liability presumably extends to the full value of the articles stolen, except in so far as it may have been modified by statute or contract.

The English rule with respect to baggage not delivered into the exclusive custody of the carriers is "that a railway company, in accepting a passenger's luggage for carriage on a passenger train, and in the carriage with the passenger himself, do enter a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passengers' own default."³ The effect of this rule with reference to a case in which bag-

ante), the English Parliament, upon the petition of the class of person affected, enacted the statute of 7 Geo. II. chap. 15, by which it was provided that for such embezzlements, etc., without the owners' knowledge, the owners shall only forfeit the value of the ship or vessel with all her appurtenances, and the full amount of the freight due, or to grow, for and during the voyage wherein such embezzlement, etc. This enactment was subsequently amended by 26 Geo. III. chap. 86, § 1 (passed in consequence of the decision in *Sutton v. Mitchell* [1785] 1 T. R. 18, where it was held that the owners of a ship which, while lying in the Thames, had been plundered in consequence of information given by a seaman who afterwards shared in the booty, were not liable except to the amount specified by the earlier statute), and 53 Geo. III. chap. 159. But both these amend-

ments were repealed by the merchant shipping act of 1854.

¹ Story, Bailm. 9th ed. § 499; Paine, Bailm. p. 345; 1 Smith, Lead. Cas. 16th ed., note to *Coggs v. Bernard*, p. 201; Hutchinson, Carr. §§ 1241 *et seq.*

² For cases in which this doctrine was recognized, see *Levins v. New York, N. H. & H. R. Co.* (1903) 183 Mass. 175, 97 Am. St. Rep. 434, 66 N. E. 803; *Habrouck v. New York C. & H. R. R. Co.* (1910) 137 App. Div. 532, 122 N. Y. Supp. 123.

³ Lord Halsbury in *Great Western R. Co. v. Bunch* (1888) L. R. 13 App. Cas. 31, affirming (1886) L. R. 17 Q. B. Div. (C. A.) 215. Lord Watson's statement on this point is as follows: "I think the contract ought to be regarded as one of common carriage, subject to this modification, that, in respect of his interference with their exclusive control of his luggage, the com-

gage of the description specified is stolen by a servant of the carrier has not been judicially discussed. It may be that, when such a case is presented, the theory that the personal negligence of the passenger relieves the carrier of responsibility will not find favor. It seems difficult to deny that there is a certain anomaly in ascribing an exculpatory effect to this element, where the carrier's own servant is the thief.

In the United States, the broad doctrine prevails that railway companies and other carriers cannot be held responsible, except upon the ground of negligence of themselves or their servants, for any baggage of a passenger which is not intrusted to their exclusive custody.⁴ But they are held to be liable for thefts of such baggage by their servants, if it was "personal" in the sense in which that term is understood by the courts; that is to say, reasonably necessary for the purposes of the journey in question.⁵

pany are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory."

⁴ 4 Elliott, Railroads, §§ 1623, 1654.

⁵ In *Abbott v. Bradstreet* (1868) 55 Me. 530, it was conceded that the owners of a steamboat would have been liable, if one of their servants had stolen money from the passenger's pocket.

In *Illinois C. R. Co. v. Handy* (1886) 63 Miss. 609, 56 Am. Rep. 846, a passenger, upon leaving a railway car, left in it a pocketbook containing money which he was taking with him to pay a debt. The money having been stolen by one of the company's employees, it was held that the passenger was not entitled to recover, for the reason that, while "the company was responsible to its patrons for the conduct of its employees as to any property as to which it was brought into contract relations with its owner," it could not be held responsible for money exceeding the amount required for traveling expenses, because in regard to such excess "it stood in no contract relation with the passenger, owed and undertook no duty, nor authorized its servant to do anything in reference to it."

In *Levins v. New York, N. H. & H. R. Co.* (1903) 183 Mass. 175, 97 Am. St. Rep. 434, 66 N. E. 803, where a porter in charge of a parlor car operated by a railway company stole some money which had been left by a pas-

senger on the window sill of the toilet room of the car, the theft was held not to be imputable to the company. The *ratio decidendi* was that money not intended for traveling expenses, in the purse of a passenger on such a car, was not baggage for which the company was liable as a common carrier; that the money when left on the window sill had not been intrusted to the company nor delivered into its possession; and that the theft was not within the scope of the porter's employment. The court was of opinion that the case did not fall within the range of the principle that, "where there is a duty to be performed by the carrier with reference to the person or property of a passenger and there has been a failure to perform it, the fact that the failure arose from a positive act of a servant to whom the carrier had delegated the performance of the duty is no defense." The court then referred to the decisions which proceed upon the theory of an absolute duty on the carrier's part to protect passengers against the violence and insults of his servants, and continued thus: "The plaintiff has failed to show any legal duty resting upon the defendant as to the care of this money lying upon the window sill where the plaintiff placed it. It was not within the scope of the employment of the porter to make any new contract, or to modify one already made. He had a very limited duty as to the performance of contracts already made and the duties

A similar rule has been applied in most of the cases in which the liability of sleeping car companies was in question.⁶ The passenger is entitled to claim compensation, even though the opportunity for

of the defendant arising therefrom, and there his power to represent the defendant stopped. If he stole the money, he, and not the defendant, was the thief, and the act was not the result of any failure of the defendant to discharge its duty. There is no ground upon which the defendant can be held."

⁶ A sleeping car company, "while it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it." *Lewis v. New York Sleeping Car Co.* (1887) 143 Mass. 267, 58 Am. Rep. 135, 9 N. E. 615.

In *Root v. New York Cent. Sleeping-Car Co.* (1887) 28 Mo. App. 199, the court thus stated its conclusions: "The settled law is that a sleeping car company is not an insurer of the baggage of the passenger, but that its liability, at most, is that of a bailee for hire. In the case of a loss of the passenger's baggage or belongings it is, therefore, liable, if at all, only on the ground of negligence; and, in order to be so liable, it must have been negligent in the performance of some duty which it assumed to perform for the passenger. That duty, so far as adjudged cases seem to have gone, is, that it will maintain in the car a reasonable watch during the night while the passenger is asleep. We now go further; and, speaking with reference to the facts of this case, we hold that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him nor watch himself while he is absent from his berth in the washing room, preparing his toilet after arising in the morning. This duty of watchfulness extends so far as to make the sleeping car company liable for a negligent failure to perform it, to the extent of any baggage or personal belongings which the passenger may thereby lose, which are reasonably necessary to

be taken by him on his journey, regard being had to his station in life, and to the length, purposes, and probable duration of the journey. . . . This defendant was, therefore, not liable, in case its porter stole the plaintiff's money, for any amount beyond what was reasonably necessary for the plaintiff's traveling expenses; and the instruction numbered 2½, which told the jury that if they should so find, the defendant was liable for the amount so stolen, was to that extent erroneous. It had not agreed to become a carrier of treasure; nor had it received compensation for such a responsibility; nor had it even received notice from the passenger that such a duty was expected of it."

In *Pullman Palace Car Co. v. Gavin* (1893) 93 Tenn. 53, 21 L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70, the liability of a sleeping car company for the value of property stolen from a passenger by the porter of a car was affirmed on the ground that it was the company's absolute duty to maintain a reasonably careful watch over the interior of the car while the berths were occupied. It was deemed to be a corollary of this doctrine that "if the servant or agent of the company charged with the duty of watching and protecting the property of the guest, purloins it himself, the company is responsible." The doctrine thus laid down was approved in *Pullman Palace Car Co. v. Hatch* (1902) 30 Tex. Civ. App. 303, 70 S. W. 771; but the evidence was held insufficient to show that the porter had taken the property in question. On the second appeal (1904) — Tex. Civ. App. —, 84 S. W. 246, a verdict directed for the defendant was set aside.

In *Pullman's Palace Car Co. v. Martin* (1894) 95 Ga. 314, 29 L.R.A. 498, 22 S. E. 700, the liability of a Pullman Car Company for money and valuables stolen by a porter from a sleeping passenger was affirmed on the ground that, whether such a company is to be regarded as a common carrier, an innkeeper, or a keeper of a lodging house, it guarantees at least that their servants shall not rob travelers of appropriate baggage.

the commission of the theft may have been supplied through the negligence of the passenger himself.⁷

The language used by the courts in most of the cases which relate to thefts of passengers' baggage shows that the carrier's liability was regarded as being dependent upon the existence of a specific obligation in respect of the baggage itself. But his liability has sometimes been referred to the notion that the special duty to which, under the theory now adopted in most of the American states (see chap. CIII., *ante*), a carrier is subject with regard to the protection of passengers from personal maltreatment by his employees, is sufficiently comprehensive to cover also the baggage of passengers.⁸

A different standpoint is indicated by the grounds assigned for decision in *Voss v. Wagner Palace Car Co.* (1896) 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010. It was there held that where a passenger in a sleeping car, after arriving at his destination, delivers his baggage to the porter, to be by him carried to the reception rooms of the station, the sleeping car company becomes responsible as a common carrier for the safe delivery of the baggage; and consequently, that if the baggage is lost by reason of the dishonesty or negligence of the porter or another employee, the company is liable. The theory upon which the court proceeded was that, "as a general rule, sleeping car companies are not liable as insurers of the wearing apparel and effects belonging to passengers upon their cars, as innkeepers would be liable, or as common carriers of passengers are usually held liable for baggage intrusted to them." But the case above cited shows that this view of the obligations of sleeping car companies has by other courts been found compatible with the imputation to them of liability for baggage stolen by their employees from the coaches themselves.

⁷ In *Root v. New York Cent. Sleeping-Car Co.* (1887) 28 Mo. App. 199 (note 6, *supra*), the court observed: "We are of opinion that, within the limits of responsibility above stated, a sleeping car company is liable for the thefts of its servants, irrespective of the contributory negligence of the plaintiff; that is to say, it is liable for the thefts of its servants to the extent of the necessary baggage or money of the traveler, regard being had to the character, duration, and purposes of the journey,

whether the traveler has been negligent in exposing such baggage or money so as to tempt the cupidity of its servants or not. In such a case contributory negligence of the passenger would not be regarded as the proximate or juridical cause of the injury."

The same doctrine was affirmed in *Pullman Palace Car Co. v. Matthews* (1889) 74 Tex. 654, 15 Am. St. Rep. 873, 12 S. W. 744, where the court remarked that, "if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant who were in charge of the car, he ought not to have had a recovery, because of his own negligence."

⁸ This point of view is distinctly indicated in the following remarks made, *arguendo*, in *Stewart v. Brooklyn & C. T. R. Co.* (1882) 90 N. Y. 588, 43 Am. Rep. 185: "A rule which should make the carrier liable when the act resulting in the injury was carelessly but unintentionally done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results. By such a rule a stage company who should place a lady passenger under the protection of its driver, to be carried over its route, would be liable if, by his unskillful driving, he upset the coach and injured her; but if, taking advantage of his opportunity, he should assault and rob her, the carrier would go scot free. If the porter of a sleeping car, employed to guard the car while the passengers sleep, should himself fall asleep, or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable; but if the guardian should himself turn pickpocket, and rifle the pockets

2488. Larceny by servants of innkeepers.—*a. Common-law doctrine.*—The doctrine that an innkeeper is an insurer of the property committed to his care against everything but the act of God, or the public enemy, or the neglect or fraud of the owner,¹ involves the corollary that he must answer for losses resulting from thefts committed by his servants, irrespective of the character of the work for which they were employed.²

of the passengers, the company would not be responsible for his acts. The carrier selects his own servants and agents, and we think he must be held to warrant that they are trustworthy as well as skilful and competent."

In *De Felice v. Compagnie Française de Navigation* (1903) 83 App. Div. 73, 82 N. Y. Supp. 555, the chief officer of a steamship, who had general charge of the baggage of passengers, permitted a passenger, who was a dentist, to keep a valise containing his dental instruments and appliances on the deck. During the voyage this officer, prompted by some feeling of spite or irritation against the passenger, countenanced the throwing of the valise overboard. Held, that the steamship company was liable for his misconduct. As the officer was guilty of a criminal conversion of the passenger's property, the right of action might apparently have been predicated with reference to the rule stated in the text. But the carrier's liability was referred by the court to the conception that the obligation of a carrier to protect his passengers against the misconduct of his servants "is sufficiently broad to protect a passenger on an ocean steamer from the violent seizure of his personal baggage by one of the steamer's officers and the flinging of such baggage into the sea." The case was distinguished from *Cohen v. Frost* (1853) 2 Duer, 335, 340), where the trunk of a steerage passenger had been taken by him into the steerage, placed under his bed, and fastened with ropes to his berth. The ropes having been cut at night and the trunk stolen by some person unknown, it was held that the passenger could not recover against the vessel owners, because the trunk was never placed in their charge or custody as common carriers.

¹ See 2 Parsons, Contr. *146; 2 Kent, Com. *596, note 1 (6).

² The leading authority for the doctrine that an innkeeper is bound to an-

swer for himself and for his family, as to all property of a guest, *infra hospitium*, is *Calye's Case* (1589) 8 Coke, 32.

"If a man desire to lodge with one that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, his master shall not be charged for the robbing; but if he had been a common hostler he should have been charged." Doctor and Student, chap. 42, p. 234 (Muchall's ed.).

"If an innkeeper's servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet.*" 1 Bl. Com. *429. The essential purport of this statement as one which declares an innkeeper to be absolutely liable is sufficiently clear. But the *rationale* suggested for that liability is by no means satisfactory. It involves the assumption that the mere fact of a servant's having been guilty of a larceny is sufficient to establish a want of care on the master's part. This assumption rests, of course, upon a purely fictitious basis, for such a crime may be, and frequently has been, committed by a servant with regard to whose selection reasonable care was exercised. Blackstone evidently had in mind the theory, now admitted to be erroneous, that the general principle, *respondet superior*, is founded on the notion that a master is bound to use care in employing his servants. See § 2246, *ante*.

"It is not necessary to prove negligence in the innkeeper; for it is his duty to provide honest servants, according to the confidence reposed in him by the public; and he ought to answer civilly for their acts, even if they should rob the guests who sleep under his roof." 2 Kent, Com. *594.

"If the goods of a guest are damaged

b. Doctrine in civil-law jurisdictions.—It is not improbable that the common-law doctrine as to the absolute liability of an innkeeper for the thefts of his servants was derived from the corresponding rule established by a prætorian edict in ancient Rome. See 2251b, *ante*. However this may be, it is certain that that rule forms the basis of the doctrine which is applied at the present day in all civil-law jurisdictions. It was adopted as a part of the older French law.³ It has been embodied in the Code Napoleon;⁴ and in the Codes of

in the inn, or are stolen from it by the servants or domestics or by a stranger guest, he is bound to make restitution, for it is his duty to provide honest servants and to exercise an exact vigilance over all persons coming into his house as guests or otherwise." *Houser v. Tully* (1869) 62 Pa. 92, 1 Am. Rep. 390; cited with approval in *Walsh v. Porterfield* (1878) 87 Pa. 376; *Shultz v. Wall* (1890) 134 Pa. 262, 8 L.R.A. 97, 19 Am. St. Rep. 686, 19 Atl. 742. The phraseology used by Blackstone is here adopted. See *supra*.

In *Cunningham v. Bucky* (1896) 42 W. Va. 671, 35 L.R.A. 850, 57 Am. St. Rep. 876, 26 S. E. 442, the court made the following remarks: "That he [the guest] had been drinking, was careless with his money, and trusted in the honesty of defendant's household, and refused the services of Mrs. Bucky as to the care of his money, will not excuse the defendant from the dishonesty of those admitted to his employment. It was his duty to surround himself with honest servants, for the protection of the public; and he cannot excuse himself from liability by showing that the servant was a stranger, and hired on recommendation as to good character. He should have exercised care and vigilance over wandering servants admitted to his house, and see that they did not have the opportunity to steal from his guests."

The absolute liability of an innkeeper for thefts of his servant was also recognized in *Chamberlain v. Masterson* (1855) 26 Ala. 371 (innkeeper liable for failure to employ honest servants); *Weisenger v. Taylor* (1866) 1 Bush, 275, 89 Am. Dec. 626 (innkeeper "guarantees honesty of his household"); *Towson v. Havre-de-Grace Bank* (1823) 6 Harr. & J. 47, 14 Am. Dec. 254 (innkeeper liable for money stolen by a servant in whose charge it had been

placed); *Treiber v. Burrows* (1867) 27 Md. 130; *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168 (*arguendo*, p. 510); *Gile v. Libby* (1861) 36 Barb. 70; *McDaniels v. Robinson* (1854) 26 Vt. 316, 62 Am. Dec. 574 (rule recognized by court, *arguendo*); *Jalie v. Cardinal* (1874) 35 Wis. 118 (innkeeper bound "to provide honest servants").

The rule that an innkeeper insures the property of a guest against theft by whomsoever committed was affirmed in *Pinkerton v. Woodward* (1867) 33 Cal. 557, 91 Am. Dec. 657; *Lusk v. Belote* (1876) 22 Minn. 468; *Epps v. Hinds* (1854) 27 Miss. 657, 61 Am. Dec. 528.

In *Roeckers v. Hart* (1908) 30 Ohio C. C. 709, it was held that one who receives a stipulated sum for boarding and lodging, and agrees to keep safely over night money of his guest, is liable for its misappropriation by his servant, whether he is regarded as an innkeeper or boarding-house keeper.

In *Vigeant v. Nelson* (1908) 140 Ill. App. 644, the position was taken that an innkeeper is not an insurer against loss of baggage by theft or otherwise, unless the owner of such baggage be a guest, as distinguished from a mere boarder, and consequently that the plaintiff, being a mere boarder, could not hold the innkeeper in question liable for baggage stolen by a servant, whose dishonesty he had no grounds for suspecting.

³ See Story, Bailm. §§ 468, 469; Toullier, Droit Français, title, IV. § 248.

⁴ By art. 1953, innkeepers are declared to be responsible for the theft of or injury to the effects of the traveler, whether the theft has been committed or the injury caused by the servants or employees of the hotel, or by travelers passing through. By an amendment added in 1889, the responsi-

Louisiana,⁵ and Quebec.⁶ It also prevails in Scotland⁷ and in Germany.⁸

2489. — by servants of other descriptions of bailees.— In a portion of the cases relating to the liability of bailees other than carriers and innkeepers, the right of recovery has been affirmed under circumstances which seem to indicate the acceptance of a doctrine going nearly, if not quite, to the extent of affecting the bailee with responsibility for a theft committed by any of his servants who may be authorized to deal with the given property for a purpose connected with the bailment.¹ These decisions are in harmony with those referred to at the commencement of the following section; nor, as it would

bility is limited to one thousand francs for moneys and securities or shares to bearer of whatever nature, which have not been actually deposited in the hands of the innkeepers.

⁵ By art. 2967 (2938), an innkeeper is declared to be responsible if any of the effects brought by travelers be stolen or damaged, either by his servants or agents, or by strangers going and coming at the inn. In art 2968 there is a qualifying provision with regard to inns in which arrangements for the safe deposit of valuables have been made.

⁶ By art. 1815 it is declared that keepers of inns, of boarding houses, and of taverns, are responsible if the things brought by travelers who lodge in their houses be stolen or damaged by their servants or agents, or by strangers coming and going in the house. The liability is limited to \$200 except in certain specified cases, one of which is where the property is stolen, lost, or injured by reason of the wilful act, default, or neglect of the innkeepers themselves, or of any servant in their employ.

⁷ See Bell, Com. 9th ed. §§ 235, 236, 240, where the law is laid down as follows: Innkeepers and stablers are responsible for the loss of things committed to their charge, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God, or of the King's enemies. Fraud and negligence of servants are no excuse. Servants are identified with their master, and the policy of the law is to protect against them and all possibility of collusion.

⁸ See Schuster's German Civil Law, p. 158.

¹ In *Thompson v. Bell* (1854) 10 Exch. 10, the manager of a bank absconded with money which the plaintiff had paid to him as the representative of the bank, on the understanding that it was to be devoted by him to a specified purpose. Held, that the bank was liable for the money misappropriated. Pollock, C. B., said: "We all agree that the rule ought to be discharged. The jury have found that the manager of the bank intended to make the plaintiff's wife believe, and that she did believe, that he was acting in this transaction as agent for the bank. That being so, the conclusion is, that the money is still in the bank, since it was paid to the agent of the bank. In my opinion, it is unnecessary to travel further. The manager of a bank is a person appointed to conduct the entire business, irrespective of the partners; and in this case the manager undoubtedly received the money in the first instance from the plaintiff's wife, and gave her a deposit receipt. He then represents to her that some benefit would accrue by her investing that money in a different way. She listens to his suggestion, and draws out the money, which she hands over to him, as manager of the bank, to be disposed of in the way suggested. That he does not do, therefore the money is still in the hands of the bank." Alderson, B., observed that "the question resolves itself into one of fact; viz., was the money paid to the bank, or to the manager individually?"

In *Jones v. Morgan* (1882) 90 N. Y. 4, 43 Am. Rep. 131, where goods deposited with the defendant were stolen by his servant, his liability was taken for granted, it being a necessary deduc-

seem, does a doctrine of the scope applied in them involve anything essentially repugnant either to the general theory of an employer's vicarious liability, or to the obligations which may reasonably be deemed to arise out of a contract which embraces an implied stipulation that a certain degree of diligence shall be exercised in performing it.

But the preponderance of authority is unquestionably in favor of the view that the loss resulting from the theft of the subject-matter of a bailment by a servant of the bailee cannot be imputed to the

tion from the existence of his duty to exercise care in safeguarding the goods.

In *First Nat. Bank v. Dunbar* (1886)

118 Ill. 625, 9 N. E. 186, the cashier of a bank, in order to hide his embezzlement of its funds, took out of special deposit, and reported as assets, certain railroad bonds which he had purchased in behalf of the plaintiff. Held, that the depositor was entitled to recover the value of the bonds from the bank. The footing upon which the case was decided is indicated by the following remarks of the court: "The only difficulty in the case is of fact,—namely, did Hubbard ever purchase any bonds with Byers' money, and if so, are those bonds among the bonds in the possession of the bank when the examiner took possession, and afterwards, when the demand was made for their possession by Byers. These questions being found in the affirmative,—and there was evidence tending to sustain that finding,—the liability of the bank must inevitably follow. Although, in the mere act of purchasing the bonds, Hubbard was the agent of Byers, when the purchase was complete that agency ended. As cashier, in receiving the bonds on special deposit, he was the agent of the bank; and it was as cashier and agent of the bank, that, to hide, in part, his embezzlement from the bank, he took the bonds from the special deposit and placed them among and reported them as assets of the bank. His knowledge was its knowledge, and it could not, in this way, acquire a legal title to the bonds without the knowledge or consent of Byers."

In *Carroll v. People's R. Co.* (1883)

14 Mo. App. 490, the treasurer of a company misappropriated a part of a servant's wages which, in pursuance of a customary practice, he had on the regular pay day left in the hands of the

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treasurer under circumstances which justified him in supposing that it was deposited with the company. Discussing the contention that the trial judge had erred in refusing to permit the defendant to show in what capacity R., the treasurer, kept the money in question, the court said: "Suppose Ryder had been allowed to answer the question, and had said that he kept it in his own individual capacity, and converted it to his own use; the plaintiff would be entitled to reply: 'I knew nothing of that; you did not inform me that you kept it in your individual capacity, nor did any other person, acting on behalf of the company, so inform me. When you retained it, you did not appear or pretend to be acting for yourself, but you appeared to be and were acting as treasurer of the defendant. You did not in my presence or with my knowledge enter the fact of your retaining this money in a private memorandum book of your own, but you entered it before my eyes on the books of the company. Having thus led me to believe, by your conduct, that the money was retained by you in the treasury of the company, and for the company, I am not to be prejudiced by the fact that you may have converted the money to your own use. That is a question between you and the company.'" The defendant's counsel also relied upon the principle that, where one of two innocent persons must suffer by the act of a third person, it must be that one who put it into the power of the third person to do the wrong or practice the deceit,—the argument in this point of view being, that the plaintiff was aware of the rule and practice of the defendant to pay off its employees on the third and eighteenth of each month, and to require every one to draw his wages and sign the pay

bailee except upon the ground of his own personal negligence.² The rationale of the position thus taken is that, where no such negligence is proved, the bailee's liability can be predicated only on one or other of two theories, both of which are regarded as being untenable; *viz.*, that he impliedly warrants the honesty of his servants, or that the misappropriation is a tort committed within the scope of the serv-

roll on those days; that, with this knowledge, he signed a receipt on each pay day for the full sum of the wages due him, and thus put it into the power of Ryder, who was only authorized to pay out, to make the defendant believe, by means of these pay rolls, that the men were paid in full on each pay day; that the retention of any moneys by Ryder was not only not within the scope of his agency, but was against the express rules and practice of the defendant. The court said that this argument was based upon stronger assumptions of fact than were warranted by the testimony given at the trial, but remarked that, if the principle invoked had any application at all to the case, "its operation would seem to be exactly the reverse of that contended for. Persons dealing with corporations are not bound to suspect fraud or to institute inquiries where everything seems fair, honest, open, in conformity with the usages of the corporation, and within the apparent scope of the powers of the agent with which they are dealing." The position was also distinctly taken that a corporation guarantees the honesty of its agents in respect of the functions intrusted to him.

In *Dougherty v. Wells* (1872) 7 Nev. 368, an express company was held liable, where one of its local agents, to whom an old certificate of deposit had been delivered for the purpose of having it sent to another city to be renewed, fraudulently procured it to be cashed, and appropriated the money to his own use. The court said: "The liability, however, in such case, arises not upon the rule that the agent acted for the principal in that particular transaction, but because he is employed by the principal in that character of business, and is so held out as a person authorized and fully to be trusted therein. When the agent in such case does an act which is apparently within the general scope of his authority, although not so in fact, if the principal were not

held liable for the act, a third person, who had reason to believe that the agent was reliable, and possessed authority in the particular matter, from the general character of his employment, might suffer loss. Hence the law holds the principal liable, upon the ground that he, rather than a third person equally innocent, should suffer."

In *Reynolds v. Witte* (1879) 13 S. C. 5, 36 Am. Rep. 678, where the city factors of a planter misappropriated negotiable instruments deposited with them as collateral security by a person to whom they had lent the money of their principal, he was held liable on grounds thus stated: "We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within 'the scope of the agency;' but tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much 'within the scope of the agency' as negligence in allowing others to take it. The proper inquiry is whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent. Here the fraudulent act was the appropriation of the very property of the agency, without which agency they would not have had possession of the property and could not have done the act."

²In *Sinclair v. Pearson* (1834) 7 N. H. 219, 224, the court observed *arguendo*: "It is perhaps a sound principle, that bailees generally should not be held liable for the larcenies of those in their employ, without circumstances of special negligence, or special trust of the servant, by the bailee, in relation to the article bailed."

ant's employment. In some of the cases decided from this standpoint the bailment was gratuitous.³ The courts have occasionally used language susceptible of the construction that they regarded the

³ One of the points ruled in *Calve's Case* (1589) 8 Coke, 32, was that, "if a man be lodged with another (who is not an inholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it."

In *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168, where a cask, containing a quantity of gold coin was deposited in a bank for safe-keeping, and the gold was fraudulently taken out by the cashier and chief clerk of the bank, the bank was held not to be liable to the depositor for the value of the gold so taken. The court said: "We shall not consider whether the act of taking the money was felonious or only fraudulent; as the distinction is not important in this case; the question being whether there was gross negligence; and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. Fraud on property deposited, committed by the depository, or his servants acting under his authority, express or implied, relative to the subject-matter of the fraud, is equivalent to gross negligence, and renders the depository liable. No fraud is directly imputed to the bank; it being found that the directors, who represent the company, were wholly ignorant of the transactions of the cashier and chief clerk in this respect. The point, then, is narrowed to this consideration; whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers." After an examination of the authorities bearing upon this point, the court proceeded thus: "We are, then, to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it; and so could not lawfully communicate any authority; and that they did not in fact give any is found by the verdict. Nor did they in any manner assent to or have any knowledge of it. There are no circumstances, then, from which such authority can be implied. The chest or cask, when once

placed in the vault, was to remain there until taken away by the owner, or ordered away by the bank; either party having a right to discontinue the bailment. It was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier, than of any other officer or person, to know the contents, or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault, when banking hours were over, that this, together with other property there, should be secure from theft. He cannot therefore be considered, in any view, as acting within the scope of his employment when he committed the larceny; and the bank is no more answerable for this act of his than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank. If it be asked, for what acts, then, of a cashier or clerk, the bank would be answerable, I should answer, for any which pertain to their official duty; for correct entries in their books, and for a proper account of general deposits; so that, if by any mistake, or by fraud, in these particulars, any person be injured, he would have a remedy. If they should rob the vaults of the property of the bank, the company would necessarily lose; as must have happened in this case to a great amount; and if the bank have become debtors to those who have deposited otherwise than specially, their debts will not be diminished by the fraud; so that in this form they are answerable to depositors; and for the correct conduct of all their servants, in their proper sphere of duty, they are answerable. . . . But they are not answerable for special deposits, stolen by one of their officers, any more than if stolen by a stranger; or any more than the owner of a warehouse would be, who permitted his friend to deposit a bale of goods there for safe-keeping, and the goods should be stolen by one of his clerks or servants. The undertaking of banking cor-

porations, with respect to their officers, is that they shall be skilful and faithful in their employments; they do not warrant their general honesty and uprightness."

The above case was cited with approval in *Giblin v. McMullen* (1869) L. R. 2 P. C. 317, 3 Eng. Rul. Cas. 613, where a banker was held not to be liable for the value of debentures abstracted from the strong room of his bank by his cashier who kept the keys. From the judgment delivered for the Privy Council, the following passages may be quoted: "It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. . . . The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property intrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. . . . No one can fairly say that the means employed for the protection of the property of the bank, and of the plaintiff, were not such as any reasonable man might properly have considered amply sufficient. But the appellant's counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depositary

does not multiply his precautions, so as not to omit anything which can make the loss of property intrusted to him next to impossible, he is guilty of gross negligence."

In *Merchants' Nat. Bank v. Guilmartin* (1892) 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831, the syllabus written by the court runs as follows: "The essence of a contract of bailment is diligence; and when the bailee shows the exercise of that degree of diligence required by law of his class he is discharged, although the thing bailed be stolen or lost. For a special deposit, received by a bank through its cashier for gratuitous safe-keeping and return to the depositor on demand, the bank is not liable if the cashier, without its knowledge or consent, steals it or fraudulently appropriates it to his own use, provided the bank has exercised due diligence in selecting the cashier and in not keeping him in office after it knew, or ought to have known, that he was or had become untrustworthy. In stealing or clandestinely appropriating the deposit to his own use, the cashier would not be acting in the bank's business, or within the scope of his employment; he would be representing himself, and not the bank. The Code, §§ 2201, 2961, does not vary this rule in respect to gratuitous bailments, inasmuch as the degree of diligence touching such bailments is no higher under the Code than at common law." From the opinion the following passage may be quoted: "The law, as disclosed by the authorities, seems to consider that, in the case of a gratuitous special deposit, there is consideration enough in the bare custody of the property to insure its being kept without gross negligence, but not enough to bind the bank as an absolute insurer of its servant's honesty. The depositor contemplates, of course, and consents that the cashier or some other agent is to be the personal guardian of the deposit. If the bank had selected and continues him in office, with due regard to the immense interests confided to him, his defalcation is a risk assumed by such a depositor. The bank, being equally liable to suffer by the same kind of misfeasance, thus evinces prima facie its good faith in having the wrongdoer in its service. As far as the question of mere negligence is concerned, the bank can plead its not knowing or having cause to suspect the integrity of its officer.

But it has been strongly urged that the bank, as master, is liable for the fraud of the cashier, its servant, in the course of its business. This is the point of most difficulty. Every bailee is bound to exercise good faith, and abstain from fraud, in keeping the property. Bad faith is at least as bad as gross negligence, and entails as much liability. The application of this is easy where the very person to whom the property was intrusted is guilty of the fraud. But suppose the master, being the bailee, is personally blameless, and his servant is the guilty one; shall the master be held liable? . . . On the question now to be decided, the cases hold that the act of the cashier by which he appropriates exclusively to himself a gratuitous special deposit in the bank is not an act done in the bank's business and within the scope of his employment. The custody of the deposit implies no act to be done, but only a mere continuance of possession until a return of the property is demanded. The cashier had nothing to do about it except suffer it to remain in a safe place of deposit. Consequently, in taking it to himself, he is said to 'step aside' from his employment to do an act for his personal gain, regardless of the business for which he was engaged. Such an act is lacking both in the rendition of, and in the intent to render, any service to the employer. The cashier does not, as a matter of fact, act with the bank's authority, and, furthermore, does not essay or even profess to act in its behalf. He represents nobody but himself."

In *Scott v. National Bank* (1873) 72 Pa. 471, 13 Am. Rep. 711, where certain bonds which the plaintiff had deposited with the defendant bank for safekeeping were stolen by the teller, the bank was held not to be liable for their value. The *ratio decidendi* is indicated by the following portion of the opinion, in which the court distinguished the case from an earlier one (*Lancaster County Nat. Bank v. Smith* [1869] 62 Pa. 54), where the action was held to be maintainable: "That case was one where the teller of the bank delivered the deposited bonds to a stranger calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held responsible for his negligence. Then the teller, in giving out the deposit, was

acting in his official capacity, and hence the liability of the bank. The case before us now is different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller, but the taking of the bonds was not an act pertaining to his business as either clerk or teller. The bonds were left at the risk of the plaintiffs, and never entered into the business of the bank. Being a bailment merely for safe-keeping, for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was no way connected with his employment. Under these circumstances the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers should not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in caretaking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create." The reasoning of the court seems to be unsatisfactory in that it fails to take account of one aspect of the bank's liability; viz., the possibility that a breach of duty in respect of the depositor might be predicable on the ground that it had, by a want of proper system of supervision, enabled the teller to misappropriate the bonds. It may be that the conclusion would have been different if the situation had been considered in this point of view. In the present connection, however, it is not necessary to say any more on this point; for the bank's liability, if imputed on the ground suggested, would have been based on the personal fault of the employer, and not on the consideration that the teller's theft was an act within the scope of his employment.

In *First Nat. Bank v. Rex* (1879) 89

bailee's exemption from liability as being predicable only with respect to such a bailment.⁴ But having regard to the considerations upon which that exemption has been declared to be founded, there seems to be no adequate reason for the differentiation thus suggested. The circumstances under which recovery has been disallowed in cases where the bailment was for hire are shown by the subjoined note.⁵

Pa. 312, 33 Am. Rep. 767, it was held that liability in respect of the fraudulent misappropriation by its president of bonds deposited with it could not be imputed to it, where its officers had no knowledge of the fraud, nor any reason to doubt the president's honesty.

The Massachusetts and Pennsylvania decisions cited above were approved in *Preston v. Prather* (1890) 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162.

In *Ray v. Bank of Kentucky* (1874) 10 Bush, 344, where a special deposit was stolen by the cashier of a bank, the court thus stated its position: "In this case the bank was required to do nothing more than to permit the deposits to remain in its vault until called for by the depositor. Its cashier was charged with no other duty. It was not expected that he should for any purpose open the package or bag. As to them his whole duty consisted in using proper care and diligence in closing and fastening securely the doors of the vault and banking house when business hours were over. If he turned aside from the discharge of this negative or passive duty, and assumed to act for himself, clearly outside of the scope of his employment, and opened the package and bag and appropriated the contents to his own use, then, unless the bank, prior to such action, had reasonable ground to suspect his integrity, it cannot be made to answer for his said fraud or felony."

In *Unites Soc. v. Underwood* (1873) 9 Bush, 609, 15 Am. Rep. 731, where the officers of a bank sold and converted to its use bonds deposited with it, the directors might be held liable for the misappropriation if by ordinary diligence they could have prevented it.

⁴See especially the extract quoted in the last note from the opinion of *Scott v. National Bank*.

⁵In *Finucane v. Small* (1795) 1 Esp. 315, it was ruled by Lord Kenyon *at nisi prius*, that the bailee was bound

to take the same care of goods bailed to be kept for hire as he would of his own; and consequently that, if they were stolen by his servants, without gross negligence on his part, he was not liable. "To support an action of this nature," said the learned judge, "positive negligence must be proved. It has appeared in evidence in this case that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own."

In *Schmidt v. Blood* (1832) 9 Wend. 268, 24 Am. Dec. 143, it was held that, in the absence of testimony charging him with personal negligence, a warehouseman was not responsible for goods stolen from his warehouse by his storekeeper, and that the onus of proving such negligence lay upon the bailor.

By Lord Campbell, *arguendo*, in *Dansey v. Richardson* (1854) 3 El. & Bl. 144, 2 C. L. R. 1442, 23 L. J. Q. B. N. S. 217, 18 Jur. 721, it was laid down that the keeper of a boarding house is not liable for the "consequences of a felony committed by his servant" in regard to the goods of a guest.

In *Cheshire v. Bailey* [1905] 1 K. B. (C. A.) 237, 1 Ann. Cas. 94, the plaintiff, a wholesale silversmith, hired from the defendant, a jobmaster, a brougham, horse, and coachman, for the purpose of driving the plaintiff's traveler about a city with samples of the plaintiff's wares to be shown to customers. It was known to the defendant that, in the course of business, occasions would arise when the traveler would have to leave the brougham with samples in it in charge of the coachman. On one of such occasions the coachman, in pursuance of an arrangement made with confederates, drove the brougham

Personal negligence on the part of the bailee may be inferred where it appears that he exercised less care with regard to the custody of the

to a place where a great portion of the samples in it was stolen by them. In an action brought by the plaintiff against the defendant to recover the value of the goods so stolen, the responsibility of the defendant in respect of the criminal act of his servant was denied on the ground that it had not been done within the scope of his employment. Collins, M. R., said: "Walton, J., being, as he conceived, bound by the decision of this court in the recent case of *Abraham v. Bullock* [1902] 86 L. T. N. S. 796, 50 Week. Rep. 626, 18 Times L. R. 701, gave judgment for the plaintiff for £800. Putting that case aside for a moment, I desire to consider whether, on principle, the decision of the learned judge can be supported. I have come to the conclusion that it cannot. There was no special contract in this case altering the ordinary rights of the parties as implied by law upon a bailment of this class. Technically it seems to come under the class described as *locatio operis faciendi*. The defendant, though not a common carrier, has come under the ordinary obligations of a person who undertakes for consideration to do the work of carrying the plaintiff's traveler and his goods to such destination as he shall direct. He is bound, therefore, to bring reasonable care to the execution of every part of the duty accepted. He may perform that duty by servants or personally, and, if he employs servants, he is as much responsible for all acts done by them within the scope of their employment as he is for his own. But he is not an insurer, and is not answerable for acts done by his servants outside the scope of their employment." Recurring to the question of the effect of *Abraham v. Bullock*, *supra*, the learned judge observed: "I have carefully reconsidered that case, and am quite satisfied that the decision is right, and that it does not support the decision under appeal. The short facts there were that the driver of a commercial brougham, hired under similar circumstances, negligently left the brougham unguarded while the traveler was at lunch, and thus gave opportunity to thieves to steal its contents. The negligence of the servant in that case was clearly committed within the scope

of his employment, and was therefore negligence for which the master was responsible just as much as if he had elected to watch himself instead of doing it by his servant, and had then neglected it in the same manner." Mathew, L. J., said: "I see no reason to doubt that in a contract of this kind the jobmaster undertakes with the hirer that the coachman will take care to protect the goods in the brougham from damage or depredation. This was the decision of this court in *Abraham v. Bullock* (1902) 86 L. T. N. S. 796, 50 Week. Rep. 626, 18 Times L. R. 701, the object of the present action was to establish that the defendant had guaranteed the honesty of his servant, and was therefore responsible for the theft of which the coachman had been guilty. But I see no ground for the implication of any such undertaking on the part of the defendant. It was not shown that the plaintiff had informed the defendant that he insisted upon any such liability on the part of the defendant. If he had done so, there seems little reason to doubt that the defendant would have declined to take upon himself without remuneration the obligation of an insurer. The coachman was not such a person as would, in the ordinary course of business, have been intrusted for safe-keeping with money or money's worth to the amount of many hundreds of pounds. The true inference from the facts would seem to be that the plaintiff relied for the protection of his property, not upon any contract with the defendant, but upon the strong arm of the criminal law, and the dread which it felt of being brought within its grasp. The plaintiff had no reason to assume that the coachman, in committing a crime, would be acting within the scope of the authority given him by his master, which must be measured by reference to the ordinary duties of a coachman. In the absence of any evidence of a contract, the law applicable to the case would seem to be clear. Any departure by the servant for his own purposes from the discharge of his ordinary duties would relieve his master from responsibility; and, from the time that the coachman drove the brougham to the public house, with the

intention of assisting in the theft of the contents, the master ceased to be liable for any loss or damage that followed. The contract between the plaintiff and the defendant must be regarded as having been made on the footing of this well-known rule of the law of master and servant. The defendant is no more liable than he would have been if the brougham and its contents, without negligence on the part of the coachman, had been carried away by a stranger."

In *Satterlee v. Groat* (1828) 1 Wend. 272, it was held that a person, not a common carrier, who sends his servant to haul goods of a certain person, with instructions not to take the goods of anyone else, is not responsible for the goods of a third person, taken by the servant, and embezzled by him during the journey. The trial judge instructed the jury that it was for them to determine whether the defendant was, at the time, acting in the capacity of a common carrier; and that, if they believed that the teamster had been specially employed by the defendant, for a particular purpose and object, then he could not bind the defendant by a contract beyond his special employment. A verdict for the defendant was sustained. The court said: "The law was correctly laid down by the judge. The defendant stood upon the same footing as though he had never been engaged in the forwarding business. He had abandoned it entirely certainly one year, and, according to the weight of evidence, four years previous to this transaction. He makes a special contract with Dows to bring goods for him from Albany, and gives his teamster express instructions to bring goods for no one else. He was acting under a special contract, and not in the capacity of a common carrier. Is he, then, responsible for the act of his servant, done in violation of his instructions, and not in the ordinary course of the business in which he was employed? If a farmer send his servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and absconds with it, is the master responsible? Most clearly not. It was an act beyond the scope of the general authority of the servant, *quoad hoc*; therefore he acted for himself and on his own responsibilities, and not for his employer."

In *Haskell v. Boston Dist. Messenger Co.* (1905) 190 Mass. 189, 2 L.R.A. (N.S.) 1095, 112 Am. St. Rep. 324, 76 N. E. 215, 5 Ann. Cas. 796, the defendant was a company which merely furnished messengers to the public for hire. Its advertising pamphlet contained numerous statements, all of which implied that the business done by the company was only in furnishing messengers for the service of others, except that, at the bottom of one page, there was this statement: "We deliver addressed circular work, bills, monthly statements, catalogs, calendars, etc. Get our prices." For several years, shortly before Christmas, it had distributed a card which stated that it made a specialty of delivering Christmas presents. Held, that, in the absence of evidence showing a want of proper care in regard to the selection of a particular messenger sent to an applicant, it could not be held liable for the loss of the applicant's property, caused by the dishonesty of the messenger. The court said: "The plaintiff contends that the defendant acted as a common carrier in receiving the bill and undertaking to bring back the money. We find nothing in the evidence tending to show this. It undertook to furnish messengers to be used by its employers in any way in which messengers could properly be employed. If special and peculiar service was wanted, special arrangements were to be made for it. In the ordinary conduct of its business the defendant did not assume any control of the work in which the messengers were to be employed, and usually had no knowledge of it until after it was completed. Even then it had no knowledge of the nature of the message delivered, or the particulars of service. The employer was left to direct the messenger, to determine what he should do and how he should do it, subject to an implied understanding that he should not be called upon to render service of a different kind from that which can properly be performed by messengers. In this service the messenger became, for the time, a servant of the employer, while he was still in the general service of the defendant. . . . It was shown that messengers had often been intrusted with money and property by those who called them. So far as appears, this was under the general arrangement already stated, which gave the

defendant no knowledge nor any responsibility in regard to the way in which the messenger was used. The evidence tended to show that some of the agents of the company, and perhaps the general manager of the company, knew that sometimes messengers were so used. But this creates no liability for the money or property, so long as the messengers were furnished only to be used and controlled by the employer as he might choose. What is the implied contract or duty of the defendant, growing out of this kind of business? Does the defendant become a common carrier and insurer of everything intrusted to the messengers? It seems quite plain that it does not. It impliedly contracts that the messengers whom it furnishes are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons. Its duty is not very unlike that of a stable keeper who furnishes a horse and carriage for the use of a hirer. Because, for the proper performance of their duties, these messengers should be worthy of confidence, ordinary care in the selection of them requires that investigation should be made and precautions be taken to insure the exclusion of all unfit persons from this employment, and to secure persons of such mental and moral qualifications as render them trustworthy. For a failure to take due precautions in these particulars, the defendant may be held liable, either for negligence or upon an implied contract, to any person who suffers loss from the misconduct of a messenger whom it has furnished. In the present case there was no evidence of negligence of the defendant in this particular. If, in the delivery of Christmas presents, or of bills, statements, catalogs, etc., the defendant becomes a common carrier, it is liable as such. But that can be only by an arrangement different from that made with this plaintiff. The exceptions in regard to the exclusion of evidence must be overruled. None of the testimony excluded had any tendency to show that the defendant became liable as a common carrier for money or property intrusted to messengers under ordinary arrangements like that made with the plaintiff. Mere knowledge that employers sometimes intrusted money to them, without

any contract other than the usual one, under which the messenger is furnished to be used by the employer in the ordinary way, would not make the defendant liable for loss of money, through his dishonesty, unless there was a failure to use proper care in the selection of the messengers."

In *Hirsch v. American Dist. Teleg. Co.* (1906) 112 App. Div. 265, 98 N. Y. Supp. 371, reversing (1905) 48 Misc. 370, 95 N. Y. Supp. 562, a similar view was taken (though the Massachusetts case was not cited) regarding the legal character and limited responsibility of an incorporated telegraph company which operated lines in a city by which to communicate with police stations, and in addition, maintained a staff of messenger boys which it furnished to its patrons at a charge based upon the time employed, but which was not incorporated to carry or deliver property, and did not assume to do so. Discussing the position of the boy who had stolen the plaintiff's money, the court said: "It might be that as to third parties this messenger boy would be the servant of both or either; but that could have no relation to the question whether, as between the general employer who furnished the servant and the person who engaged the messenger for a particular work, the general employer was responsible for the misfeasance or malfeasance of the messenger. Nor was the case submitted to the jury upon any such theory. The question that was submitted to them was whether or not there was a special agreement by the defendant corporation to deliver this particular package to the bank at Rutherford; and the jury were especially instructed that, in the absence of such an agreement, they must find for the defendant. That instruction is the law of this case, and as the evidence did not sustain a finding that there was such a special agreement, the verdict was not sustained by the evidence." The evidence referred to was to the effect that the defendant's manager was told of the contents of the envelop, but that the owner of the money delivered the envelop to the manager, and, after refusing several messengers, selected one and delivered the envelop to him in the presence of the manager, and personally gave directions to the messenger as to the carriage and delivery of the envelop. Until the court of appeals has had an

thing bailed than with regard to his own property,⁶ or that he omitted to take appropriate precautions, after having been notified of circumstances calculated to raise a suspicion that the servant in question was not trustworthy.⁷

The second of the theories above reviewed is now so strongly forti-

opportunity of expressing its views upon the subject, this decision must be regarded as overruling the opinions in *Sanford v. American Dist. Teleg. Co.* (1895; N. Y. C. P.) 13 Misc. 88, 34 N. Y. Supp. 144, and *Gilman v. Postal Teleg. Co.* (1905) 48 Misc. 372, 95 N. Y. Supp. 564 (in both of these cases the gravamen of the action was negligence), in so far as they rely upon the theory that a company of the sort in question is a common carrier. The *Gilman Case*, it may be remarked, was decided, partly, at least, upon the authority of the reversed decision of the lower court in the *Hirsch Case*.

⁶In *Clarke v. Earnshaw* (1818) Gow, N. P. 30, where the defendant's servant, who slept in his master's shop for the purpose of protecting the property in it, stole a chronometer intrusted to the defendant to be repaired, with some watches, part of which belonged to the defendant himself, the defendant was held liable for the value of the chronometer, as having, at the time the theft was committed, deposited the principal part of his own property in an iron chest, in the same shop, which could not easily have been, and was not, broken open. It was ruled by Dallas, Ch. J., that the servant had been improperly trusted; and the defendant was guilty of gross negligence in leaving him in care of the goods. Having regard to this statement, it seems clear that the doctrine laid down by the learned judge, that "the defendant was bound to protect the property against depredation from those in the house," must be taken as importing merely that he was bound to use ordinary diligence in protecting it.

⁷This ground of liability is recognized in *Scott v. National Bank* (1873) 72 Pa. 479, 480, 13 Am. Rep. 711. There the servant in question, a teller, was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks. This fact was not allowed to control the decision, because it was proved that

the officers of the bank did not know of his gambling in stocks until after he had absconded. The court, however, observed: "No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters whose speculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed." This passage was quoted with approval in *Preston v. Prather*, *infra*.

In *Ray v. Bank of Kentucky* (1874) 10 Bush, 344, it was held that the case should have been submitted to the jury where the bank cashier by whom plaintiff's special deposit was stolen had, to the knowledge of some of its directors, been guilty of irregularities in failing to answer letters of inquiry as to moneys collected by the bank, and in drawing checks upon other banks at which his own bank of Bowling Green had no deposits, and with which it had made no arrangement to have such checks honored.

In *Preston v. Prather* (1890) 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, a banker who knew that his cashier, who had no property except his salary, and had access to the securities deposited with the bank, had been speculating in grain, and made no examination to ascertain whether such cashier has been using such securities, but retained him in his position, was held to be responsible for bonds deposited in the bank, which were stolen by the cashier.

fied by precedents that it is virtually beyond the reach of criticism. Yet it may be permissible to suggest that there is a certain anomaly in a position which essentially amounts to this,—that a servant who is bound by virtue of his contract to exercise the same degree of diligence as the bailee in protecting the thing bailed against unlawful interference by strangers transcends the scope of his employment where he himself converts that thing to his own use. In spite of the adoption of that view by several tribunals of the highest authority, it may reasonably be contended that a breach of the criminal's delegated duty is a necessary and inevitable result of the act of conversion. If such is actually the juristic situation, it seems to follow that the conversion should be treated as being imputable to the criminal's employer.

2490. —by servants of masters who expressly contract to protect property against theft.—On grounds which seem conclusive it has been held by one of the inferior courts of New York that a company which has contracted to guard the plaintiff's house from burglars and thieves during his absence is answerable for the act of one of its watchmen in breaking into the house and stealing property from it.¹

2491. —by servants of trustees, executors, etc.—In England it is settled law that a trustee cannot be held liable for the dishonesty of the servants and agents whom he engages to assist him in the administration of the trust property, unless some specific negligence in respect of their employment or retention is brought home to him.¹ This doc-

¹ *Williams v. Brooklyn Dist. Teleg. Co.* (1895; Brooklyn City Ct.) 12 Misc. 565, 67 N. Y. S. R. 602, 33 N. Y. Supp. 849. The court said: "It is well settled that, in a case where the party contracting commits the duty contracted for to another, he cannot shield himself from liability on the ground that he has committed his duty to another person, and that he never authorized that other person to do the particular act complained of. Having contracted to perform the duty, if he commits it to another, he does it at his peril. It is to be treated as his own act, and he is liable for whatever his agent or servant does, even though done contrary to instructions, wilfully or fraudulently. A familiar application of this principal is found in the obligation of common carriers of passengers. . . . Plaintiff employed defendant to protect his property with the knowledge that it could only act through its servants

whom it employed for that purpose. Defendant was bound to exercise reasonable care in the selection of its servants, and, if it neglects to do so (and the jury have here so found), it cannot now be permitted to plead, as an excuse for failing to do the very thing it was employed to do, that its servant was the guilty party, and that it has no concern with or responsibility for his unlawful acts, producing the very opposite result from that which it was employed to effect." This case was apparently not carried to a higher court.

¹ In *Speight v. Gaunt* (1883) L. R. 9 App. Cas. 1, 25 Eng. Rul. Cas. 298, a broker, employed by a trustee to buy securities of municipal corporations authorized by the trust, gave the trustee a bought-note which purported to be subject to the rules of the London Stock Exchange, and obtained the purchase money from the trustee upon the representation that it was payable the next

trine is applicable although the trustee may be remunerated for his services.²

day, which was the next account day on the London Exchange. The broker never procured the securities, but appropriated the money to his own use, and finally became insolvent. Some of the securities were procurable only from the corporations direct, and were not bought and sold in the market, and there was evidence that the form of the bought-note would have suggested to some experts that the loans were to be direct to the corporations; but (as the House of Lords held on the facts) there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business; and such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange. Held, affirming the decision of the court of appeals (Lord Fitzgerald doubting), that the trustee was not liable to the *cestuis que trust* for the loss of the trust funds. Lord Selborne referred to the early case of *Ex parte Belchier* (1754) Ambl. 218, in which it was determined by Lord Hardwicke "that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss." Lord Blackburn said: "The authorities cited by the late Master of the Rolls, I think, show that, as a general rule, a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own.

There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money; and it may be that however usual it may be for a person who wishes to invest his own money, and instructs an agent, such as an attorney or a stock broker, to seek an investment, to deposit the money at interest with the agent till the investment is found, that is in effect lending it on the agent's own personal security, and is a breach of trust. No question as to this arises here."

In a Quebec case it was held that a testamentary executor was bound to supervise the management of matters intrusted to an agent, and was consequently liable for his misappropriation of the trust fund, although he was a notary of high reputation. *Low v. Gemley* (1890) 18 Can. S. C. 685, affirming (1889) Montreal L. R. 5 Q. B. 186. This decision apparently presupposes an obligatory standard of diligence higher than that exacted in England.

² *Jobson v. Palmer* [1893] 1 Ch. 71. There the dishonest servant was employed to help in carrying on a shop. It was found as a fact that, under the circumstances, and having regard to the nature of the plaintiff's business, which had temporarily to be carried on, and to the way in which the plaintiff's goods had to be offered for sale and sold in order to realize the best prices, the case was one in which the defendant was entitled and bound to employ a man to do the work that the thief was employed for, and that no negligence in regard to his selection was proved. Romer, J., said: "The position of the defendant may, I think, be well likened to that of a bailee for reward who has to take care of, or do something with, the article handed to him,—of course, I am speaking of a common bailee for reward, and not of the special cases of an innkeeper and a carrier. Now, such a common bailee is clearly not liable for the tortious acts of his servants, causing a loss of the articles, unless there has been negligence on his part. And in the present case, as I have said, the defendant has, in my judgment, dis-

The provisional assignee of a bankrupt is not responsible for the fraud of an agent appointed with due care.³

2492. — by other classes of servants.— The liability of an employer in respect of property stolen by his employee has been affirmed under the following circumstances: Where debts were not paid by a servant to whom the master had given money for that purpose;¹ where the secretary-treasurer of an unincorporated building society, who transacted that part of its business which related to the borrowing of

charged the onus of proving that there was no negligence on his part. It is true that Lewis had access to the plaintiff's goods; but that was inevitable, having regard to the nature of the business and to the fact that the goods had to be shown to the customers and be handed over to them if they bought."

³ *Raw v. Cutten* (1831) 9 Bing. 96. Tindal, Ch. J., said: "Inasmuch, therefore, as the provisional assignee had the power, both from the necessity of the case, and also from the ordinary course of business observed on similar occasions, to execute this part of his duty by means of an agent, and as there is the entire absence of fraud on the part of the defendant, and no proof of negligence in choosing an insufficient or dishonest person as his agent, we hold, upon the authority of the cases above referred to, that he is not to be charged with the money received by Williams, and not paid over to the defendant, in an action for money had and received by him to the use of the plaintiff. It has been argued that the case resembles that of a sheriff, who undoubtedly would be liable to the plaintiff in any action, for money levied and received by his bailiff, although not paid over to himself. In the first place, the sheriff is no trustee, having no interest in the goods seized and sold. He is a public officer upon whom the law casts the ministerial duty of seizing and selling under the King's writ. There may well, therefore, be one scale of responsibility attached to the breach of trust in the trustee, and another to the breach of an express command made by the law to a ministerial officer. Again, from the necessity of the case, and for the security of the King's subjects, the rule *respondent superior* has been laid down from the earliest times in the case of sheriffs over whose appointment the pub-

lic have no control; and in consequence of that known rule of law, the practice has prevailed from early times that the deputies and bailiffs of the sheriffs give security to him against their wrongful acts done in the execution of warrants granted by him. It would be unreasonable, therefore, to apply such rule to the present case, which comes under the description of the nonperformance of a trust by a trustee appointed for a particular purpose; namely, the trust of paying over to the assignees all the monies received by the defendant. . . . The case in *Re Lichfield* (1737) 1 Atk. 87, would seem at first to bear against the present defendant. He had intrusted the clerk to the commission to receive and to pay some of the effects and debts of the bankrupt. No fraud appeared in the assignee, but the clerk afterwards failing, the question was whether the assignee should make up the deficiency. Lord Hardwicke held the assignee liable upon the general principle of any other trustee, who, if his agent deceives him, *respondet superior* to the *cestui que trusts*. But he afterwards adds as the ground of his judgment, that the assignee employed the clerk to the commission, 'a person of very little credit,' to pay the dividends; and, again, that 'he did not consult with the body of the creditors, who are his *cestui que trusts*, in the appointment of this agent.' So that it is clear that his judgment proceeds on a want of proper care in the assignee, in appointing the particular agent."

¹ *Wayland's Case* (1702) 3 Salk. 234. The reason assigned by Holt, Ch. J., for holding the master to be chargeable, was that "the master at his peril ought to take care what servant he employs: and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen."

the money, misappropriated a sum lent to it;² where a servant employed to drive a team stole hay to feed the team, and it did not appear whether the master had or had not furnished hay for such purpose, the latter was held liable for the trespass;³ where the cashier of a bank which held a note on which he was an indorser received bonds as a collateral security, and, having sold them, used the proceeds to reduce his indebtedness to the bank for money unlawfully appropriated by him;⁴ and where the agent of a financial corporation absconded with the proceeds of a check for a sum of money which had been lent to the plaintiff in pursuance of an application made through the agent.⁵

² *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880) L. R. 5 C. P. Div. 331, 2 Eng. Rul. Cas. 366. The certified rules of the society authorized the directors to borrow money not exceeding a prescribed amount. The usual course of business was that the secretary-treasurer delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed, exceeding that limited by the rules, the plaintiffs paid him a sum as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same. Held, by Lord Coleridge, Ch. J. (sitting alone), that although money had been borrowed in excess of the total amount limited by the rules, and they might therefore afford protection to the society or its members as between themselves and the directors, yet that the society and directors, having, for a purpose legal in itself, authorized the loan made by the plaintiffs, were both liable to them. "If the members of the society," said the learned judge, "or any of them, were really ignorant of what Keighley Lea was habitually doing, and if, knowing it, they did not sanction it, they might have been called to say so. No one was called to say so, probably for the best

reason, that no one could be. The case comes, therefore, under a well-settled principle. The society have put their agent in his place to do the very acts for them which he did, and they must be answerable for the manner in which he has conducted himself in doing those acts. . . . As to the directors, it seems to me quite plain that they might, if they pleased, hold out Keighley Lea to the plaintiffs as authorized to undertake for them that they would give their promissory note on the receipt of money paid as this £100 was paid. It seems to me equally plain that there is overwhelming evidence, quite uncontradicted, that they did in fact so hold him out. It follows, I think, that they are bound by his undertaking."

³ *Potulni v. Saunders* (1887) 37 Minn. 517, 35 N. W. 379. The majority of the court were of opinion that, from the facts on the record, "it might fairly be found that providing food for the team was an act contemplated by the servant's employment; and, if so, that the defendant would be liable for the use by the servant of unlawful means to accomplish that end, and that the taking of the hay for the purpose of feeding to the horses was within the line of his employment."

⁴ *First Nat. Bank v. Sing Sing Gas Mfg. Co.* (1909) 194 N. Y. 580, 88 N. E. 1119, affirming (1907) 120 App. Div. 542, 104 N. Y. Supp. 1040. The *ratio decidendi* was that the cashier, being intrusted with the management of the bank's affairs, had a general authority to receive additional security for notes held by the bank.

⁵ *Finn v. Dominion Sav. & Invest. Soc.* (1880) 6 Ont. App. Rep. 20. The

In a case where the plaintiffs were held by the English House of Lords to be entitled to recover from the defendants the value of certain timber fraudulently sold to them by the plaintiffs' confidential clerk, the decision was put upon the ground that the plaintiffs, not having held out the clerk to the defendants as their agent to sell to the defendants, were not estopped from denying the clerk's authority to sell; that the clerk, having no title or apparent authority himself, could not give the defendants any title; and that the plaintiffs were entitled to recover from the defendants the value of the timber. The theory of the court of appeal, that the loss should fall on the plaintiffs, because they had, by their conduct in giving their clerk authority to sign delivery orders, enabled him to commit the fraud, was disapproved.⁶ In another case where an agent employed by a first mortgagee to sell the mortgaged premises misappropriated the surplus

plaintiff, in making his application, requested the defendant to send the money "by check, addressed to W.," the agent. In accordance with their custom to make their checks payable to their agent and the borrower, to insure the receipt of the money by the latter, they sent W. a check, payable to the order of himself and the plaintiff. The plaintiff swore that he did not know that the paper he signed was a check, and there was no evidence to show that he had dealt with W. in any other character than as the defendants' agent, through whose hands he expected to receive the money. The decree of the lower court, restraining proceedings on the mortgage which the plaintiff had given to the defendants as security, and directing a reconveyance, was affirmed. Patterson, J. A., said: "The facts seem to me to be, that the plaintiff dealt with Woodman only as agent of the defendants; that he relied upon receiving from the defendants, through Woodman's hands, the money he had borrowed; that he signed the checks supposing it to be a necessary step towards getting the money; that Woodman's duty to the defendants was to indorse the check to the plaintiff, or to see that the money reached the plaintiff's hands; and that he fraudulently neglected that duty. The defendants, who, by making the check payable to Woodman, put it in his power to commit the fraud, must bear the loss. Having made a distinct act of their agent essential to the plain-

tiff's power to receive the money, and having adopted this method as a precaution in their own interest, it would, to my apprehension, be unjust to subject the plaintiff to the consequences of the agent's fraud, without at least showing that the agent had done the act prescribed, or that the plaintiff had knowingly accepted as sufficient that which was done."

For cases in which the loss caused by the conversion of property of which possession had been, in the course of their employment, obtained by persons who were agents, not servants, was held to be imputable to their principals, see *Fatta v. Edgerton* (1911) 143 App. Div. 658, 128 N. Y. Supp. 181 (attorney absconded with proceeds of mortgage); *Greer v. Lafayette County Bank* (1895) 128 Mo. 559, 30 S. W. 319 (president of bank converted shares).

⁶ *Farquharson v. King* [1902] A. C. 325, reversing [1901] 2 K. B. (C. A.) 697, 70 L. J. K. B. N. S. 985, 85 L. T. N. S. 264, 49 Week. Rep. 673, 17 Times L. R. 689. The plaintiffs, who were timber merchants, warehoused with a dock company the timber they imported, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk, under an assumed name, fraudulently sold timber of the plaintiffs to the defendants, who knew nothing of the plaintiffs or of the clerk under his real

money which, by falsely representing that the second mortgagee had empowered him to receive it, he had induced the first mortgagee to leave in his possession, it was held that the second mortgagee could not hold the first liable for the money.⁷ In another case, where the servant of a person who carried on business in one city purchased goods in another city for cash, and misappropriated the money which his employer's general agent in the latter city gave him to pay for the goods, it was held that the vendor could not recover the price from

name, and who bought and paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock company orders for the transfer of the timber into his assumed name, and then in that name giving delivery orders to the defendants. Referring to an earlier case, *Henderson v. Williams* [1895] 1 Q. B. (C. A.) 521, 14 Reports, 375, 64 L. J. Q. B. N. S. 308, 72 L. T. N. S. 98, 43 Week. Rep. 274, 11 Eng. Rul. Cas. 105, in which the general doctrine formulated in *Root v. French* (1835) 13 Wend. 570, 28 Am. Dec. 482, had been mentioned with approval, Lord Halsbury said: "I confess I am a little surprised that two of the learned judges seem to be under the impression that my proposition, quoted, as I have said, from an American judge, was that any person who has enabled another by any means to commit a fraud must be the person to suffer when two innocent persons are in question. Of course it depends on the sense in which you are to understand the word 'enabled.' As I put it to the learned council yesterday, in one sense every man who sells a pistol or dagger enables an intending murderer to commit a crime, but is he, in selling a pistol or a dagger to some person who comes to buy in his shop, acting in breach of any duty? Does he owe any duty to all the world, as is suggested here, to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a crime? It seems to me that the moment that you analyze what is intended by this argument the answer is plain; when you analyze what is the only function which this man Capon was entitled to perform, it is simply this,—that he was a delivery clerk. But, say the learned counsel for the respondents, not only was he a delivery clerk,

but sometimes he had power and authority to make a contract. Suppose he had—what then? Was anybody misled by that? Did anybody act upon that belief? No one. Therefore, any notion of anybody acting upon something that was held out and represented is entirely out of the question." Lord Robertson said: "This seems to me to be exactly the case of a servant having unrestricted access to goods for his master's purposes, and using that access to steal the goods and sell them. In the one case, as in the other, the innocent purchaser parts with his money on getting the goods, and does so misled by the fact of possession being given owing to the dishonest servant having access to the goods. And, unless the master is bound to all the consequences of the servant's access, I can see no grounds for the respondents' argument on 'disposing power.'" Lord Lindley said: "It is, of course, true that by employing Capon and trusting him as they did, the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiff in one sense enabled him to cheat both themselves and others. In that sense, everyone who has a servant enables him to steal whatever is within his reach. . . . In the present case, in my view of it, Capon simply stole the plaintiff's goods and sold them to the defendants, and the defendants' title is not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike. The defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; and the plaintiffs are not, therefore, precluded from denying Capon's authority to sell."

⁷ *Thorne v. Heard* [1894] 1 Ch. (C. A.) 599.

the employer.⁸ But the reasoning by which the decision was supported is somewhat unsatisfactory.⁹

The liability of the employee has also been denied where the "accredited clerk" of a firm of stock brokers, in whose behalf he transacted a large amount of business of their clients, got possession of some certificates of shares which had been duly delivered to his employers by the secretaries of the companies concerned, but had not been sent on to the purchaser, and, having executed forged transfers, sold the shares on the Stock Exchange to innocent buyers in his own behalf, and appropriated the proceeds;¹⁰ and where the servant of a contractor engaged in decorating a building committed a theft in a room which, as the door was locked, he had been ordered to enter through the window, for the purpose of doing some work;¹¹ and where the secretary of a company misappropriated a sum of money

⁸ *Almon v. Tremlet* (1840) 1 N. S. 1st ed. 89, 2d ed. 117. Halliburton, Ch. J., said: "All that the Starrs (defendant's general agents) did was to give money to Lane to purchase copper for cash. Starr expressly negatives Lane's having any authority to make purchases of any kind on defendant's credit. The plaintiff's own witness proves that no credit (in the mercantile sense of the word) was given to anybody in this transaction. It was a sale for cash; but, unfortunately, the plaintiff reposed confidence in Lane that he would bring the money for it, according to agreement made with him; and the article was delivered to him without exacting the payment from him at the time. Now, it was the plaintiff who reposed that confidence in Lane; and if Lane abused it, he must take the consequences as far as this part of the case goes. . . . The mere reception of the goods, therefore, does not amount to a recognition unless they are received under circumstances which authorize an inference that the party receiving them wants to recognize the power of another to make purchases on his credit. Now here a party who had never authorized Lane to purchase goods for him on credit, but was accustomed to receive goods from him out of this vessel, bought for him with cash, receives this copper from him out of that vessel in the usual manner. Can that amount to a recognition of a purchase made on his credit?" Hill, J., said: "In all the cases that I have looked into, where the master is

held liable by reason of the receipt and use of the goods, they were sold to the servant on the credit of the master, and the master was known and was made the debtor. Here they were sold for cash to Lane, and not on the credit of the defendant. If a party thinks proper, without any authority, to give my servant goods on credit on my account, he takes the risk of my liability to pay; but if he chooses to make a cash sale to my servant, and looks to and treats with him as the purchaser and principal, he must, I think, abide by his mark; and if I have paid the servant for the article, I do not see how I can again be made responsible to a man of whom I know nothing."

⁹ The defendant, as it would seem, might properly have been held liable upon the authority of Lord Holt's ruling in *Wayland's Case*, note 1, *supra*, which apparently was not brought to the attention of the court. It is also deserving of notice that the decision was rendered at a date when the nature and extent of the liability of an employer for the fraudulent act of his employee had not been precisely defined. See § 2383, *ante*.

¹⁰ *Robb v. Grew* (1905) 8 Sc. Sess. Cas. 5th series, 90.

¹¹ *Searle v. Parke* (1895) 68 N. H. 311, 34 Atl. 744. The court said: "The plaintiffs could not recover in case against the defendants for negligently employing thieves as servants, because negligence is not found. In trespass *quare clausum* the defendants would be

consisting of the accumulated amounts of a salary which another employee had, after giving a receipt for it, left in his hands at the end of each month, to be drawn from time to time, as he might need it.¹²

A public official whose duties consist in the collection of money on behalf of the state or of a municipality is liable for the defalcations of a deputy whom he permits to discharge those duties.¹³

2493. Forgery.—A forgery is not infrequently one of the circumstances disclosed by the evidence in cases where recovery is sought on the ground of the fraud of an employee. See §§ 2391 *et seq.*, *ante*. In one of those cases it was laid down that, so far as regards the liability of the employer, there is no difference between a fraud carried out by means of forgery and any other fraud.¹ The employer, therefore, is chargeable with the consequence of a forgery committed by his employee, whenever the writing falsified was one to which he was empowered in the course of his employment to impart a certain form; as where the certificates of deposit of railway bond coupons were forged and issued by an employee deputed to transact that part of the business of the railway company;² where the clerk of a stockbroker forged a check for the purpose of obtaining money to meet a balance for which he had by his speculations in a stock exchange rendered his employer liable;³ where a fictitious despatch was sent by a tele-

liable in nominal damages, at least, for the breaking and entering, which they directed. They would also be responsible for any damage directly caused by the act of breaking and entering, and for any consequential injury that naturally and reasonably could be expected to result therefrom. For consequences neither natural nor probable, they would not be answerable. *Gilman v. Noyes* (1876) 57 N. H. 627; *Pollock, Torts*, 31-37; *Cooley, Torts*, 68-77. The larceny was not the immediate or direct result of the unlawful act which the defendants directed. Whether it was the natural or probable consequence of the act—a consequence that the defendants reasonably ought to have anticipated—is a question of fact. *Gilman v. Noyes, supra*. That it was such a consequence is not, and, on the evidence reported, could not properly be, found.”

¹² *Gardner v. Omnibus R. Co.* (1883) 63 Cal. 326. In the opinion of the court, the evidence showed that the employee had left the money with the secretary in his individual, not his official, capacity. It may be doubted, however,

whether the court was justified in so ruling, as a matter of law. For a case involving similar circumstances, but in which the evidence distinctly showed a bailment to the employee in his official capacity, see *Carroll v. People's R. Co.* (1883) 14 Mo. App. 490, § 2489, note 1, *ante*.

¹³ *Reg. v. Stanton* (1852) 2 U. C. C. P. 18.

¹ *Mathew, J.*, in *Shaw v. Port Philip & C. Gold Min. Co.* (1884) L. R. 13 Q. B. Div. 103, 108, 53 L. J. Q. B. N. S. 369, 50 L. T. N. S. 685, 32 Week. Rep. 771.

² *Western Maryland R. Co. v. Franklin Bank* (1882) 60 Md. 36. The court said: “Having confided to him the special trust of executing that business, the agent was held out to the public as competent, faithful, and worthy of confidence; and though he deceived both his principal and the public by forging and issuing the false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong, should bear the loss.”

³ *Clydesdale Bank v. Paul* (1877) 4 Sc. Sess. Cas. 4th series, 626, 14

graph operator; ⁴ where the local agent of a construction company forged a check purporting to have been drawn by the company in its

Scot. L. R. 403. The check in question purported to be drawn on the Clydesdale Bank and one D——, in favor of the clerk's employer. The action was brought against the Royal Bank, the employer, and the trustee of his sequestered estate. Lord Inglis said: "No doubt an agent will not be held to be authorized to commit a forgery or any other wrong; but if, in the course of doing his business of agent, he does commit a wrong or a crime, and if the principal is benefited, then he is liable to the extent to which he is benefited." Lord Shaw observed that "the benefit received by the employer was that the forgery produced a sum which went directly through the clerk to the secretary of the Stock Exchange, and, by wiping out his liability, saved him from being dealt with as a defaulter."

⁴ In *Bank of California v. Western U. Teleg. Co.* (1877) 52 Cal. 280, it was held that if the agent of a telegraph company at one of its stations, with power to delegate his authority, employs another person to transmit and receive messages, and such other person sends a false message purporting to come to the cashier of a bank, directing another bank to pay a fictitious person a sum of money, and the sender then personates the fictitious person and obtains the money without any neglect on the part of the bank, the telegraph company is responsible to the bank for the same. The court said: "If an agent of a telegraph company, whose duty it is to send genuine messages, shall wilfully and fraudulently send a despatch in the name of another, this wrong act is as much done 'in the course of his employment' as if he had negligently sent a forged message. To this extent the person receiving the despatch may depend on the guaranty of the company that their agent is faithful and honest; and he is equally damnified, whether the fraud is committed by the agent directly, or is successfully consummated by another by reason of the negligence of the agent. The agent is authorized to transmit messages, and the transmission of a false message—whether contrived by himself or contrived by another, and negligently sent by him—is within the course of his employment."

In *McCord v. Western U. Teleg. Co.*, (1888) 39 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 39 N. W. 315, the local agent of a telegraph company, who was also agent of an express company at the same place, sent a forged despatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in buying grain. The money was in good faith forwarded by express in response to the telegram, but was intercepted and converted to his own use by the agent. Held, that the transmission of the forged despatch was the proximate cause of the loss, and that the corporation was liable though an action might also have been maintained against the express company. The court said: "The rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment, in furtherance of the master's business or interest, though there are many cases which fall within that rule. . . . Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful acts occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties. . . . The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving despatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a

despatch to investigate the question of the integrity and fidelity of the defendant's agents acting in the performance of their duties, before acting. Whether the agent is unfaithful to his trust or violates his duty to, or disobeys the instructions of, the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send despatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation."

In *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto* (1901) 54 L.R.A. 711, 48 C. C. A. 413, 109 Fed. 369, the defendant was held liable for the money paid by a bank in reliance upon a message which purported to have been sent by another bank, but which was in fact forged by an operator. The court said: "The vital question involved in this case is whether or not a telegraph company can be held responsible in damages for the criminal use of its wires and instruments by a subordinate employee; to wit, a telegraph operator, as distinguished from the manager, agent, or superintendent of the business, acting in pursuance of a criminal conspiracy with an outside party, and in criminal violation of the duties of his position and employment. . . . What is an operator employed for? What are his duties? But one answer can be given; viz., to send and receive messages in the regular order and manner of the business. Of course, it is his duty to send true messages, not false ones or forged ones. The same duty rests upon the agent. If either the agent or the operator should manufacture telegrams and send them over the company's lines, of the character of the telegram sent in the present case, they would be acting outside the scope of their authority. But both would be acting in the direct course of their employment; viz., transmitting messages over the company's lines. The company is held liable because it has placed its agent and operator in charge of its appliances and instruments for the transmission of despatches over its lines, and

authorized them to use the same." The court expressly rejected the contention of counsel that the principle, *Respondet superior*, does not apply in cases where crimes are committed by the agent or employee. The court also relied upon the notion that the operator's act was a violation of a duty which the company owed to the public and third persons to transmit only genuine messages.

In *Usher v. Western U. Teleg. Co.* (1906) 122 Mo. App. 98, 98 S. W. 84, A., an assistant telegraph operator at defendant's office at P., communicated with B., defendant's operator at M., representing himself to be his chief, who was an express agent, and informing B. that he had received a package of money to be sent to F. at M., but, by mistake, had sent it to another place. A. also stated that he would send his own check to replace the money, and requested B. to assist F. in getting the check cashed. B. suggested that certain merchants in that village would probably cash the check, and A. then sent a regular message to B., asking him to assist F., signing the message with the name of his chief, and sent to the merchants mentioned a forged telegram, signed by a bank, advising them to honor such check. A. then presented himself to B., representing himself to be F., whereupon B., taking with him the forged telegram, went out with the assistant to plaintiff, a merchant other than the one to whom the telegram had been sent. B. introduced A. as F., and showed the telegrams, and the plaintiff was thus induced to cash a forged check. The court approved the doctrine applied in the above cases, saying: "It ought to be plain to everyone that if the telegraph company is under an obligatory duty to exercise ordinary care, through its agent, in protecting persons with whom it comes in business contact from forged or fraudulent telegrams, by stronger reason ought it to be held that a positive obligation rests upon it to absolutely protect such persons in respect to its agent, who is himself the swindler. The two obligations, at first view, look to be so near akin as to be substantially alike. While there is a difference, it is principally in the character or degree of the obligation. In the one the obligation upon the company is that its agent will be careful and prudent, the business considered,

own name;⁵ and where a summons was set aside, for the reason that the clerk of the attorney in the case had fraudulently simulated the court's seal upon it.⁶

On the other hand, the liability of a corporation has been denied in a case where its secretary had effected a transfer of its stock by means of the fraudulent use of its seal in the execution of forged powers of attorney. The *ratio decidendi* was that evidence which merely showed that the corporation allowed the seal to remain in his possession, and this enabled him to commit the forgery in question, was not sufficient to establish "that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void."⁷ In another case, where a clerk

in guarding against imposition in sending forged telegrams. In the other there is an absolute assurance that the agent himself has not forged the telegram." It was held, however, that, as the forged telegram was not directed to the plaintiff, nor "intended to affect him, or interest him in any manner," and the communication of the misrepresentation to a person other than the ones mentioned in the telegram was not an event which could reasonably be anticipated, the injury sustained was not a natural or probable consequence of the forgery. The further question, whether the action could be maintained upon the ground that the operator to whom the forged telegram was sent had accompanied the criminal to the plaintiff's house, was thus discussed: "It seems to us that such act of the agent was clearly outside the scope and the course of his employment as defendant's telegraph operator. It would be altogether unreasonable—it would be a dangerous enlargement of the authority of a telegraph operator—to say that he might leave his office and go upon the streets with a stranger, and bind his principal as a sort of surety for money borrowed by the stranger of one with whom the principal had no connection and in whom he had no interest, and to whom he owed no duty. That is, practically, what is sought in this case; for there was nothing done by the agent when he went out with Connelly in quest of money which can be in any way traced to authority from defendant, either express or implied. True, he delivered the telegram to plaintiff, and a delivery of telegrams is undoubtedly a part of his

employment, and if he delivers to a party not the addressee, he may put a liability against his principal, but not in favor of the person who accepts such improper delivery, for no duty was owing to such person. Besides, such person must necessarily know that the agent is violating his duty to his principal, if not the law itself, in making delivery to one not addressed. It must have been equally manifest to plaintiff that the agent, merely by virtue of being a telegraph operator, had no authority to bind the defendant by assurances that it would be obligated to any person receiving the telegram, though not the addressee. To allow such authority, in consideration of where it might lead, would go far towards making the operation of telegraph lines too hazardous for prudent men to undertake."

⁵ *Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank* (1899) 38 C. C. A. 108, 97 Fed. 181, 186. The *ratio decidendi* was that, as the company had authorized the forger to indorse and sign checks in its behalf, any loss resulting from his dishonesty, when apparently acting within the scope of his powers, must be borne by it.

⁶ *Dunkley v. Farris* (1851) 11 C. B. 457. The attorney was held to be personally liable for the costs entailed by his clerks.

⁷ *Bank of Ireland v. Evans' Charities* (1855) 5 H. L. Cas. 389. The secretary having been indicted and convicted after the discovery of his crime, the trustees who constituted the corporation authorized one C. to transfer the stock. The bank in which it was registered having

in the office of a local insurance agent had forged his name to a policy, the decision holding that the company could not hold the agent accountable for the amount paid on the policy was referred to the consideration that the misfeasance had neither been committed by the agent's authority, actual or apparent, nor ratified by him after its commission.⁸

refused to make the transfer, an action was brought against it. The judge who tried the cause told the jury that if, under these circumstances, the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the bank. Held, that the direction was wrong. Parke, B., who delivered the opinion of the judges consulted by the House of Lords, said: "We concur with Mr. Justice Jackson and Justices Ball, Crampton, and Torenson, and the Chief Justice Lefroy, in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself. Such was the case of *Young v. Grote* (1827) 4 Bing. 253, 5 L. J. C. P. 165, 12 F. Moore, 484, 29 Revised Rep. 552, on which great reliance was placed in the argument at your Lordships' Bar. In that case it was held to have been the fault of the drawer of the check that he misled the banker, on whom it was drawn, by want of proper caution in the mode of drawing the check, which admitted of easy interpolation, and consequently, that the drawer, having thus caused the banker to pay the forged check by his own neglect in the mode of drawing the check itself, could not complain of the payment. The present case is entirely different. If there was any negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bankers could have maintained an action for the negligence of the trustees, and recovered the damages they had sustained by reason of their having made the transfer.

If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his check book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged check would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney."

⁸*Bradford v. Hanover F. Ins. Co.* (1900; C. C. A. 3d C.) 49 L.R.A. 530, 43 C. C. A. 310, 102 Fed. 48. The court said: "Hoyt, the actual tort-feasor, was the agent of Bradford, with authority 'to solicit insurance, to collect premiums, and to deliver policies.' He forged the signature of Bradford to the policy, and he delivered that policy as and for a genuine one. But Bradford was not responsible for these unlawful acts merely because, for lawful purposes, Hoyt happened to be his agent. To make him responsible for them something more was requisite, and none of the conditions necessary to charge him was made to appear. Neither of the wrongful acts was committed for his purposes. The motive, whatever it was, was not his, but Hoyt's. It is also clear that Bradford neither expressly authorized them, nor ratified them, nor consented to profit by them. . . . Hoyt was not in fact authorized to sign Bradford's name, and the scope of his actual employment embraced the delivery only of policies which Bradford himself had signed. The signature in question was not so written as to indi-

2493a. Arson.—Where a servant in a warehouse set it on fire for the purpose of destroying the evidence of an embezzlement committed by him, the nonliability of the warehouseman for the loss of a depositor's goods was affirmed on the ground that the servant's act was outside the scope of his employment.¹ The right of action, therefore, was determined with reference to the same criterion as in most of the cases involving thefts by the servants of bailees other than common carriers. See § 2489, *ante*.

2494. Subornation of evidence.—Evidence that an employee of a corporation attempted to suborn witnesses to testify falsely in an action against it for personal injuries is admissible in favor of the plaintiff, if it appears that the employee was intrusted with the general duty of investigating and arranging the evidence in cases where such actions were brought. Such evidence is held to be competent, although tampering with witnesses is unlawful, and the legal authority of the employee extends only to lawful acts.¹

cate that it was made for Bradford, but as if made by him. It was simply a forgery. There was no assumption nor pretense of authority for it, and it is quite impossible to perceive that such authority apparently existed. The specific offense of Hoyt was one which Bradford himself was incapable of committing, and the act of the agent, therefore, was one which the principal not only could not have been justified in doing, but could not possibly have done. *Seeber v. Commercial Nat. Bank* (1897) 77 Fed. 957. Nor was Bradford responsible for Hoyt's delivery of this policy. He was authorized to deliver genuine policies, not spurious ones; and of this particular transaction Bradford had no knowledge until after the fire and loss had occurred. If the forgery had been known by those to whom the policy was delivered, they certainly would not have been warranted in accepting it upon the supposition that its delivery was sanctioned by Bradford, or that, in making it, Hoyt was acting within the apparent scope of his employment. On the contrary, they must inevitably have seen that Bradford had not authorized it, and that Hoyt was grossly transcending the limits of his agency. The imposition which was consummated by the delivery had its inception in the forgery, and by that alone was the delivery made possible. Bradford did not—manifestly—could not—authorize the

forging of his own signature; and this being so, we are unable to discern, in his delegation of power to deliver policies bearing his genuine signature, any apparent authority for the delivery of one falsely and feloniously subscribed."

¹ *Collins v. Alabama G. S. R. Co.* (1894) 104 Ala. 390, 16 So. 140.

¹ In *Chicago City R. Co. v. McMahon* (1882) 103 Ill. 485, 42 Am. Rep. 29, the agent who approached the witness was a clerk in the office of the defendant's superintendent. It was testified that it was the business of the clerk, in case of an accident, to take the statements of parties and witnesses to it, and that he attended to the business of looking up witnesses for cases in court; to take the statements of parties to the circumstances of the accident; when an accident occurred, to investigate and ascertain all he could with reference to its circumstances; that sometimes he was specially sent for such purpose, and sometimes went in pursuance to general instructions; that no person had any authority from the company to deal with any witness in any way; that had any person used money to suborn or get him out of the way, he would have been instantly discharged. Discussing the authority of the clerk, the court said: "He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with

2494a. Maritime offenses.—The civil liability of shipowners and ships in respect of crimes has been affirmed with reference to the following offenses: piratical acts committed by the crew of a privateer;¹

the general authority to use his judgment in its performance. His acts, therefore, were the acts of the company within the scope of his employment. . . . The clerk was in the exercise of a corporate power, engaged in the performance of a duty delegated to him by the company, and in the performance of that duty he attempted the use of illegal means for the accomplishment of a legal end, and for the benefit of the company. He did not attempt to suborn the witness for the benefit of himself, but for the benefit of the company,—not with the consent of his superior, but in the course of legitimate and authorized business of the company. He was unquestionably employed by the company, was acting for it, and did the act to promote its interest. He was engaged in performance of a duty for the company,—he did the act as a part of the duty, although unauthorized. We are therefore of the opinion that he performed the illegal and unauthorized act while acting in and as part of his employment, and we must hold the company is responsible for the act. For that reason we hold that the evidence was admissible."

The above case was followed in *Nowack v. Metropolitan Street R. Co.* (1901) 166 N. Y. 433, 54 L.R.A. 592, 82 Am. St. Rep. 691, 60 N. E. 32, reversing (1900) 54 App. Div. 302, 66 N. Y. Supp. 533, where the evidence held to be admissible was that of an "investigator" employed by a corporation "to see to the witnesses and take statements and to interview witnesses,"—those who "expect and those who are witnesses,"—upon the trial of actions against it, without limitation as to the means to be employed. Vann, J., after stating the general rule as to the liability of a master for the misfeasances of a servant, said: "So far as this rule rests upon estoppel, it does not apply to the question before us; but so far as it rests upon public policy or convenience, it has some bearing, for the interest of the public is promoted by the exposure of corrupt acts intended to turn the course of justice." The passage set out from the Illinois case was then quoted with approval.

See also *Baltimore & O. R. Co. v. Rambo* (1893) 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75, where it was said to be competent for the plaintiff to introduce in rebuttal evidence tending to show that the authorized agent of a railroad company had been engaged in suborning witnesses to testify falsely. Such evidence was "relevant on the main issue, as tending to show an admission by its conduct that it had a bad case, needing false and perjured evidence to support it."

¹*The Amiable Nancy* (1818) 3 Wheat. 546, 558, 4 L. ed. 456, 458. Story, J., argued thus: "If this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owner of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages. While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government by burthening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders." The same doctrine was applied in *United States v. The Malek Adhel* (1844) 2 How. 210, 11 L. ed. 239. See note 5, *infra*.

the violation of a blockade;² a violation of the revenue laws;³ and the contravention of an embargo.⁴ The fact that the owner was innocent of the crime in question will not exempt the vessel from condemnation.⁵

See also *Talbot v. Three Brigs* (1784; Pa. Err. & App.) 1 Dall. 95, 1 L. ed. 52, where only questions of jurisdiction were discussed; and compare the cases cited in § 2379, notes 1 and 2, *ante*.

The above-cited rulings of the United States Supreme Court overrule an earlier case decided by one of the inferior Federal courts (though, strange to say, it was not referred to in either of them), *Dias v. The Revenge* (1814) 3 Wash. C. C. 262, Fed. Cas. No. 3,877, where the liability of the privateer was negatived on grounds thus stated: "There must be a capture as prize of war, in order to warrant to conclusion drawn by the appellants' counsel; because, otherwise, the master did not act in execution of the business with which his owners had charged him. The commission did not authorize him to seize, in any manner he pleased, the property he might find at sea, to whomsoever it might belong, but to seize as prize of war,—to exercise an acknowledged and legitimate belligerent right, in doing which, he might be guilty of a mistake, or might wilfully abuse this right; in either of which cases, he acts at his own and his owner's peril. Still, however, he acts in a lawful employment. But if he turns his back upon the business intrusted to him, and sanctioned by his commission, and commits acts of piracy, for which he was not directly or impliedly employed, such acts are imputable to those only who perform them, and cannot, upon any principle of common, maritime, or national law, be visited upon his owners, beyond the penalty of their bond and the loss of their vessel." Commenting upon the general statement of Roccus (p. 23), that "the owner is not liable for the faults or crimes of his master, if he exceed his instructions, unless the owner is benefited by such act," the court remarked: "We should, however, understand this author to mean throughout, that the exemption of the owner from responsibility is only in those cases where the master acts, not only without or against orders, but

in some other business than that in which he was employed. It is upon this principle that the owner is liable for spoliation of papers; for injury sustained by a prize, by the unskilfulness of the prize master put on board of her; for embezzlement of the property taken as prize by the officers or crew; and for ill treatment, unnecessarily inflicted upon the persons of the prize crew. The master was in the execution of a business for which he was employed, and abused his trust by wilful misconduct, or by the want of skill or care."

² *The Vrouw Judith* (1799) 1 C. Rob. 150; *The Adonis* (1804) 5 C. Rob. 256. In the former case, Sir W. Scott laid it down in general terms that "the act of the master of the vessel binds the owner in respect to the conduct of the ship, as much as if it was committed by the owner himself."

³ *Phile v. The Anna* (1787; Phila. C. P.) 1 Dall. 197, 1 L. ed. 98 (vessel liable to forfeiture where part of cargo is unloaded without a previous entry at the collector's office).

⁴ In *United States v. The Little Charles* (1818) 1 Brock. 347, 354, Fed. Cas. No. 15,612, Marshall, Ch. J., said: "This [note] is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. . . . But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report."

⁵ In *United States v. The Malek Adhel* (1819) 2 How. 210, 11 L. ed. 239, where the crew of a ship had been guilty of an offense under the U. S. piracy act of 1819, Story, J., said: "The act makes no exception whatsoever, whether the aggression be with or without the co-

2495. Violation of penal statutes. Generally.—The extent to which an employer can be held civilly liable in respect of a misfeasance of his employee which amounts to a violation of a prohibitory enactment by which a new offense is created depends partly upon the phraseology used by the legislature, and partly upon the general principles with reference to which the applicability of the principle *Respondet superior* is ordinarily determined. The cases which bear upon the subject are not harmonious, and it will be advisable to state separately the effect of those decided in England and in the United States.

2496. Same subject. English and colonial decisions.—In a case where it was held that a policy of marine insurance had not been avoided by the act of the master of a vessel in stowing cargo on the deck, contrary to the provisions of a statute, the broad position was taken, both by the court of common pleas and the exchequer chamber, that his implied authority could not be regarded as extending to illegal acts.¹ So far as the law of insurance is concerned, this ruling is merely one of a series of precedents which have established a doctrine which has been thus stated as a standard treatise: "When the adventure is not

operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, etc., shall have been first attempted or made, shall be condemned. Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and nonintercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be inno-

cent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs."

¹In *Wilson v. Rankin* (1865) 6 Best & S. 208, affirmed by the exchequer chamber in (1865) 6 Best & S. 218, L. R. 1 Q. B. 162, 35 L. J. Q. B. N. S. 87, 13 L. T. N. S. 564, 14 Week. Rep. 198. It was proved that the shipowner did not in fact know of lumber being stowed on the deck, nor of any intention on the master's part so to stow it. The contention that, as the stowing of the cargo was immediately within the duty of the master, the assured, the shipowner, must be considered as bound by the act of the master as his agent, and that the knowledge of the latter must in law be taken to be that of the owner, was thus dealt with by Cockburn, Ch. J., in delivering the judgment of the court of common pleas: "Admitting, of course, the general rule that a principal is bound by the acts and knowledge of his agent, while acting within the scope of his authority, we are of opinion that the rule has no application in the present case. For, although it is true that the stowing of the cargo is undoubtedly within the authority of the master, yet, in the

itself unlawful, the fact that in the performance of the voyage a law relative to navigation is contravened does not make the insurance void, unless the assured was aware of the illegality at the time when the insurance was made, or was himself a party to the illegality." ²

absence of proof to the contrary, it must be taken that his authority, in this as in other respects, is by his instruction limited to that which is lawful. . . . No authority can be implied in the master, in the discharge of his duty, to do that which, with reference to this part of his duty, was a violation of the law. Again, it is a well-established distinction that, while a man is civilly responsible for the acts of his agent when acting within the established limits of his authority, he will not be criminally responsible for such acts, unless express authority be shown, or the authority is necessarily to be implied from the nature of the employment, as in the case of a bookseller held liable for the sale by his shopman of a libelous publication. Under ordinary circumstances the authority of the agent is limited to that which is lawful. If, in seeking to carry out the purpose of his employment, he oversteps the law, he outruns his authority, and his principal will not be bound by what he does. Now, in the present case, as has been already pointed out, not only are there no circumstances from which an authority to contravene the statute can properly be implied, but, according to the authority of *Earle v. Rowcroft* (1806) 8 East, 126, 133, 9 Revised Rep. 385, the reverse is to be presumed. It appears to us, therefore, impossible to say that the master, in stowing the cargo on deck contrary to the act of Parliament, was acting by the authority of his owner, or that the latter was bound by his knowledge. This view of the law as here applicable becomes materially confirmed if the case be looked at in another point of view. It seems clear, on the authority of *Earle v. Rowcroft*, *supra*, that if the master of a vessel, acting within what otherwise would be the extent of his authority, contravenes some positive law, and thereby causes injury to his owners, this will be barratry in the master, notwithstanding that the purpose of the thing done was to benefit the owners. In the case referred to, the master, having instructions to make

the best purchases with despatch, had gone into an enemy's port to complete his cargo, which could be more speedily and cheaply obtained there, in consequence of which the ship was seized and confiscated. This proceeding on the part of the master, though within the general scope of his authority, and though done in the interest of his owners, was held to be barratrous; and the owner, on a policy in which barratry of the master was insured against, was held entitled to recover. Within the principle of this decision, the soundness of which never has been questioned, the conduct of the master in the present case would have amounted to barratry, as being an unlawful act, done in contravention of his duty, though with the intention of benefiting his owners. . . . *Earle v. Rowcroft*, *supra*, directly establishes that, on loss occasioned by the illegal act of the master without the authority of the owner, the latter may recover, and therefore shows that, where the master does an illegal act which, but for its illegality, would be within the scope of his ordinary authority, but which, being illegal, is barratrous, this will not amount, in point of law, to assent or knowledge on the part of his employer. For these reasons it appears to us that the plaintiff in this action cannot be taken to have constructively, any more than he had actually, knowledge of the illegal act of the master; and that, consequently, within the decision in *Cunard v. Hyde* (1858) El. Bl. & El. 670, 27 L. J. Q. B. N. S. 408, 5 Jur. N. S. 40 (1859) 2 El. & El. 1, 29 L. J. Q. B. N. S. 6, 6 Jur. N. S. 14, he is entitled to recover; and that our judgment, therefore, should be in his favor."

² Arnould, Ins. § 745. For cases relating to voyages illegal in such a sense as to preclude the assured from recovering, see *Farmer v. Legg* (1797) 7 T. R. 186 (statute violated forbade slave ships to make a voyage unless the captain's certificate was attested in the manner prescribed); *Feard v. Dawson* (1805) cited in *Marshall on Insurance* (want of proper documents);

That doctrine is presumably beyond the reach of criticism, at all events in England. But the language used by Cockburn, Ch. J., was evidently intended to enunciate a principle of general application, which in one particular direction operated so as to limit the liability of an employer in respect of the tortious acts of his employee,—the principle, namely, that, in the absence of an explicit legislative provision, the injurious consequences resulting from the violation of a penal statute by an employee could not be imputed to his employer in a civil suit, unless it was shown by affirmative evidence that the employer either authorized or ratified the illegal act in question. Such a position was in harmony with the rule which formerly prevailed in England, that an employer could not be held liable under the maxim *Respondent superior*, for the wilful trespass of an employee. But it cannot be reconciled on any satisfactory grounds with the more recent cases which show that this general rule has been abandoned.³ It has been rejected in New Zealand, on the ground that the older authorities are no longer valid precedents.⁴

2497. Same subject. American decisions.—For the purpose of the present discussion, the American statutes with reference to which the

Bell v. Carstairs (1811) 14 East, 374, 2 Campb. 544, 12 Revised Rep. 557, 11 Revised Rep. 593 (want of proper documents); *Stuart v. Powell* (1830) 1 Barn. & Ad. 266, 8 L. J. K. B. 391 (ship sailed without proportion of British seamen required by navigation act; recovery allowed under exemption clause applicable to cases of necessity); *Keir v. Andrade* (1816) 6 Taunt. 498, 2 Marsh. 196, 16 Revised Rep. 660 (goods of a prohibited class shipped in excess of amount covered by a special license policy held invalid as to excess only).

For cases illustrating the circumstances under which the policy may be enforced, unless privity on the master's part is proved, see *Carstairs v. Allnutt* (1813) 3 Campb. 497 (sailing without convoy); *Metcalf v. Parry* (1814) 4 Campb. 125, 15 Revised Rep. 734 (sailing without convoy); *Cunard v. Hyde* (1858) El. Bl. & El. 670, 27 L. J. Q. B. N. S. 408, 5 Jur. N. S. 40, 2 El. & Bl. 1, 29 L. J. Q. B. N. S. 6, 6 Jur. N. S. 14 (owner shown in this case to have been privy to the carrying of a deckload); *Dudgeon v. Pembroke* (1874) L. R. 9 Q. B. 581, 43 L. J. Q. B. N. S. 220, 31 L. T. N. S. 31, 22 Week. Rep. 914, affirmed in (1877) L. R. 2 App. Cas. 284, 46 L. J. Q. B. N. S. 409,

36 L. T. N. S. 382, 25 Week. Rep. 499, 3 Asp. Mar. L. Cas. 393, 14 Eng. Rul. Cas. 105 (master of ship carried passengers without having obtained a certificate authorizing him so to do). The ruling in *Law v. Hollingsworth* (1797) 7 T. R. 160, that a voyage was rendered illegal by a violation of the pilot laws, is not consistent with the later decisions.

³ See the general discussion in § 2241 *et seq.*, *ante*, and the cases cited in § 2483, note 1, *ante*.

⁴ In *Hunter v. McKae* (1897) 15 New Zeal. L. R. 701, where a servant threw a spade at a stallion which was annoying his master's mare, and wounded the animal so severely that it died, it was held that its owner was entitled to recover damages from the servant's employer, although his act was within the purview of a provision in the Criminal Code. *Wilson v. Rankin*, *supra*, was not brought to the attention of the court, which cited *Dyer v. Munday* [1895] 1 Q. B. (C. A.) 742, 64 L. J. Q. B. N. S. 448, 14 Reports, 306, 72 L. T. N. S. 448, 43 Week. Rep. 440, 59 J. P. 276, as indicating that the English courts have repudiated the doctrine that the illegal acts of a servant are not imputable to his master.

vicarious liability of a master has been considered may be divided into the following classes:

(1) Statutes which do not contain any declaration regarding the recovery of damages. There is ample authority for the doctrine that, where an employee violates a statute of this type, while acting in the course of his duties, the party aggrieved by a violation may maintain an action for damages against the employer.¹ The violation is imputed to his master, although, in perpetrating it, he may have disobeyed the master's orders.²

¹ By Kentucky Stat. 1837-38, p. 45, it was declared to be unlawful for the "owners and proprietors of a stage or other coach or railroad car" to "suffer or permit" slaves to go as passengers therein without the written request of their owners, or in the company of the owners. In *Johnson v. Bryan* (1841) 1 B. Mon. 292, it was held that the owners of a stagecoach were guilty of "suffering and permitting," within the meaning of the statute, when the act was done, or permitted, by themselves, their agents, or subagents, and consequently that they are responsible in a civil action for the damages caused by their agents' breach of the statute. The decision in *Covington Ferry Co. v. Moore*, 8 Dana, 158 (note 9, *infra*), was distinguished as having been rendered on a statute, expressed in different phraseology.

In *Price v. Thornton* (1846) 10 Mo. 135, it was conceded that the owners of a vessel would be liable in a common-law action for the value of a slave whom the commander of the vessel had, in contravention of a statute, transported out of Missouri without the consent of his master.

In *Healy v. Johnson* (1905) 127 Iowa, 221, 103 N. W. 92, the owner of a horse and wagon used by his servant for delivering goods to the owner's customers was held to be liable for an injury caused by the negligence of the servant in violating a municipal ordinance by leaving the horse unsecured in a street where he was delivering goods.

In *Osborne v. McMasters* (1899) 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543, a druggist was held liable for an injury resulting from the omission of his clerk to comply with the provision of a statute requiring poisonous drugs to be labeled as such. The court said: "Whether the act constituting

the actionable negligence was such on common-law principles, or is made such by statute, the doctrine of agency applies; to wit, that the master is civilly liable for the negligence of his servant, committed in the course of his employment."

In *Bryan v. Adler* (1897) 97 Wis. 124, 41 L.R.A. 658, 65 Am. St. Rep. 99, 72 N. W. 368, where a waiter at a restaurant refused to serve a customer simply because he was a colored man, it was held that, under Wis. Laws of 1895, chap. 223, by which it is provided that all persons shall be entitled to the full accommodation, etc., of inns, etc., the keepers of the restaurant were liable in damages to the person aggrieved. The act of the waiter being done in the course of an employment in which he was engaged to perform a duty owed by the defendant to the complainant, it was error for the trial judge to give an instruction based upon the theory that the defendants were not liable for the unlawful act of their servant, unless they either ratified it or aided or incited or encouraged him in his breach of duty.

For cases affirming the doctrine that the act of a servant in illegally setting fire to a prairie could not be imputed to his master if the act was done from motives of malice or wantonness, see *Johnson v. Barber* (1849) 10 Ill. 425, 50 Am. Dec. 416; *Armstrong v. Cooley* (1849) 10 Ill. 512.

² In *Lewis v. Schultz* (1896) 98 Iowa, 341, 67 N. W. 266, where the defendant's servant had caused damage to the plaintiff's land by violating Iowa Code, § 3890, by which it is declared to be a misdemeanor to allow a fire set out on a prairie to get out of control, the conclusion of the jury that the setting out of the fire was within the scope of the servant's employment was held to be

(2) Statutes which declare in one form or another that a civil action may be maintained by any person who suffers injury in consequence of their violation. Under such enactments the right of recovery is clearly determinable upon the same footing as in a common-law action of tort. It is not necessary to show that the defendant directed that particular act to be done, but merely that it was done by the employee in the course of his duties.³ The master cannot escape liability by showing that the illegal act of the servant was done without his knowledge,⁴ or in contravention of his orders.⁵ By the express terms of some of the statutes belonging to this category, em-

warranted by evidence that he, together with the two sons of the defendant, was directed "to go to the meadow, to fix it up so it could be moved; to level it off, clear it up, cut down the ant hills, and get it in shape for next year;" that the hay which remained upon the ground was an obstruction which would interfere to some extent with the use of the mower during the next season, and, if left, would have killed the grass which it covered; and that the removal or destruction of part of the hay was necessary in order to level ant hills which it covered. The court said: "It does not follow that because the master gave no express directions to set out the fire, and did not know of it until after it had been done, he is to be exonerated. If the servant was acting in the course of his employment in clearing up and leveling off the meadow, and, while so doing, committed the wrong complained of, the master is liable, although the servant may have disobeyed the master's instructions with reference to setting out fire."

³ In *Knight v. Towles* (1895) 6 S. D. 575, 62 N. W. 964, where damages were claimed under South Dakota Comp. Laws, § 2392, which prohibits the setting of fire on prairie land during certain months, evidence was given which tended to prove that he directed his employee to make a "fire break" around a certain tree claim under his control, and to "burn it off." Held, that the question whether or not the employee setting the fire was acting within the scope of his authority should have been submitted to the jury. The court was of the opinion that the circuit judge took an erroneous view of the law, "in holding that the defendant could only

be held liable in a civil action under the statute, for the action of the agent or servant, upon proof that he expressly directed the act of such servant or agent. This is the general rule applicable to criminal prosecution. . . . The last clause of the section, making the person setting or causing the fire liable for damages that may be caused by the same, . . . was designed to extend the common-law liability of persons for damages caused by fire. (*Mattoon v. Fremont, E. & M. Valley R. Co.* 6 S. D. 301, 60 N. W. 69), by relieving the parties so damaged from the necessity of proving negligence on the part of the principal or agent. The liability of a principal for the act of his agent, in a civil action for damages under that section, is not affected by the fact that the same act may constitute a misdemeanor if done, or caused to be done, by the principal himself."

A master is liable for the damage resulting from a sale of liquor by his servant in contravention of a "dram shop act." *Kehrig v. Peters* (1879) 41 Mich. 475, 2 N. W. 801; *Peterson v. Knoble* (1874) 35 Wis. 85, and the cases cited in the following note.

⁴ *Duckworth v. Stainaker* (1910) 68 W. Va. 197, 69 S. E. 850 (action under a "dram shop act").

⁵ In *Smith v. Reynolds* (1876) 8 Hun, 128, it was held that an action was maintainable for fatal injuries received by a person in consequence of his having drunk intoxicating liquor supplied to him by defendants' bartender, in violation of N. Y. Laws 1873, chap. 646, and that the trial judge had properly refused to charge the jury that the plaintiff was not entitled to recover, if they found from the evidence that the liquor alleged to have been de-

livered to deceased was delivered by defendants' bartender without the knowledge of the defendants, and after defendants had directed him not to sell or give any liquor to the deceased.

In *George v. Gobe* (1880) 128 Mass. 289, 35 Am. Rep. 376, where a servant, while acting in the course of his employment, sold intoxicating liquor to a certain person, after the master had received from that person's wife a notice requesting him not to do so, it was held that the violation of Mass. Stat. 1875, chap. 99, § 16, which such a sale involved, might be imputed to the master, in an action brought by the vendee's wife under the clause giving a right of action in tort, although he had instructed the servant not to make a sale to the person in question, and the sale was without his knowledge or consent. The court said: "We see no reason why the general principle which governs the responsibility of the master for the acts of his servant should not apply in the case at bar. The action is brought under a statute which makes that a tort which was not so before, and provides for the recovery of damages against the tort-feasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit, and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment."

In *Lee v. Nelms* (1876) 57 Ga. 253, an action to recover the treble damages allowed for the killing of stock (Code 1880, § 1445), the judgment rendered for the plaintiff was reversed on the ground that the evidence was insufficient to show that the plaintiff's property was injured by the defendant's servants while they were acting within the scope of their employment.

In *Kennedy v. Howe* (1874) 72 Ill.

133, a civil action brought by a wife, under a provision similar to that in the Massachusetts statute mentioned *supra*, to recover for injuries caused by the sale of liquor to her husband, it was held that the trial judge had wrongly instructed the jury that the defendant would not be liable if the liquor had been supplied by his servants in contravention of his express orders. The court said: "Appellant contends, as this is not a suit at common law, for negligence, but one on a statute highly penal, it must be strictly construed, and not extended by implication beyond its express language. To this, this court has assented, in a modified form, in one or more of the cases cited *supra*. But this action is a civil suit, authorized by that law. If it was a prosecution under that law for the penalty, then it might be held, as in the cases cited, that the one who incurred the penalty must be the person punished. The citation of authorities is not entirely apposite, as, in this case, it is undeniable the clerk was acting within the scope of his employment, which was to sell intoxicating drinks. The record shows liquors were sold by the clerk to Howe, in the presence of the defendant, without objection from the defendant. We do not understand the rule to be as contended by defendant. . . . Selling strong drinks was the employment or business, and it was not a wilful departure from this business to sell to a drunkard against the orders of the principal, though it might be held as a wilful departure from the orders of the master." Such an instruction might be proper in a criminal prosecution to recover the penalty. And if the defendant had, in good faith, forbidden his clerk or bartender to let the husband of the plaintiff have liquor, and the clerk wilfully disobeyed him, without the connivance of defendant, it seems that, in a civil action, this fact should go in mitigation, not of the actual damages, but of the vindictive damages claimed." For another decision to the same effect with reference to this Illinois statute, see *Layton v. Deck* (1895) 63 Ill. App. 553.

A similar ruling has been made with reference to the Michigan act which authorizes the aggrieved party to recover exemplary damages against the seller of the liquor. *Kreiter v. Nichols* (1874) 28 Mich. 496.

ployers are declared to be responsible for the illegal acts of their employees.⁶

(3) Statutes which declare that any person violating their provisions shall forfeit to the person injured by the violation a certain penalty, specified either as a definite sum of money or a multiple of the actual damages occasioned by the violation. An action under a statute of this tenor will not lie in respect of an illegal act committed by a servant of the defendant, unless that act was wilfully done.⁷ Nor, unless the statute in question expressly so provides,⁸ can the master be held responsible unless he was a participant in the act, either as having directed it to be done, or as having ratified it after its commission.⁹ But it is open to the aggrieved party to sue the master in a common-law action, and rely upon the breach of the stat-

⁶ For cases decided with reference to the Michigan dram shop act of this term, see *Kreiter v. Nichols* (1874) 28 Mich. 496; *Kehrig v. Peters* (1879) 41 Mich. 475, 2 N. W. 801 (both under Comp. Laws 1871, § 2137); *Dice v. Sherberneau* (1908) 152 Mich. 601, 16 L.R.A.(N.S.) 765, 116 N. W. 416 (under Comp. Laws, § 5398). In the last-cited case a saloon keeper was held liable for a breach of the statute by a servant employed to clean the saloon, who had been temporarily left in charge of it.

⁷ In *Batchelder v. Kelly* (1839) 10 N. H. 436, 34 Am. Dec. 174, it was held that a person cannot be subjected to the penalty of the statute for the trespass on timber lands, unless the trespass was wilful and intentional; that the cutting, upon another's land, by mistake or accident, was not a trespass within the purview of the statute; and consequently that, where the servant, by mistake or accident, cut trees beyond the boundary of his employer, and the employee knowing such mistake, afterwards drew off and appropriated the trees to his own use, he was not liable for the penalty. The court said: "Carrying the timber away might have had some tendency to have convinced the jury that the defendant was cognizant of and approved of the original cutting; but such would not have been the necessary legal effect of the evidence, as a rule of law; and most clearly an affirmance of the cutting in this manner would not have altered the original nature of the act, so as to have rendered that wilful and malicious that

was originally an unintentional and accidental trespass."

For other cases in which the same doctrine has been applied with reference to statutes of the same type, see *Russell v. Irby* (1848) 13 Ala. 131; *Whitecraft v. Vanderver* (1850) 12 Ill. 235; *Cushman v. Oliver* (1876) 81 Ill. 444. It was also recognized in *Smith v. Causey* (1853) 22 Ala. 568, where the claim was laid under a statute concerning injuries to cattle. See note 9, *infra*.

⁸ By Gen. Stat. p. 234, §§ 20, 21 (somewhat amplified in Gen. Stat. 1902, §§ 2035, 2036), it is provided that any driver of a vehicle who shall, by neglecting to turn to the right in passing teams met on the highway, drive against another vehicle and injure its occupant or the property of any person, shall pay to the party injured in person or property treble damages; and that the owner of the vehicle shall, if the driver is unable to do so, pay the damages, to be recovered in a suit of scire facias. In a suit of scire facias so brought, in a case where the driver of the vehicle was the servant of the owner of it, and acting in his employment, it was held that the statute imposes upon the master a statutory suretyship for the payment of damages, resulting from the negligence or malicious conduct of the person employed by him to drive the vehicle, that shall be awarded against the latter under the statute.

⁹ By the Kentucky act of 1820 a penalty of \$200 was imposed upon any ferryman or other person who should take slaves across the Ohio into an-

other state, without the owner's authority; and it was also declared that, if the ferryman was a slave, the owner or keeper of the ferry should be liable for the penalty. Another act passed in 1831 prohibited the taking of any slave or slaves from this state, across the Ohio to the opposite shore, by the owner or keeper of a ferry, or by any other person without the owner's consent; and it was declared that for a violation of this statute, the offender should be liable for the value of the slave or slaves, and to a penalty of \$200; and that, if he were the owner or keeper of the ferry, he should incur a forfeiture of his ferry privileges also. In *Covington Ferry Co. v. Moore* (1839) 8 Dana, 158, it was held that the term "keeper of a ferry," as used in these acts, designated not the acting ferryman, but the grantee or lessee or other person having a beneficial interest in, or control over, the ferry, and that the penalties denounced by both statutes were imposed upon him or those by whose individual acts they were violated, and upon the owner or keeper of a ferry whose ferryman was a slave; but that such a keeper was not responsible for the act of a free ferryman who violated the law without his consent. A slave having been transported across the Ohio by a ferryman in the employ of a company which had leased the ferry, it was held that, as no member of the company was present at the time, and the permitting of the slave to pass was contrary to their general orders, the company was not liable for the value of the slave, nor for the penalty.

In *Cushing v. Dill* (1840) 3 Ill. 460 (action brought under the Illinois "act to prevent trespassing by cutting timber)," the court laid it down that "to subject anyone, therefore, to the penalty of the act, it must be shown to have been wilfully violated by proof that the party charged committed the forbidden act himself, or caused another to do it by his command or authority. The statute gives the penalty against the actual trespasser only; but it would be a violation of legal principles, therefore, to extend it so as to embrace another by implication. . . . The maxim, *Qui facit per alium, facit per se*, would be strictly applicable in an action of trespass against Cushing, but in this prosecution he is liable only for his personal acts, or such acts of his

workmen or servants as are proved to have been done by his express, or, at least, necessarily implied, authority." It was held not to be sufficient to show that the trees in question were cut by persons employed by the defendant to cut timber on his own land, and appropriated by them to the use of the defendant. This decision was followed in *Satterfield v. Western U. Teleg. Co.* (1887) 23 Ill. App. 446.

In *Williams v. Hendricks* (1896) 115 Ala. 277, 41 L.R.A. 650, 67 Am. St. Rep. 32, 22 So. 439 (action under a statute imposing a penalty for cutting trees on another's land, Code 1896, § 4137), the court observed: "We think it is clear that the authorities made a broad distinction as to the liability of a principal or master, where it is sought to hold him responsible upon a common-law liability, for the torts of the agent or servant, and when it is sought to recover from him a statutory penalty. In the former cases he is liable for the acts done within the scope of his employment. In the latter, the liability is fixed and limited by the statute itself. The distinction is clear and rests upon sound principles of law." The remarks of a contrary tenor in *Postal Teleg. Cable Co. v. Lenoir* (1894) 107 Ala. 640, 18 So. 266 (action under the same statute) were disapproved. The doctrine formulated in *Williams v. Hendricks* was followed in *Alabama Mineral Land Co. v. Lathrop-Hatton Lumber Co.* (1906) 148 Ala. 679, 41 So. 952, where it was held that, as the defendant was not shown to have authorized or consented to the cutting of plaintiff's trees by his agent, he was not liable to the penalty imposed by the statute.

In *Goodhue v. Dix* (1854) 2 Gray, 181, the court, in discussing the effect of the Massachusetts statute (Rev. Stat. chap. 51, § 3) as to the rule of the road, said: "It makes the omission or failure, in the contingencies enumerated, to drive according to the rule prescribed, a criminal offense; and, moreover, subjects the party by whom it is committed, to the responsibility of compensating all other parties for the damages to them resulting from it. 'Every person offending against the provisions' of the act 'shall for each offense forfeit a sum not exceeding \$20, to be recovered on complaint before any justice of the peace; and he shall be further liable to any party for all damages

sustained by reason of such offense.' Sec. 3. This language limits the responsibility for damages, resulting from a mere violation of the rule of driving prescribed and established by the statute, to the party who is guilty of it. And therefore the employer or owner of the vehicle driven, if he be in no way implicated in the conduct of the servant, as the facts reported in the bill of exceptions show that the defendant in this case was not, is not liable for damages which ensue simply from the failure of the servant to drive, upon a proper occasion, to the right of the middle of the traveled part of the road. This statute repeals no part of the common law relative to the liability of principals or employers for the carelessness or negligence of their agents or persons in their employment. But we do not find it necessary now to consider how far, or in what instances, the former are legally responsible for the unlawful acts of the latter, because the statute itself, upon which this action is brought, confines alike the civil remedy and the public prosecution to the particular individual who is personally guilty of violating the rule he is required by law to observe."

In *Smith v. Causey* (1853) 22 Ala. 568, it was held that, in the absence of evidence of a prior direction given by the defendant, the act of his servant in setting dogs upon the plaintiff's hogs did not render him liable for the treble damages imposed by a statute for inflicting injuries upon stock. (Clay's Dig. 241, § 3, now embodied in the Code 1907, § 4243.)

The same doctrine has been adopted in Georgia with reference to a similar provision (Code, § 1445). *Lockett v. Pittman* (1884) 72 Ga. 815. There the trial judge was held to have improperly instructed the jury that, "if the agent, servant, or overseer of defendant, employed for the purpose of cultivating and protecting the field, killed the cow in the same, and it was not inclosed with a lawful fence, and the killing was done for the purpose of protecting the crop growing on the field, and to prevent its destruction by the cow, then the defendant would be liable, as this would be within the scope of his business."

In *Fairchild v. New Orleans & N. E. R. Co.* (1883) 60 Miss. 931, 45 Am. Rep. 427, where laborers who were instructed

to cut poles for a telephone line only on the right of way negligently or wilfully cut them from the adjoining land, the action was held not to be maintainable against their employers to recover the statutory penalty for cutting trees on the land of other persons. The court stated its reasons as follows: "It is, however, said by the appellant, that, as a corporation can only act by and through its agents, it must be held that the corporation was itself present through its agents, the laborers, and if it was so present, then the negligence or wilfulness of the laborers was the negligence or wilfulness of the defendant. The principle invoked would be applicable if the injury had been caused by the negligence of Thompson, the agent of the corporation, who was charged with the performance of the work of constructing the line; but the mere laborers who were under his control and direction did not occupy the attitude of agents of the company within the rule invoked. These laborers were the mere sentient tools of the company, authorised by the character of their employment to exercise no discretion or judgment, . . . but were simply charged with performance of the physical labor necessary to the execution of the instructions of their superior." The distinction then taken between the superior and subordinate employees of a corporation was, it is submitted, quite erroneous. A subordinate servant hired by a superior is certainly the servant of the superior's employer (see § 32, *ante*), and the proposition that, where the right of action against the master in respect of a trespass upon property is involved, his liability extends only to the acts of the superior employee, seems to be quite destitute of authority. But the actual decision, absolving the master from liability, is in harmony with the other cases cited in this note.

In *Potulni v. Saunders* (1887) 37 Minn. 517, 35 N. W. 379, where a servant employed to drive a team took, without express authority from the employer, some of plaintiff's hay to feed the team, it was held that the provisions in Gen. Stat. 1878, chap. 66, §§ 269, 270, imposing treble damages for such trespasses, "do not apply against one who is in law deemed guilty only by reason of his relation to the actual trespasser."

In *Taylor v. Gilman* (1885) 23 Blatchf. 325, 24 Fed. 632, an action for

ute by the servant as evidence of misconduct entitling him to damages.¹⁰

The liability of a principal for the exaction of usurious interest by his agent is a subject which falls outside the scope of this treatise.¹¹

the penalty which, under U. S. Rev. Stat. § 4968, U. S. Comp. Stat. 1901, p. 3416, may be recovered by a person whose copyright has been infringed, it was held that the plaintiff could not succeed upon evidence which showed that the copyright had been infringed by the defendant's agents without his knowledge.

¹⁰ In *Reynolds v. Hanrahan* (1868) 100 Mass. 313, where the plaintiff's injuries were caused by the violation of the law of the road (Mass. Rev. Stat. chap. 51, § 3), the court, after having referred to *Goodhue v. Dix*, note 9, *supra*, said: "The omission to drive according to the rule given is made a criminal offense, and subjects the party by whom it is committed to damages resulting therefrom. But the language of the statute limits the responsibility for damages to the party who is guilty of the offense. In the case cited, the action was founded upon the provisions of the statute. This action is founded up-

on the common-law liability. The declaration is general in its terms, alleging an injury occasioned by the defendant's negligence. And at common law a master is held for the negligent acts of the servant, done in his employment. It is immaterial that the negligence consists in the violation of some penal statute. It was not intended to impair by the statute any of the ordinary remedies of the party. Where new remedies are given by statute to enable one more effectually and conveniently to enforce his rights, and intended for his benefit, its provisions, unless expressly excluding other remedies, are to be construed as cumulative rather than restrictive."

The doctrine stated in the text was also recognized in *Smith v. Causey* (1853) 22 Ala. 568; *Cushing v. Dill* (1840) 3 Ill. 460, both cited in note 7, *supra*.

¹¹ The practitioner may consult Page on Contracts, § 483, and Mechem on Agency, § 745.

CHAPTER CVII.

VICARIOUS OR CONSTRUCTIVE LIABILITY OF A MASTER, CONSIDERED WITH REFERENCE TO THE DUTY OWED BY HIM TO THE INJURED PERSON.

2498. Introductory.

2499. Injuries to passengers.

2500. Injuries to persons invited on premises, vehicles, etc.

2501. Injuries to volunteers.

2502. Injuries to bare licensees, trespassers, or intruders.

2503. Injuries due to dangerous agencies.

2498. Introductory.—In discussing the vicarious or constructive liability of the master with reference to the character of the duty owed by him in respect to the injured person, it is necessary to consider at the outset how far such duties are distinctive duties of a master; for if they are not duties which pertain particularly to him in that capacity, a full treatment of them is outside of the scope of this treatise. Certain duties and liabilities, for example, arise out of contracts between a master and persons other than his servants. These are governed by the law of contracts, and not by the law of master and servant, the master's liability being in no wise different from the liability of any other person making a similar contract. A master may owe certain duties to passengers, to licensees, to volunteers, and to trespassers, but so do all other persons, whether they happen to be masters or not, to similar classes of persons. Therefore an exhaustive treatment of the duties which a person owes to those upon his premises by virtue of a contract of carriage, by invitation or permission, or by trespass, is not to be expected in a work on master and servant. The fact that these duties are involved and discussed in cases in which masters are sought to be made liable does not alter the nature of the question, since the fact of master-ship is a mere incident in the discussion.

The master may owe certain duties to persons not sustaining toward him any of the relationships mentioned, such as the care he

must exercise to abstain from injuring all persons through the use of a dangerous agency. This is a subject often treated as a master and servant question, but which we shall see does not really belong to that branch of the law, for the reason that the duty which a master owes in this respect is the same which all other persons owe, and consequently where the injury happens to be caused by the act of a servant, it is immaterial whether the servant is acting within the scope of his authority or not. An exhaustive discussion of this question belongs to a work on negligence or torts, and not to one on master and servant.

Since, however, these duties are duties which devolve upon a master as well as upon other persons, the question very naturally arises as to how far a servant may create the relationship as to which the particular duty arises, and from a violation of which the corresponding liability results. Here again, there is danger of confusing the law of agency with the law of master and servant. The distinction between servants and agents has been fully discussed,¹ and it has been seen that the power to create contractual relationships between the master and another belongs only to agents, and not to servants, and that it is consequently governed by the law of agency, and not by the law of master and servant. Whether the creation by persons other than the master of other relationships mentioned in this section is an act of agency or service will be discussed in the following sections of this chapter.

2499. Injuries to passengers.—It is not intended in this section to discuss the extent and limits of the duties which a carrier owes to a person who becomes his passenger. It is well understood that, generally speaking, the carrier is required to exercise a high and extraordinary degree of care for the safety of his passengers.¹ And whatever the degree of care may be in any particular case, it is the same whether the carrier be a master or not,—whether he drive his own coach or hire it done by others. The question which arises in many cases is not what the duty of a carrier to a passenger is, but whether the person is a passenger; for if he is not, the degree of care due him is quite different from that required toward a passenger. The relationship of a carrier and passenger is created by contract, express or implied.² And the power to create that relationship by one

¹ See §§ 65 *et seq.*, *ante*.

¹ *Kansas City, Ft. S. & M. R. Co. v. Berry* (1894) 53 Kan. 112, 42 Am. St. Rep. 278, 36 Pac. 53.

² In *O'Donnell v. Kansas City, St. L.*

& C. R. Co. (1906) 197 Mo. 110, 114 Am. St. Rep. 753, 95 S. W. 196, it is said: "The plaintiff in this case realized in the beginning that to establish his claim to the character of passenger

he must show that he was on the train by virtue of a contract; and therefore in his petition he said that before entering upon the train he made a contract with the brakeman whereby, in consideration that he would help the brakeman handle freight, the brakeman would allow him to ride on the train. The law charges the plaintiff with common sense and common knowledge in such matters, and therefore charges him with knowledge that the brakeman had no authority to make such a contract."

Where the plaintiff boarded a freight train, intending to pay his fare, but was injured before doing so, it was held that he was not a passenger. *Gardner v. New Haven & N. Co.* (1883) 51 Conn. 143, 50 Am. Rep. 12.

The court said: "The whole controversy in the case depends upon this question,—was there any contract relation, express or implied, between the plaintiff and the defendant in this case? Or, in other words, was the plaintiff a passenger according to the legal meaning of the term on the defendant's road at the time the accident happened? We have no hesitation in answering this question in the negative, and in saying that the defendant, under the facts disclosed in the finding, was not liable for more than nominal damages. The plaintiff was in no legal sense a passenger on the road, but was in the car at the time without the consent or knowledge of the defendant. This clearly appears from the facts disclosed. The train upon which he was injured was, so far as the case shows, exclusively a freight train; there was no passenger car attached, and no invitation to the plaintiff nor to the public to take passage upon it. The plaintiff paid no fare, and whether he intended to pay or not when called upon is of no consequence, so that his good or bad faith in taking his place on the car among the horses is quite immaterial. He had no business to be there without the consent of the defendant, and he had no rights except that of immunity from wilful and wanton injury, common to all citizens. Railroad companies have the clear and undoubted right to make rules and regulations that are reasonable and proper for the running of their trains. It would be impossible to conduct their vast business otherwise. If a

person desires to be transported as a passenger, he must comply with the rules of the company in regard to payment of fare and conduct while on the train, and all other reasonable requirements of the company. If a person desires to have his goods transported, he must in like manner comply with the rules of the company in relation to all matters appertaining to the shipment, transfer, and delivery of the goods transported. The whole duty of the company towards shipper or passenger is a duty resting entirely upon contract, express or implied."

The relation between carrier and passenger in the first place is contractual. From the moment the passenger comes to purchase his ticket and enters the train, to the end of his journey, he passes measurably under the control and direction of the agents and servants of the carrier, upon whom the law imposes the correlative duty of protecting him against insults, assaults, and injuries perpetrated by them or others on the train, in so far as they can reasonably do so. *Bowen v. Illinois C. R. Co.* (1905) 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306.

"A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied, but if it does not exist in either form, the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination." *Purple v. Union P. R. Co.* (1902) 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123.

But the term "passenger" is sometimes used in a loose sense, to denote that the person riding was not a trespasser, the relation not being based on contract.

In *St. Joseph & W. R. Co. v. Wheeler* (1886) 35 Kan. 185, 10 Pac. 461, it is said: "One of the questions raised is, that there was no correspondence be-

in the service of the carrier depends, as has been seen, not upon the law of master and servant, but upon the law of agency.³ This position was expressed in an Ohio case in which it is said: "The view of counsel for the defendant in error appears to be that the duty of the company to exercise care toward the decedent arose out of the fact that he was riding on the freight train with the express or implied assent of the conductor; and this view is said to have been taken in the circuit court. It invokes the doctrine of the law of agency; and, since the company did not authorize the transportation of passengers on its freight trains, it relies upon the implied or apparent authority of the conductor to bind the company to a relation which its rules forbade. It assumes that the company had given to the conductor an apparent authority which its operating rules had expressly denied him. But the apparent authority of the conductor was to represent the company in the conduct of that portion of its business to which the train in his charge was appropriate. It did not, therefore, exceed his actual authority. The differences between trains intended exclusively for the carriage of freight and those intended for the carriage of passengers are so obvious and

tween the pleadings and the evidence. The point is made that the plaintiff alleged that Frank Wheeler was a passenger,—a term which it is claimed implied that Frank Wheeler was traveling in a public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor, while the evidence offered showed that he was carried on a train not designed for passengers, that no fare was collected or expected to be paid, and therefore that he did not stand toward the company in the relation of a passenger. This is one sense in which the term is used, but not the only one. It is commonly applied to anyone who travels in a conveyance, or who is carried upon a journey, irrespective of the character of the conveyance or of compensation to the carrier. While the plaintiff alleged that Wheeler was carried as a passenger, he nowhere averred that he was carried for hire, nor can it be said that the petition was framed upon the theory that there was a contract relation between deceased and the company. It was rather upon the theory that he was not a trespasser upon the

defendant's train; and it is specially alleged that he was upon the train with the knowledge and consent of the conductor. From this averment it is manifest that the pleader did not rely upon any agreement between the company and Wheeler, and did not intend to hold the company to extraordinary care, as it would be held in carrying persons who were passengers, in a strictly legal sense; but rather, that as Wheeler was upon the train with the consent of the conductor, he was not wrongfully there, and the company owed him the duty of ordinary care. The action was founded upon the neglect of the company, and not upon a breach of a contract; and allegations of the relation which he occupied toward the company are only material for the purpose of determining and fixing the grade of care owing to him by the company. As we interpret the petition, it did not allege that the relation of carrier and passenger existed by reason of an agreement between the deceased and the company, and therefore that there was no substantial variance between the pleadings and the evidence."

³ See chapter CXI., *post*.

familiar as to forbid the view suggested.”⁴ It is true that in most of the cases the courts refer to the agents of the company for the

⁴ *Baltimore & O. S. W. R. Co. v. Cox* (1902) 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119.

And in Missouri, in *Whitehead v. St. Louis, I. M. & S. R. Co.* (1889) 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751, it is said: “This leads us to the specific objection made to the petition, which is, that, as it shows the plaintiff was injured whilst in the caboose attached to a freight train, it should contain a direct allegation that authority was given by the company to the agent in charge of it, to carry passengers; for, without such permission from the company, it is insisted, the defendant owed no duty whatever to the plaintiff. There is no law which prohibits a railroad company from carrying, or persons from riding, in the caboose of a freight train. When one is permitted to take a caboose for the purpose of transportation, by the consent of those agents in charge of the train, he is presumed to be there of right.”

So in *Haggerty v. Flint & P. M. R. Co.* (1886) 59 Mich. 366, 60 Am. Rep. 301, 26 N. W. 639, where it was held that a passenger who had traveled beyond the station to which his ticket entitled him to go could not recover damages on account of his having been ejected for nonpayment of fare by a new conductor who had taken charge of the train at that station. The *ratio decidendi* was that the case must rest upon the general principle that an agent, to bind his principal, must act within the scope of his agency; and that there was no express authority conferred upon the conductor in question to collect fare on the division beyond the station in question, nor any usage or facts connected with his position from which such authority could be implied.

And in *Willis v. Atlantic & D. R. Co.* (1897) 120 N. C. 508, 26 S. E. 784, in holding that a section master was without authority to invite a person walking on the track to ride on a hand car so as to make him a passenger, the court said: “The law of common carriers will not solve this question. It must be settled by the principles of the law of agency. The defendant is a common carrier, but every

employee of the defendant is its agent, with such powers as pertain to the duties of his department, or such others as may be expressly given him. And this presents the question whether the section master, as an agent of the defendant, had authority to take the plaintiff on the hand car in such a way as to fasten on the defendant the duties of a carrier to him as a passenger. It must be conceded that any carrier has a right to make reasonable regulations in the management of his business. He may, if he sees fit, have the freight and passenger business carried on upon the same train, under one management, or he may completely separate these transactions by arranging them in distinct departments. He may have a conductor for a freight train and a conductor for a passenger train, but such conductor would have very different powers. The name has but little significance. The law would confer upon one such authority as was incident to the business of moving freight, and no authority for moving passengers. This would clearly be so to one having actual notice of such a division of the business. The carrier may also arrange and allow freight to be carried on the ‘hand car,’ and the law would confer on the section master such authority as was incidental to the business in which he was engaged, but no authority as to the transportation of passengers. In the great transactions of commercial business and corporations, as railroads and the like, convenience requires a subdivision of their work among numerous agents, each of whom may have a distinct employment, and is a general agent in his particular department, with no powers beyond it. He is identified with his master to that extent only. In the absence of actual notice of the extent of the power of these agents, is there anything in the nature and apparent division of the business which would imply notice to a supposed passenger, as the plaintiff in this instance? There is no real analogy or resemblance between the duties of a conductor of a passenger train and those of a section master in charge of a hand car. A different class of men would be employed for such places,

purpose of creating the relation of carrier and passenger as servants, but this is not an accurate use of the term. The scope-of-employment doctrine, when referred to in this connection, is a doctrine of the law of agency. It is evident that it makes some difference whether a person is accepted as a passenger by a conductor of a passenger train or the conductor of a train employed exclusively in the carriage of freight,⁵—whether by a person held out by the company as a ticket

and the principal (the defendant) would have a right to assign specific and distinctly separate duties to each. The difference in the appearance of a passenger train and a hand car would be significant. The conveniences of the former and the inconveniences of the latter would suggest to a wayfarer that one was for passengers, and that the other was not. Such evidences in the actual operations of the defendant's business would negative the conclusion that the carrier would allow passengers on the hand car, and would suggest that the authority of the foreman of the section was limited to the business in which he was actually engaged. Under such circumstances, although a stranger to the company may take a free ride with the foreman's assent, he could scarcely be regarded as a passenger and the defendant as a carrier, as to him."

The copy of a rule placed in the hands of an engineer, that "no person shall be allowed to ride on the engine without the permission of the engineer," authorizes him to allow a person to ride upon the engine. *Whitehouse v. Grand Trunk R. Co.* (1877) 2 Haskell, 189, Fed. Cas. No. 17,565.

⁵In *Simmons v. Oregon R. Co.* (1902) 41 Or. 151, 69 Pac. 440, 1022, it is said: "This brings us to the inquiry whether the conductor of the train upon which plaintiff was riding had authority, real or apparent, to create the relation of passenger and carrier between the company and one riding upon his train. A railway company may separate its passenger and freight business, providing certain trains in which people may be carried as passengers, and other trains devoted exclusively to the transportation of freight. In case of such a complete separation between its freight and passenger business, the conductor of a freight train has no implied authority to receive passengers thereon, or to

bind the company by his act in so doing. And again, where one gets on a train made up exclusively of cars appropriate alone to the carrying of freight, he is, under many of the authorities, bound to take notice that such train is not intended for passengers, and, if he rides thereon, even with the consent and approval of the conductor, he is not entitled to the rights of a passenger, nor is the company bound to exercise toward him the same degree of care that would be required of it toward a passenger lawfully traveling in one of its trains. . . . Where, however, freight and passenger business is not entirely separated, but a railway company carries passengers on some of its freight trains under certain terms and conditions, one who, without knowledge of the company's regulations to the contrary, gets in a car attached to a freight train, designed and prepared for receiving passengers, and is allowed by the conductor to ride therein, is to be regarded as a passenger, and entitled to recover for an injury received through the company's negligence, even though the conductor may have been prohibited by the rules of the company from carrying passengers on that particular train. *Schouler, Bailm*, 598; *Thomp. Carr.* 344; *Dunn v. Grand Trunk R. Co.* (1870) 58 Me. 187, 4 Am. Rep. 267; *Lucas v. Milwaukee & St. P. R. Co.* (1873) 33 Wis. 41, 14 Am. Rep. 735; *Everett v. Oregon Short Line & U. N. R. Co.* (1893) 9 Utah, 340, 34 Pac. 289; *Whitehead v. St. Louis, I. M. & S. R. Co.* (1889) 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751; *St. Joseph & W. R. Co. v. Wheeler* (1886) 35 Kan. 185, 10 Pac. 461; *Spence v. Chicago, R. I. & P. R. Co.* (1902) 117 Iowa, 1, 90 N. W. 346. . . . Under the doctrine of these cases it was within the apparent authority of the conductor of the train upon which the plaintiff was riding at the time of his injury to allow per-

agent, or by an engineer, a brakeman,⁶ or a track walker. A conductor on a passenger train, in accepting a person as a passenger, would be manifestly acting within the scope of his employment or agency. So, likewise, would the ticket agent. But this would not be true of the freight train conductor, the engineer, the brakeman, or the track walker. But the relation, if it is created, must be

sons to ride thereon, and thereby create the relation of passenger and carrier between such persons and the company. The rules of the company permitted the carrying of passengers upon some freight trains, and under certain conditions. It is true that under these rules the defendant may not have been a common carrier of passengers on any of its freight trains, in the sense that one had a lawful right to ride there without complying with the conditions imposed. Nor were such conditions and limitations illegal or void. But, nevertheless, the company did assume to carry such passengers as complied with its rules on certain of its freight trains. It was the duty of the conductors of its trains to enforce these rules. For that purpose they stood in the place and as the representatives of the company, and by their acts the company is bound. The rules regulating the carrying of passengers on freight trains were unknown to the plaintiff. He had no knowledge of their existence, and did not know, when he entered the train, that he was violating them. He entered the car in good faith, supposing it to be one in which passengers were allowed to ride, and was permitted by the conductor to remain therein. He therefore, under the law, became a passenger, and entitled to the rights of such, even if he paid no fare, unless the fact that he was an employee of the company would change that relation-ship."

In *Vassor v. Atlantic Coast Line R. Co.* (1906) 142 N. C. 68, 7 L.R.A. (N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535, the court, in holding that a freight train conductor is without authority to establish any contractual relation between the company and a third person as carrier and passenger, said: "It is too well settled to call for the citation of authority that a railroad company has the right to classify its trains and assign to them such service as is reasonable. That in the exercise

of this right it may operate trains exclusively for carrying freight; and that when it has done so no person has a right to demand that he be carried upon such trains as a passenger. It is equally well settled that before a person can enter upon such a train and acquire the rights of a passenger he must show some contract made with some servant or agent of the corporation authorized to make such contract. Such authority may be shown either by express grant or necessary implication growing out of the nature or character of the employment."

⁶In *O'Donnell v. Kansas City, St. L. & C. R. Co.* (1906) 197 Mo. 110, 114 Am. St. Rep. 753, 95 S. W. 196, it is said: "Men dealing with corporations of a public character like that of a railroad company are presumed to know the ordinary scope of the duties of a servant of the company with whom the public is brought into daily contact; they know the ordinary scope of the duties of a brakeman, a locomotive engineer, and a conductor. No man of ordinary common sense needs to be told that neither a locomotive engineer nor a brakeman has authority to make a contract in behalf of the corporation for the carrying of passengers, or to receive the price of carriage; no man offers to make such a contract with either such servant with an honest purpose. . . . There is no difference in a legal point of view between the contracts this plaintiff made with the two other brakemen severally whereby he paid 50 cents to one to allow him and his companion to ride from Jacksonville to Roodhouse, and to the other 75 cents between Roodhouse and Odessa; it was a corrupt bribe in each case; the money paid to the two other brakemen was for their use, not for the railroad company, and the agreement to assist in handling the freight which the railroad company had employed this brakeman to do was a benefit, if benefit at all, to the brake-

created by a negotiation with a third person involving the exercise of judgment and discretion; and this, within the most approved definition of agents, constitutes the act the act of an agent, and not of a servant.⁷ A full discussion, therefore, of questions relating to

man, and in no sense an advantage to the corporation. Not only, therefore, was the alleged contract not within the scope of a brakeman's duties, but it was an agreement for a consideration personal to himself, to induce him to violate his duty. Can one who knowingly makes a contract with a servant to violate his duty to his master be heard to say that the contract is binding on the master, or that out of that contract such a condition of affairs has arisen as gives him a right of action against the master? If one by bribing your servant induces him to violate his duty to you, and either to take of that in the servant's care which belongs to you, or to impose on you a service which the servant had no authority from you to impose, who is the injured party, you or the man who tampered with your servant? . . . The petition says that this contract which the plaintiff made with the brakeman was immediately called to the attention of the conductor, and he, 'acting within the scope of his employment, expressly assented to it.' There was no proof of that allegation. There was proof on the part of the plaintiff tending to show that the conductor saw him handling freight at one of the stations, and saw him and his companion on top of a freight car, from which the inference might be drawn that the conductor knew that the plaintiff was on the train; that is the extent of the legitimate inference to be drawn from that evidence. There is nothing in the mere fact of seeing the man handling freight to justify the jury in drawing the inference that the conductor knew that he had made a contract with the brakeman of the kind pleaded. If the making of such a contract had been within the scope of the brakeman's authority, there might be some reason for the contention that seeing the man handling the freight was a circumstance from which the conductor should draw the inference that he was employed under such a contract; but when the conductor knew that the brakeman not only had no such authority, but that

to do so would be a violation of his duty, he had no right to draw such an inference."

⁷ Servants performing duties in respect of vehicles regularly used for the transportation of goods have usually no authority to act as agents, so as to create the relation of carrier and passenger. The general rule established by the cases is that the employer of a servant in charge of a vehicle which is not normally used for the conveyance of persons cannot be held liable for an injury received by a third party, while riding upon it in pursuance of an invitation given by the servant, unless the invitation is shown by affirmative evidence to have been within the scope of his authority.

In *Whitehead v. St. Louis, I. M. & S. R. Co.* (1889) 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 75, it was held that an authorization given by a conductor of a freight train having entire charge thereof, to ride on such train, although he was forbidden to carry passengers on that train, and although the person allowed to ride was not required to pay fare, was within the scope of the conductor's powers so as to render the company liable for an injury resulting from lack of ordinary care on the part of the employees of the company.

It has been laid down that, in the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that conductors have no authority to authorize them to ride thereon; but that this presumption may be overcome by proof of an order to the conductor from the superior officer, to carry the person on his freight train. *Dysart v. Missouri, K. & T. R. Co.* (1903) 58 C. C. A. 592, 122 Fed. 228. The evidence in that case was that the defendant's train master had no authority to allow freight trains to carry passengers without the direction of the superintendent, but that it was his duty to issue orders for their carriage whenever he was directed by the superintendent, and that the conductors were required to obey such orders without question.

the creation of the relationship of carrier and passenger, is not within the field of this work.

Without having been authorized by the superintendent, he ordered a conductor to carry a physician on a freight train. Neither the conductor nor the doctor knew that the train master had violated his duty. It was held, that the act of the train master was within the scope of his agency, and, as against the conductor and the doctor, the apparent authority was as binding on the railway company as actual authority would have been.

For other cases discussing the authority of conductors on freight trains to create the relation of carrier and passenger, see *Canadian P. R. Co. v. Johnson* (1890) Montreal L. Rep. 6 Q. B. 213; *McCauley v. Tennessee Coal, Iron & R. Co.* (1890) 93 Ala. 356, 9 So. 611; *Atchison, T. & S. F. R. Co. v. Headland* (1893) 18 Colo. 477, 20 L.R.A. 822, 33 Pac. 185; *Bergan v. Central Vermont R. Co.* (1909) 82 Conn. 574, 74 Atl. 937; *Cleveland, C. O. & St. L. R. Co. v. Best* (1897) 169 Ill. 301, 48 N. E. 684; *Smith v. Louisville, E. & St. L. R. Co.* (1890) 124 Ind. 394, 24 N. E. 753; *Cooper v. Lake Erie & W. R. Co.* (1893) 136 Ind. 366, 36 N. E. 272; *Stalcup v. Louisville, N. A. & C. R. Co.* (1897) 16 Ind. App. 584, 45 N. E. 802; *Dalton v. Louisville & N. R. Co.* (1900) 22 Ky. L. Rep. 97, 56 S. W. 657; *Clarke v. Louisville & N. R. Co.* (1908) 33 Ky. L. Rep. 797, 111 S. W. 344; *Hanson v. Mansfield R. & Transp. Co.* (1886) 38 La. Ann. 111, 58 Am. Rep. 162; *Dunn v. Grand Trunk R. Co.* (1870) 58 Me. 187, 4 Am. Rep. 267; *Thomas v. Chicago & G. T. R. Co.* (1888) 72 Mich. 355, 40 N. W. 463; *Greenfield v. Detroit & M. R. Co.* (1903) 133 Mich. 557, 560, 95 N. W. 546; *Cain v. Minneapolis & St. L. R. Co.* (1888) 39 Minn. 297, 39 N. W. 635; *Wencker v. Missouri, K. & T. W. Co.* (1902) 169 Mo. 592, 70 S. W. 145; *Eaton v. Delaware, L. & W. R. Co.* (1874) 57 N. Y. 382, 15 Am. Rep. 513; *Radley v. Columbia R. Co.* (1904) 44 Or. 332, 75 Pac. 212, 1 Ann. Cas. 447; *Louisville & N. R. Co. v. Hailey* (1895) 94 Tenn. 383, 27 L.R.A. 549, 29 S. W. 367; *Texas & P. R. Co. v. Hayden* (1894) 6 Tex. Civ. App. 745, 26 S. W. 331; *San Antonio & A. P. R. Co. v. Lynch* (1894) 8 Tex. Civ. App. 513,

28 S. W. 252; *Missouri, K. & T. R. Co. v. Cook* (1896) 12 Tex. Civ. App. 203, 33 S. W. 669; *St. Louis Southwestern R. Co. v. White* (1896) — Tex. Civ. App. —, 34 S. W. 1042; *Houston & T. C. R. Co. v. Moore* (1878) 49 Tex. 31, 30 Am. Rep. 98; *Texas & P. R. Co. v. Black* (1894) 87 Tex. 160, 27 S. W. 118; *Everett v. Oregon Short Line & U. N. R. Co.* (1893) 9 Utah, 340, 34 Pac. 289; *Lucas v. Milwaukee & St. P. R. Co.* (1873) 33 Wis. 41, 14 Am. Rep. 735.

One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from wilful or reckless injury. Citing *Purple v. Union P. R. Co.* (1902) 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123; *Condran v. Chicago, M. & St. P. R. Co.* (1895) 28 L.R.A. 749, 14 C. C. A. 506, 507, 508, 32 U. S. App. 182, 185, 67 Fed. 522, 523; *Toledo, W. & W. R. Co. v. Brooks* (1876) 81 Ill. 250; *Chicago & A. R. Co. v. Michie* (1876) 83 Ill. 431; *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 84, 28 Am. Rep. 613; *Chicago, B. & Q. R. Co. v. Mehl-sack* (1889) 131 Ill. 64, 19 Am. St. Rep. 17, 22 N. E. 812; *McVeety v. St. Paul, M. & M. R. Co.* (1891) 45 Minn. 269, 11 L.R.A. 174, 22 Am. St. Rep. 728, 47 N. W. 809; *Robertson v. New York & E. R. Co.* (1856) 22 Barb. 91; *Union P. R. Co. v. Nichols* (1871) 8 Kan. 505, 12 Am. Rep. 475; *Prince v. International & G. N. R. Co.* (1885) 64 Tex. 146; *Gulf, C. & S. F. R. Co. v. Campbell* (1890) 76 Tex. 175, 13 S. W. 19; *Way v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828; (1887) 73 Iowa, 463, 35 N. W. 525; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* (1891) 45 Kan. 377, 25 Pac. 893; *Kansas P. R. Co. v. Whipple* (1888) 39 Kan. 531, 18 Pac. 730; *Atchison, T. & S. F. R. Co. v. Gants* (1888) 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54.

For collusive or fraudulent attempt to establish relation of carrier and passenger, see also: *Kruse v. St. Louis, I. M. & S. R. Co.* (1911) 97 Ark. 137, 133 S. W. 841; *Grahn v. International & G. N. R. Co.* (1906) 100 Tex. 27, 5 L.R.A.(N.S.) 1025, 123 Am. St. Rep. 767, 93 S. W. 104; *Smith v. Georgia R. & Bkg. Co.* (1901) 113 Ga. 9, 38 S. E. 330; *Sands v. Southern R. Co.* (1901) 108 Tenn. 1, 64 S. W. 478; *Youmans v. Wabash R. Co.* (1910) 143 Mo. App. 393, 127 S. W. 595.

On the ground that it is not within the scope of the authority of a brakeman on a freight train to collect fares, it has been held that a person does not, by paying money to such a brakeman, become a passenger, nor obtain any of a passenger's rights. *McNamara v. Great Northern R. Co.* (1895) 61 Minn. 296, 63 N. W. 726; *Mendenhall v. Atchison, T. & S. F. R. Co.* (1903) 66 Kan. 438, 61 L.R.A. 120, 97 Am. St. Rep. 380, 71 Pac. 846.

For other cases on the authority of a brakeman to create the relation of carrier and passenger, see: *Chicago & E. R. Co. v. Field* (1893) 7 Ind. App. 172, 52 Am. St. Rep. 444, 34 N. E. 406; *Janny v. Great Northern R. Co.* (1896) 63 Minn. 380, 65 N. W. 450; *Brevig v. Chicago, St. P. & O. R. Co.* (1896) 64 Minn. 168, 66 N. W. 401; *Atchison, T. & S. F. R. Co. v. Johnson* (1895) 3 Okla. 41, 41 Pac. 641; *Gulf, C. & S. F. R. Co. v. Campbell* (1890) 76 Tex. 174, 13 S. W. 19; *Galaviz v. International & G. N. R. Co.* (1896) 15 Tex. Civ. App. 61, 38 S. W. 234; *Missouri, K. & T. R. Co. v. Huff* (1904) 98 Tex. 110, 81 S. W. 525, reversing (1903) — Tex. Civ. App. —, 78 S. W. 249.

For authority of ticket agent to create relation of carrier and passenger, see *Illinois C. R. Co. v. Davenport* (1898) 177 Ill. 110, 52 N. E. 266.

For the authority of other employees to create the relation of carrier and passenger, see *Gulf, C. & S. F. R. Co. v. Campbell* (1890) 76 Tex. 174, 13 S. W. 19; *Pittsburg, C. C. & St. L. R. Co. v. Hall* (1910) 46 Ind. App. 219, 90 N. E. 498.

A boy on a freight train by invitation of the fireman is a mere licensee, if not a trespasser. *Louisville & N. R. Co. v. Thornton* (1900) 22 Ky. L. Rep. 778, 58 S. W. 796.

A railroad company is not liable for injury to a seven-year-old child while

boarding a moving freight train under the direction of an employee of the company, acting outside of the scope of his authority. *Keating v. Michigan C. R. Co.* (1893) 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346.

Persons riding on trains not intended for passengers, by permission of the trainmen, are bare licensees. *White v. Illinois C. R. Co.* (1911) — Miss. —, 55 So. 593; *Thacker v. Illinois C. R. Co.* (1911) — Miss. —, 55 So. 595.

Servants performing duties in respect of locomotive engines: In *Chicago & A. R. Co. v. Michie* (1876) 83 Ill. 427, it was laid down that "the engine driver of a railway company has no authority or right to say who shall be upon the train, or give permission to anyone to ride upon his engine, against the rules of the company. The conductor, having control of the train, might, perhaps, give such permission; and if he knows that a party is so riding on the engine, and suffers him to remain, his act may be considered that of the company."

In *Chicago, B. & Q. R. Co. v. Casey*, (1881) 9 Ill. App. 632, it was held that the defendant was not liable for an injury received by a boy who, when attempting, in compliance with the engineer's invitation, to get on to a moving locomotive, was struck by a platform, while he was hanging on to the side of the locomotive.

In *Radley v. Columbia Southern R. Co.* (1904) 44 Or. 332, 75 Pac. 212, 1 Ann. Cas. 447, plaintiff desired to travel on a freight train which carried passengers in a caboose, and, on going to the station just as the train was about to leave, was informed by the station agent that he would have to go some distance from the depot, to where the train was standing, as it would not stop after it started. After plaintiff reached the train, and had passed the engine toward the caboose, the engineer called to him to get on the engine, as he could not wait for plaintiff to go to the caboose, which plaintiff did. Thereafter plaintiff was injured by jumping from the train, on the advice of the fireman, just prior to the engineer's running the engine and some of the first cars off the track at a derailing device. It was held that the engineer had no authority to accept plaintiff as a passenger on the engine, and that the conductor's knowledge that

plaintiff was riding there, without objecting thereto, did not entitle plaintiff to the rights of a passenger.

In *Flower v. Pennsylvania R. Co.* (1871) 69 Pa. 210, 8 Am. Rep. 251, on the ground that there was no actual or presumptive authority on the part of a locomotive fireman, whose duty it was to supply the engine with water, to invite a ten-year-old boy to climb up on the side of the tender, put in the hose, and turn on the water at a water tank, it was held that the boy's father could not recover from the railroad company for his death, caused by his being knocked from the tender by a collision.

See also *Stringer v. Missouri P. R. Co.* (1888) 96 Mo. 299, 9 S. W. 905 (defendant not liable for injuries received by a person who was riding on a switch engine by the permission of a brakeman); *Virginia Midland R. Co. v. Roach* (1887) 83 Va. 375, 5 S. E. 175 (recovery denied where former employee rode on a locomotive at the engineer's invitation).

A person who voluntarily enters an engine cab to ride is presumed to know that it is not designed for such use, and there is no presumption that an engineer, conductor, or master mechanic has implied authority to extend such an invitation. *Clark v. Colorado & N. W. R. Co.* (1908) 19 L.R.A. (N.S.) 988, 91 C. C. A. 358, 165 Fed. 408. The court said: "While some courts have gone to considerable length in holding railroad companies responsible for the acts and assumptions of their employees while in positions of apparent authority, yet, when requested to hold that there is any presumption in favor of the authority of the employees to permit third persons to use places and instrumentalities obviously not designed therefor by the master, they come to a halt. If a conductor or engineer should invite a person to ride on the cowcatcher, a cross beam in front of the engine, or on a brake beam of a moving car, the foolhardy acceptor, receiving an injury thereby, would not be heard to say that he assumed the conductor or engineer had authority from the railroad company to invite him to ride there. By voluntary entering the engine cab to ride, the deceased assumed all the known hazards incident to such exposed position, because it is not a place designed by the railroad company for carrying passen-

gers, and because it is a known place of increased danger."

For other cases on power to create relation of passenger and carrier by invitation to ride on engine, see: *Lake Shore & M. S. R. Co. v. Brown* (1887) 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 197; *Chicago, M. & St. P. R. Co. v. West* (1888) 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788; *Southern R. Co. v. Cullen* (1906) 221 Ill. 392, 77 N. E. 470; *Harris v. Southern R. Co.* (1903) 25 Ky. L. Rep. 559, 76 S. W. 151; *Files v. Boston & A. R. Co.* (1889) 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; *Woolsey v. Chicago, B. & Q. R. Co.* (1894) 39 Neb. 798, 25 L.R.A. 79, 58 N. W. 444; *Wilcox v. San Antonio & A. P. R. Co.* (1895) 11 Tex. Civ. App. 487, 33 S. W. 379; *Missouri, K. & T. R. Co. v. Avis* (1906) 41 Tex. Civ. App. 27, 91 S. W. 877; *Fischer v. Columbia & P. S. R. Co.* (1909) 52 Wash. 462, 100 Pac. 1005.

Servants performing duties in respect to construction trains: In *Graham v. Toronto, G. & B. R. Co.* (1874) 23 U. C. C. P. 541, the defendants agreed with a contractor to furnish a construction train to be used in carrying materials for ballasting and laying the track of a portion of their road; the defendants to provide the conductor, engineer, and fireman; the contractor furnishing the brakemen. After work was over on the day in question and the train was returning to the place where the plaintiff, one of the contractor's workmen, lived, he, with the permission of the conductor, but without the authority of defendants, got on the train, and was injured through the negligence of the person in charge of the train. It was held that the defendants were not liable, since their contract was to carry materials only, not passengers, and the conductor, in permitting the plaintiff to get upon the train, was not acting as defendants' agent.

In *Morris v. Brown* (1888) 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722, defendants were engaged, under a contract with the aqueduct commissioners of the city of New York, in excavating for a tunnel. By their contract they were bound to furnish "all facilities for the purpose of inspection." M., defendant's intestate, was a civil engineer in the employ of the commissioners. It was his duty to inspect the work to see that it was done in compliance

with the contract. For the purpose of removing the material excavated defendants employed "dump cars" running on a track laid in the shaft. The cars were drawn out by a cable and returned by gravitation, their downward speed being regulated by a brake. They were not intended as facilities for taking persons down the shaft, or fitted for that purpose. M., while riding on the outside of one of these cars down the shaft, to where the work of excavation was going on, was, through the neglect of the brakeman in charge of the car to control its velocity, thrown from the car and killed. From the evidence it appeared that there was plenty of room in the shaft to go on foot up and down it, and there was no obstruction in the way of the engineer's proceeding to the work on foot; that while M. had been accustomed, with the consent of the brakeman, so to ride down, it did not appear that this was with the knowledge of the defendants, or that the brakeman had any authority to give his consent. It also appeared that other engineers employed in the work of inspection usually, although not always, walked up and down the shaft. Held, that no duty or obligation rested upon defendants to transport M. into the tunnel, or to allow such a use of their car by him, or to manage it with such care as to prevent injury to him when riding thereon; that no license could be implied by such former use of the cars; that the decedent took upon himself the risk, both as to the condition of the car and the quality and care of the brakeman; and that therefore a refusal to nonsuit was error. The court said: "All the witnesses agree that no permission was given by the defendants; no evidence tends to show that they even knew the car was at any time so used. The brakeman of the car had known it, but neither his knowledge nor assent could bind the defendants. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant only when he acts in the execution of the authority given him. Here the servant had only to go up with loads of stone or dirt and return with the empty cars,—the easiest and simplest of duties, with little responsibility, and engaged in an employment requiring only a low degree of intelligence, his discretion at any rate limited

to the care and proper disposition of the loads intrusted to him; his position inferior to that of the driver of the wagon or carriage in the cases I have supposed. There is nothing whatever in the record to show that in not resisting the intestate's entrance upon the car, or in consenting to it, he was acting in pursuance of any authority conferred on him. He had nothing to do, and could, in the nature of things have nothing to do, with human freight."

Where the plaintiff, an inspector of works for a tube railway, for his own convenience, but with permission of a representative of the defendants, rode on an electric engine on a temporary line constructed for the purpose of carrying on work in connection with the building of a tunnel, and was hurt through the negligence of the defendants' servants, it was held that the defendants' liability was that of a person who undertakes to carry another gratuitously whose duty it is to exercise reasonable care under the circumstances. *Harris v. Perry* [1903] 2 K. B. 219, 72 L. J. K. B. N. S. 725, 89 L. T. N. S. 174, 19 Times L. R. 537.

For lack of authority of conductor of construction train to create relation of carrier and passenger, see also *Jenkins v. Central of Georgia R. Co.* (1906) 124 Ga. 986, 53 S. E. 379; *Spence v. Chicago, R. I. & P. R. Co.* (1902) 117 Iowa, 1, 90 N. W. 346.

Status of person riding on hand car: In *International & G. N. R. Co. v. Prince* (1890) 77 Tex. 560, 19 Am. St. Rep. 795, 14 S. W. 171, an action for injuries sustained by a passenger while riding on a hand car, evidence that the train master who authorized plaintiff to ride on the car was the representative of the company on that part of the road in respect to all matters connected with the use of the road, cars of all kinds, and the services of its employees, was held to be sufficient to justify a finding that the train master had authority to use the hand car for transporting passengers.

In *International & G. N. R. Co. v. Cook* (1887) 68 Tex. 713, 2 Am. St. Rep. 521, 5 S. W. 635, a station agent received from the train master and train despatcher of the division a telegraphic order, directing the section foreman to collect his crew and transport the plaintiff, a justice of the peace, on

a hand car to the place where an accident had occurred, so that he might hold an inquest. It was held that, under the evidence set out on the record, he was not entitled to recover for an injury sustained while riding on the car, as the servants of the company who had given him permission to ride on the car were "not shown to have had the power to abrogate or suspend rules promulgated by the proper authority for the operation of the road;" and that "the court below could not assume that said servants, in so doing, were acting in the apparent scope of their authority." An instruction expressed in language which assumed that the plaintiff had been conveyed with the consent of the defendant was held to be error. It was observed that the decision in *Prince v. International & G. N. R. Co.* (1885) 64 Tex. 146, although it grew out of the same facts as those under review, was rendered upon demurrer to a petition, in which it was alleged that the plaintiff was on the hand car by the invitation and consent of an agent of defendant, who had authority to give defendant's consent thereto. That decision, therefore, had no application to the point under consideration.

In *Eastern Kentucky R. Co. v. Powell* (1895) 17 Ky. L. Rep. 1051, 33 S. W. 629, a station agent of one railroad company, who was also employed to sell tickets and look after freight business of another company whose railroad crossed the former at his station, was held not to have been acting within the line of his employment by the latter, when, without its consent or authority, he used a hand car upon its track, at times carrying passengers thereon, and dividing the receipts among persons assisting him to run the same. The liability of the latter company for injuries to a third person, due to his negligence in so using the car, was accordingly denied.

In *Robinson v. McNeill* (1897) 18 Wash. 163, 51 Pac. 355, an action for an injury received through falling from a hand car which the complainant and several other boys had borrowed from a section foreman was held not to be maintainable.

In *Rathbone v. Oregon R. Co.* (1901) 40 Or. 225, 66 Pac. 909, the liability of the defendant for the death of a man who was killed while riding on a

hand car at the invitation of a section foreman was denied on the ground that such an employee had no authority to receive passengers on a hand car.

In *Houston, C. A. & N. R. Co. v. Bolling*, (1894) 59 Ark. 395, 27 L.R.A. 190, 43 Am. St. Rep. 38, 27 S. W. 492, where a child who had been invited by one of the members of a section gang to ride on a hand car, contrary to the rules of the company, and not in accordance with any custom acquiesced in by it, caught his hand in a cogwheel and was killed, it was held that no action would lie for his death.

In *Dougherty v. Chicago, M. & St. P. R. Co.* (1908) 137 Iowa, 257, 14 L.R.A. (N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902, the evidence showed that, as the car was coming to the station where it was kept, and was passing the house where the boy lived, one of the section men invited him to get upon the car. Pursuant to the invitation, the foreman stopped the car, and ordered the men to help the boy to get onto it. They then proceeded to the depot, from which some tools were to be taken to the tool house. After the tools were loaded, two men got on one end of the car and the boy got on the other. The foreman did not get upon the car, but ordered the men to take it to the tool house, and seeing the boy on the car, remarked: "Hold on tight." The boy testified that he had hold of the handle bars of the car, and kept hold for a little while until he got dizzy, and then let go and fell off. The court said: "It is manifest, of course, that the boy was not a passenger, and that defendant's liability cannot be predicated upon that theory. The injury was due to the wrong of defendant's employees, entirely outside of the scope of their employment, and defendant cannot be held responsible therefor. The only possible theory upon which there could be a recovery is that the boy was either a licensee or a trespasser, and that defendant was charged with the duty of not wantonly or purposely injuring him. But to this proposition there are several answers. In the first place, the original wrong, for which defendant was in no way responsible, was the proximate cause of the injury to the boy. Again, there is no evidence of any such wanton or malicious conduct upon the part of defendant's agents as would justify a

recovery. And, lastly, as to the employees who injured the boy, he was not a trespasser, for they invited him upon the car, and, although defendant is not responsible for the conduct of these men in extending the invitation, it cannot be charged with the negligence of the section men, no matter how gross, in injuring the boy, after they had themselves placed him in the dangerous position. In all that they did they were acting outside of the scope of their authority and for some purposes of their own, and defendant should not, under the circumstances, be held liable for their negligence. *Keating v. Michigan C. R. Co.* 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346. Defendant should not be held liable either for their original wrong, or for the consequences thereof. If the boy had got upon the car without the consent of the section men, he would have been a trespasser, and defendant would only be held responsible in such a case if they wantonly or purposely injured him after discovering his presence. The rule in the so-called turntable cases, as announced in *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, has no application whatever."

A railroad company is not liable for injury to a boy falling off of a hand car upon which he was permitted to ride without authority while the car was being employed by a section foreman for his private purposes. *St. Louis, I. M. & S. R. Co. v. Robinson* (1910) 95 Ark. 39, 128 S. W. 60.

Status of persons riding on horse-driven vehicles: In *Lygo v. Newbold* (1854) 9 Exch. 302, 23 L. J. Exch. N. S. 108, 2 C. L. R. 449, 2 Week. Rep. 158, the plaintiff, a person of full age, contracted with the defendant to carry goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way the cart broke down, and the plaintiff was thrown out and severely injured. It was held that, as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained.

In *Driscoll v. Scanlon* (1896) 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. M. & S. Vol. VI.—477.

E. 100, the driver of a dump cart had invited a boy nine years old to ride upon the cart, either for pleasure or to take his place in driving the horse while he slept. It was held that his employer was not liable for injuries received by the boy through falling off and being run over while the driver was asleep. The court said: "It was argued that we might look only to the later moment when the plaintiff was under the wheels; that it did not matter how he got there, and that the defendant was liable for running over the plaintiff, if he would have been in case his cart had run over a third person when his driver was asleep. But it does make all the difference in the world how the plaintiff got under the wheels. The defendant was not bound to expect or look out for people falling from his cart, where they had no business to be, and persons who got into it took the risk of what might happen as against him. The driver's slumber was so intimately connected with the unauthorized act that it is impossible to separate the two. The driver would not have been asleep and the plaintiff would not have fallen but for the driver's unauthorized act, and if the plaintiff had not been driving. The plaintiff does not stand in the same position as if he had been run over when crossing the road."

In *Foster-Herbert Cut Stone Co. v. Pugh* (1906) 115 Tenn. 688, 4 L.R.A. (N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, where a boy was injured in attempting to alight from a wagon, one of the grounds upon which recovery was denied was that no evidence had been offered to show that the driver had been authorized to invite children to ride upon it.

In *Marquis v. Robidoux* (1900) Rap. Jud. Quebec, 19 C. S. 361, a boy ten years old, after having been ejected with other boys from the defendant's delivery wagon, secretly re-entered the wagon without the driver's knowledge, and after having been observed by him, had been tacitly permitted to remain, because he was unwilling to leave him in the public road, far from his father's home. The boy was injured by a collision between the wagon and a railroad train, without any negligence on the part of the driver. It was held that the defendant was not liable for this injury, as the driver was not within

the scope of his duties in permitting the boy to remain in the wagon.

The master is not liable for an injury to a boy permitted to ride on a coal wagon by a servant, without authority, and in violation of his instructions. *Scott v. Peabody Coal Co.* (1910) 153 Ill. App. 103.

For other cases of a similar type, in which the master's liability was denied, see *Schulwitz v. Delta Lumber Co.* (1901) 126 Mich. 559, 85 N. W. 1075 (boy seated himself on the hounds of a wagon in charge of a driver, who had been forbidden to allow children to ride on it; injury caused by horses starting); *Mahler v. Stott* (1902) 129 Mich. 614, 89 N. W. 340 (boy thrown from wagon owing to negligence of driver, who had been forbidden to allow boys to ride on it).

The production of evidence showing that the act of the servant was within the scope of his employment is also deemed to be a prerequisite to the maintenance of an action by a person whose injuries were sustained as a result of his having mounted a horse not kept for hire. *Bouler v. O'Connell* (1894) 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498, where a child was kicked by a horse upon which a teamster, who was leading it to a water tub, had invited him to ride, the right of recovery was denied upon grounds thus explained by the court: "The defendants were contractors and excavators, and owned many teams. There was nothing to show that it was any part of their business, or that it was their habit or custom, to furnish horses or colts to ride, or to allow boys to ride upon them, or that they in any way ever authorized or permitted Frank to do this. Under this state of things, we are unable to see how the invitation by Frank to the plaintiff to ride upon the colt, although given while Frank was engaged in his employment, can be considered to be an act done in the course of such employment, or for the purpose of doing the business of his masters. The true test of liability on the part of the defendants is this: Was the invitation given in the course of doing their work, or for the purpose of accomplishing it? Was this act done for the purpose, or as a means, of doing what Frank was employed to do? If not, then in respect to that act he was not in the course of the defendants' business. An act done by a servant

while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt."

The rules for determining whether persons in the service of a carrier have authority to create the relation of carrier and passenger in respect to vehicles used for the transportation of passengers are the same as those in respect to other vehicles. Whether such persons may create the relationship depends upon the scope of the agency.

For authority of ticket agent to bind company, see *Central R. & Bkg. Co. v. Roberts* (1893) 91 Ga. 513, 18 S. E. 315; *Burnham v. Grand Trunk R. Co.* (1873) 63 Me. 298, 18 Am. Rep. 220; *Lake Shore & M. S. R. Co. v. Pierce* (1882) 47 Mich. 277, 11 N. W. 157.

For authority of passenger conductor, see *Condran v. Chicago, M. & St. P. R. Co.* (1895) 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Louisville & N. R. Co. v. Scott* (Louisville & N. R. Co. v. Weaver) (1900) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674; *Case v. Delaware, L. & W. R. Co.* (1899) 191 Pa. 450, 43 Atl. 319; *St. Louis Southwestern R. Co. v. Fowler* (1906) — Tex. Civ. App. —, 93 S. W. 484; *Texas & P. R. Co. v. Hayden* (1894) 6 Tex. Civ. App. 745.

For authority of baggage man, see *Reary v. Louisville, N. O. & T. R. Co.* (1888) 40 La. Ann. 32, 8 Am. St. Rep. 497, 3 So. 390.

For authority of yard master, see *Chicago, St. P. M. & O. R. Co. v. Bryant* (1895) 13 C. C. A. 249, 27 U. S. App. 681, 65 Fed. 969.

For authority of driver of street car, see *Evansville Street R. Co. v. Meadows* (1895) 13 Ind. App. 155, 41 N. E. 398; *Buck v. People's Street R. & Electric Light & P. Co.* (1891) 108 Mo. 179, 18 S. W. 1090.

For authority to board a train from an employee not connected in any way with its running, see *Thompson v. Nashville, C. & St. L. R. Co.* (1909) 160 Ala. 590, 49 So. 340.

For who are or are not passengers in general, see *Hutchinson, Carr*, §§ 997 et seq.; *Elliott, Railroads*, §§ 1578b-1581; *Blackmore v. Toronto Street R. Co.* (1876) 38 U. C. Q. B. (C. A.) 207;

2500. Injuries to persons invited on premises, vehicles, etc.—

It is well settled that the owner of property rests under a higher obligation to protect from danger persons whom he has invited upon it, than is exacted from him in respect to trespassers, intruders, mere volunteers, or bare licensees. This is a duty which rests upon all persons, and which does not therefore pertain particularly to the relation of master and servant. The liability of the master to third persons, for the negligent acts and the wilful torts of his servant, with reference to duties imposed by contractual and noncontractual relations, has been discussed in preceding chapters. Assuming that a master inviting another upon his premises owes him a certain duty or degree of care to prevent him from sustaining injuries thereon, both by reason of the condition of the premises and of the acts of his servants, the question often arises as to how far persons in the service of the master may create this relationship which carries with it the corresponding duty; in other words, how far such persons may do his inviting for him. As the position of a complainant may be materially different, according as the invitation or license in question proceeded from the defendant himself or one of his employees, these alternative seductions will be separately dis-

Harrison v. Fink (1890) 42 Fed. 787; *St. Louis & S. F. R. Co. v. Sanderson* (1911) 99 Miss. 148, 54 So. 885; *Lawrence v. Kaul Lumber Co.* (1911) 171 Ala. 300, 55 So. 111; *Gradert v. Chicago & N. W. R. Co.* (1899) 109 Iowa, 547, 80 N. W. 559; *Passenger R. Co. v. Young* (1871) 21 Ohio St. 518, 8 Am. Rep. 78.

For collusive or fraudulent attempt to create relation of carrier and passenger on passenger train, see *Condran v. Chicago, M. & St. P. R. Co.* (1895) 28 L.R.A. 749, 14 C. C. A. 508, 32 U. S. App. 182, 67 Fed. 523; *Harmon v. Jensen* (1910) 100 C. C. A. 115, 176 Fed. 519, 20 Ann. Cas. 1224; *Sessions v. Southern P. Co.* (1911) 159 Cal. 599, 114 Pac. 982.

One who, knowing that a conductor has no authority to grant free transportation, rides upon his train with the deliberate intention not to pay his fare, under an agreement or tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but a mere trespasser. *Purple v. Union P. R. Co.* (1902) 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123, cit-

ing: *Condran v. Chicago, M. & St. P. R. Co.* (1895) 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Toledo, N. & W. R. Co. v. Brooks* (1876) 81 Ill. 250; *Chicago & A. R. Co. v. Michie* (1876) 83 Ill. 431; *Toledo, W. & W. R. Co. v. Beggs* (1877) 85 Ill. 84, 28 Am. Rep. 613; *Chicago, B. & Q. R. Co. v. Mehlsack* (1889) 131 Ill. 64, 19 Am. St. Rep. 17, 22 N. E. 812; *McVeety v. St. Paul, M. & M. R. Co.* (1891) 45 Minn. 269, 11 L.R.A. 174, 22 Am. St. Rep. 728, 47 N. W. 809; *Robertson v. New York & E. R. Co.* (1856) 22 Barb. 91; *Union P. R. Co. v. Nichols* (1871) 8 Kan. 505, 12 Am. Rep. 475; *Prince v. International & G. N. R. Co.* (1885) 64 Tex. 164; *Gulf C. & S. F. R. Co. v. Campbell* (1890) 76 Tex. 175, 13 S. W. 19; *Way v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828, (1887) 73 Iowa, 463, 35 N. W. 525; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* (1891) 45 Kan. 377, 25 Pac. 893; *Kansas P. R. Co. v. Whipple* (1888) 39 Kan. 531, 18 Pac. 730; *Atchison, T. & S. F. R. Co. v. Gants* (1888) 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54.

cussed. Where the claim is founded upon an invitation given by the defendant himself or his general agent, so that the question of authority in respect of giving it is excluded, the question whether the action is maintainable is determined simply by an application of the general doctrines of the law of negligence which define the rights of persons who act upon an invitation or a license. In this point of view we reach the following conclusions:

(1) If the entrance upon the premises of the defendant or the use of his chattel was induced by his invitation, and the injury complained of resulted from the actual condition of those premises or that chattel, the injured person is entitled to be indemnified, if that condition was such as betokened a want of reasonable care.¹ The lia-

¹ The owner or occupier of real property is under the duty of exercising reasonable or ordinary care and prudence to the end of keeping his premises safe for the benefit of those who come upon them by his invitation, express or implied; and if, through a neglect of his duty, they are, without negligence or fault of their own, injured by reason of any negligence therein, he must pay damages. 1 Thomp. Neg. § 968. For a full discussion of this question see also the following sections of the work of the same author to and including § 1022.

Every public-service company owes to such members of the general public as have occasion to transact with it the business it is accustomed to perform the duty of affording them safe and decent access to the office or other place where such transactions are to be had. It must see that those members of the public who come to the usual and appointed place to deal with it are accorded respectful treatment. *Dunn v. Western U. Teleg. Co.* (1908) 2 Ga. App. 845, 59 S. E. 189.

A corporation inviting a workman on its premises for the purpose of repairing a boiler owes him the duty, while he is so engaged, of exercising reasonable care not to injure him. *Winona Technical Institute v. Stolte* (1909) 173 Ind. 39, 89 N. E. 393.

And this duty cannot be delegated. *Ibid.*

In *Central of Georgia R. Co. v. Dufey* (1902) 116 Ga. 346, 42 S. E. 510, where a train upon which a laborer was engaged in sacking corn moved off with him and was derailed, the trial

judge was held to have properly refused a request on the part of "counsel for the defendant, to charge, in effect, that if the jury should believe that the servants of the railroad company had notified S., the plaintiff's employer, that the car in which the plaintiff was working would be moved by a certain time, and to finish sacking the corn by that time; that if the defendant's servants did not move the car until after the time specified; and that if the failure of the plaintiff to leave the car before it was moved was due to the failure of S. to notify him to leave it, they would be authorized to find 'that the injury was not caused proximately by the act or negligence of the defendant in not notifying him, and that the plaintiff would not be entitled to recover.'" The court said: "If the plaintiff was rightfully in the car, and servants of the company knew or had reason to suspect his presence there, it was then the duty of the company to notify him that the car was about to be moved, and that duty could not be shifted to Sanders or to anyone else not connected with the company. The warning to Sanders that the car would be moved at a certain time could in no sense be considered as a warning to the plaintiff, and the responsibility for the defendant's acts of negligence cannot be placed upon him. If the defendant made Sanders its agent for the purpose of notifying the plaintiff when the car would be moved, it would be liable for his failure to carry out the object of his agency; if he was not its agent, the railroad company cannot escape liability to the plaintiff on account of a warning conveyed to Sanders which

should have been communicated directly to the plaintiff." The court also approved the refusal of an unqualified instruction to the effect that ignorance on the part of the servants of the company regarding the presence in one of its cars of one rightfully working there would relieve it from liability. Such a charge would have taken from the jury the consideration of the essential question whether the ignorance of the defendant was in itself negligence. The circumstances must have been such that the servants of the company had no reason to suspect his presence in the car.

A railroad owes one rightfully unloading goods from a wagon beside its track the duty of exercising ordinary care to avoid injuring him. *Ft. Worth & R. G. R. Co. v. Eddleman* (1908) 52 Tex. Civ. App. 181, 114 S. W. 425.

A railroad company owes to the employees of an independent contractor permitted to ride on its gravel train between his home and the place of work only the duty of ordinary care. *Lovett v. Gulf, C. & S. F. R. Co.* (1904) 97 Tex. 436, 79 S. W. 514, affirming (1903) — Tex. Civ. App. —, 74 S. W. 570. It was assumed for the purposes of the case that the riding had been duly authorized by agents of the railroad company.

Where an action is brought for injuries received by a person struck by a stone thrown by a blast while the plaintiff was on the defendant's premises by invitation, the defendant's liability depends on whether reasonable care was used to shield plaintiff from exposure to danger. *Miller v. Twinline* (1908) 129 App. Div. 623, 114 N. Y. Supp. 151.

A subcontractor is liable to an employee of the general contractor for injury sustained by a defective scaffold which he had been invited to use by the subcontractor's general superintendent to facilitate the subcontractor's work. *Huston v. Dobson* (1910) 138 App. Div. 810, 123 N. Y. Supp. 892.

But where there is an agreement between the lessee of a building and his subtenants that when one of them is using a common freight elevator he shall have the exclusive use of it until his business is finished, and while the elevator is being so used by a servant of the subtenant, the servant of the lessee, at his own request, is permitted

to come upon the elevator, and is afterward injured by the starting of the elevator, by the servant of the subtenant, the servant of the lessee is in the position of a mere licensee, and not entitled to recover for his injuries unless able to show that the servants of the subtenant acted wilfully or recklessly. *McManus v. Thing* (1907) 194 Mass. 362, 80 N. E. 487.

Where the decedent, who was bearing a message to a guest on the master's premises, was directed by the master to accompany his bell boy, and was misled by an act of the latter into stepping through an open door into an elevator shaft, it was held that the master was liable. *Calhoun v. Windsor Hotel Co.* (1893) Rap. Jud. Quebec 4 C. S. 471.

In *Lackat v. Lutz* (1893) 94 Ky. 287, 22 S. W. 218, where the plaintiff, who had entered the defendant's premises for the purpose of delivering a message from the defendant's foreman to the effect that he would not be at work on the day in question, was directed by one of defendant's employees to go through a certain room which was not customarily used as a passageway for strangers, and, while in that room, fell into an unguarded opening, recovery was denied on the ground that in giving the direction, the employee was not acting in the line of his duty, or by the express or implied authority of the defendant.

Where the conductor of an oil train called to an employee of an oil company to remove obstructions from the track, and the only practicable way to reach the obstructions quickly was to pass from a building in which the employee of the oil company was, over the car, and where, in doing so, he lost his footing because of the sudden jerking of the car in coupling, and was hurt, it was held that if, in response to the invitation, and through no fault of his own while there, he was injured, the railroad company was liable. *Flynn v. Boston & M. R. Co.* (1910) 204 Mass. 141, 90 N. E. 521.

In an action against the proprietor of a store for false imprisonment by a floor walker of a customer accused of stealing goods, it was held that the rule as to the high duty owed by a carrier to a passenger was inapplicable to the relation of storekeeper and customer. *Cobb v. Simon* (1903) 119 Wis. 597,

100 Am. St. Rep. 909, 97 N. W. 276. The court said: "It is true that customers in such case are upon the premises by invitation, and the merchant owes the positive duty to the customer of using ordinary care to keep the premises in a reasonably safe condition for use by the customer in the usual way; and this doubtless includes the duty of using ordinary care to employ competent and law-abiding servants; but we do not understand that he insures the customer's personal safety. We have been referred to no cases so holding. The general principle, as frequently stated, is that persons who come upon premises to do business with the occupant at his express or implied request, are there by invitation, and that they are entitled to the same treatment due to all invited persons; namely, the exercise of ordinary care by the occupant."

A depot company incorporated for the purpose of furnishing depot and station-house accommodations for carriers is guilty of negligence in allowing the continuance in its depot of an employee of its tenant, renting a room in which to check parcels, who is a man of savage and vicious propensities, and in the habit of attacking and beating people; and it will be liable for injuries to one who is, without his own fault, attacked and beaten by such employee. *Dean v. St. Paul Union Depot Co.* (1889) 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54. The court said: "In support of its demurrer the defendant corporation contends: First, that it owed no duty whatever to the plaintiff, because no contractual relation existed between the parties; that therefore he must look to the railway company whose passenger he was, or had been, for compensation for his injuries; second, if it should be held that the duties imposed by railway companies towards their arriving and departing passengers have been assumed by the defendant, it is not responsible in this case, because the alleged assault was not committed by one of its servants or employees, but by the employee of a tenant who was engaged in an independent business, wholly disconnected from that of a common carrier of passengers, and conducted solely for the accommodation and convenience of those who chose to patronize the room, and pay

for the privilege of having their parcels temporarily taken care of; finally, if these positions prove untenable, it is argued that the assault of the employee was for purposes of his own, outside of his occupation, in disregard of the object for which he was employed, not committed in execution of it, and therefore in no event can the defendant be held responsible. . . . But, under the allegations of the complaint now before us, it is not essential to determine the precise relations existing between the defendant (organized for the special purpose and under contract to furnish to certain railway corporations proper and adequate depot and station-house accommodations for those who are entitled to use the same) and the plaintiff, who, arriving upon the train of one of these carriers, remained its passenger until he had an opportunity, by safe and convenient means, to leave the cars, the railway, and the station-house. *Warren v. Fitchburg R. Co.* (1864) 8 Allen, 227, 85 Am. Dec. 700. Nor is it necessary to pass upon the contention of the defendant that, whatever duty it owed the plaintiff as a passenger, it cannot be held liable for the wilful act of the servant and employee of one who had leased a room in its depot building for the purpose of carrying on an independent business, not required of the carrier of passengers, and conducted by a tenant solely for the convenience of the traveling public. Nor, as we regard the pleading, need we consider the final position assumed by defendant, that the master is not responsible for the wilful acts of his servant, performed outside of his employment, not in execution of it, and for purposes of his own. . . . Whatever obligation otherwise, by virtue of its contract with the carrier, rested upon the defendant as to the plaintiff, it is manifest that it was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there. It had no more right, therefore, to knowingly and advisedly employ or allow to be employed, in its depot building, a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog or other animal, or to permit a pitfall or trap into which a passenger might step as he was passing to or from his train."

A union station company cannot escape liability for failure to perform its duty to direct passengers to their proper trains, on the theory that it allowed this to be done by the employees of a railroad company, since for this purpose such employees were its agents for the performance of this particular work. *Union Depot & R. Co. v. Londoner* (1911) 50 Colo. 22, 33 L.R.A.(N.S.) 433, 114 Pac. 316.

It has been held that the duty of exercising reasonable care for the safety of the public, on the part of the owner of fixed property, is absolute, and consequently is not satisfied by the exercise of ordinary care in the employment of an architect to inspect the premises for defects. The owner cannot shift responsibility in such a case upon the shoulders of his agent. *Connolly v. Des Moines Invest. Co.* (1905) 130 Iowa, 633, 105 N. W. 400.

It is to be noted that "invitation," as commonly used and defined by law writers, is a term of considerable breadth, and includes not only express invitation, but the invitation that may be implied from custom, usage, or conduct on the part of the carrier, or of its servants, if notorious or actually known to the carrier or its *alter ego*. *Lawrence v. Kaul Lumber Co.* (1911) 171 Ala. 300, 55 So. 111.

The question often arises as to what constitutes an invitation. Where the consignee of ice was told by the conductor that he must unload it himself, and was injured while doing so, it was held that he was not a mere licensee, but that he was on the car by invitation. *Santa Fe, P. & P. R. Co. v. Ford* (1906) 10 Ariz. 201, 85 Pac. 1072.

A notification to a consignee of freight of its arrival, and that, if he desired to avoid demurrage, he should unload it within a fixed time, is an invitation to enter upon carrier's premises for that purpose. *Ackley v. West Jersey & S. R. Co.* (1908) 76 N. J. L. 741, 71 Atl. 273.

Where an intending purchaser of an automobile asked the demonstrator if he could crank the car, and the demonstrator said, "yes, anybody can crank a car," and then explained how to do it, the court held that the purchaser was an invitee, and that the demonstrator, having neglected to warn him of

the dangers attendant upon the operation, his master was liable for a resulting injury. *Martin v. Maxwell-Brisco Motor Vehicle Co.* (1911) 158 Mo. App. 188, 138 S. W. 65. The same rule applies to such a case as to one in which a stopkeeper invites persons to come upon his premises.

The fact that a servant is painting the side of a vessel under a general contract of his master to paint all of defendant's steamships is prima facie evidence that he is there on defendant's invitation. *Horn v. Hamburg-American Packet Co.* (1911) 81 N. J. L. 729, 80 Atl. 490.

In one case the supreme court of Georgia laid it down that a person who had come upon the premises of a railroad company, not as a passenger, but merely for the purpose of questioning a station agent about some freight consigned to him, was entitled in the transaction of his business to protection against the violence and insults of the agent. *Columbus & R. R. Co. v. Christian* (1894) 97 Ga. 56, 25 S. E. 411. But this statement was made with reference to a provision in the Code of that state, which imposes an unqualified liability upon railway companies in respect of the torts of their employees.

But the invitation must be broad enough to cover the situation in which the person invited was injured. So, an invitation to unload a car on a side track does not imply the right to project a timber from the car over the adjacent main track; and if the railroad company has no notice that this has been done, it is not liable for injuries to the person unloading, caused by the striking of the timber by a passing train. *Ackley v. West Jersey & S. R. Co. supra.*

For liability for wilful torts of servants, see chapters CL-CVI.

For duty of innkeeper with respect to operation of elevator, see note to *McCracken v. Meyers*, 16 L.R.A.(N.S.) 290.

For rights of one who has been prohibited from entering a passenger elevator, but who does so for the purpose of doing business with a tenant, see note to *Ferguson v. Truax*, 14 L.R.A.(N.S.) 350.

For liability to one examining industrial plant in response to express or implied invitation, see note to *Weaver v. Carnegie Steel Co.* 21 L.R.A.(N.S.) 466.

bility of the defendant under such circumstances is determined with reference to the conception that he is subject to what has been characterized by an eminent jurist as "a limited duty of insurance."²

This doctrine would seem to entail the consequence that liability may be imputed to a defendant in respect of a condition brought about by the default of his servant, even though that default may have occurred while he was acting outside of the scope of his employment. But, so far as the writer knows, this point has not been discussed in any reported case.

(2) If the entrance upon the premises of the defendant, or the use of his chattel, was induced by his invitation, and the injury complained of resulted from the casual negligence of one of his servants, the injured person is at least entitled to maintain an action, if the negligent act was within the scope of the servant's employment.³

² Pollock, Torts, p. 414, Webb's Am. ed. pp. 624, 625. The following remarks of the learned author may be quoted: "The duty is founded not on ownership, but on possession; in other words, on the structure being maintained under the control, and for the purposes, of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus, the duty is described as being impersonal rather than personal. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonable safe condition as far as the exercise of reasonable care and skill can make it so."

³ *Tebbutt v. Bristol & E. R. Co.* (1870) L. R. 6 Q. B. 73. There the stations of the defendants and of two other railway companies at Bristol adjoined, and were open to one another, and the passengers of each company were in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendants' platform, on his way from the terminus of one of the other companies to the booking-office of the other company, waiting for his luggage, a porter of the defendants negligently drove a truck laden with luggage, and a portmanteau fell

off and injured the plaintiff. It was held that as the negligence complained of was an act of misfeasance by a servant of the defendants in the course of his employment, the maxim of *respondeat superior* applied; and that, under the circumstances, they were liable. In delivering the judgment of the court, Hannen, J., said: "It was contended that, assuming this to have been an act of negligence on the part of the porter, for which the defendants would have been responsible to a passenger by their own line, yet that the company were not responsible to the plaintiff, inasmuch as he was neither a passenger of theirs, nor a person who was on their premises on any business in which they were interested, but was a mere licensee, using the platform for his own convenience. It is unnecessary to consider what would have been the rights of the parties if the plaintiff's complaint had reference merely to the state and condition of the platform upon which he was allowed to enter. What he complains of is an act of misfeasance done by a servant of the defendants in the course of his employment,—the doing carelessly what the servant was employed to do, and which caused damage to the plaintiff. In such case the maxim *respondeat superior*, as a general rule, applies. The exception is where the injured party stood at the time of the injury in such a relation to the master that it may reasonably be presumed he agreed to undertake the risk arising from the negligence of those

With regard to this situation, no less than that which is adverted to in the preceding paragraph, it would seem to be a reasonable contention that the "limited duty of insurance" to which the defendant is subject should be viewed as being sufficiently comprehensive to include those negligent acts also which are not within the scope of the employment of his servants. But the decisions do not throw any light upon the question thus indicated.

It has been said that, strictly speaking, a servant cannot make a contract for his master, for this requires the exercise of discretion and judgment in a negotiation with a third person which makes the servant for the time being an agent, and the rights resulting from the transaction a question of agency. The same may be said of the servant's power to create the relation of owner and invitee. In fact, it would seem that the power of any person in the service of another to create a special relation between his employer and a third person

whom the master employed. . . . He was allowed the use of the defendants' platform in the same manner and upon the same conditions as if he had been one of their passengers, and is as 'external' to the defendants and their servants as he would have been if the accident had happened to him in the public street."

In *De Haven v. Hennessey Bros. & E. Co.* (1905) 69 C. C. A. 620, 137 Fed. 472, defendant was a contractor engaged in the construction of a courthouse, the work being in charge of a superintendent. On several occasions plaintiff, as well as other citizens, had visited the building by invitation of the superintendent, and in his company. Sometimes, also, in company of a subordinate, who, as the evidence tended to show, had charge of the work in his absence, he had gone over the building, using at times an elevator or hoist, which was employed for the purpose of carrying both men and materials to the several floors and into the tower. On one occasion, the superintendent being absent, plaintiff, by invitation of the assistant, went with him into the tower, and was injured by the falling of the elevator through the gross negligence of the man who had charge of the hoisting engine in failing to put on the clutch which held the elevator in position; the result being that it dropped at once when the two men stepped upon it. He was known to be careless, and had once been discharged for that reason. It was

held that the question whether the assistant was acting as vice principal within the scope of his authority was for the jury. The court was of opinion that, as the plaintiff was visiting the building upon the invitation of the employee in charge of the work, the fact that a notice was posted outside, by which the general public were warned to keep out, did not render him a trespasser. Accordingly, while he assumed the risk of injury from apparent dangers resulting from existing conditions, he did not assume the additional risk due to negligence of the licensor or its servants, and especially of a servant known to the contractor to be dangerously careless.

In *Corrigan v. Union Sugar Refinery* (1868) 98 Mass. 577, 96 Am. Dec. 685, it was held that one whose servant carelessly threw a keg out of a window, so as to injure a passer-by, was liable for the injury sustained, whether the injured person was on a public or private way, or whether he was passing over the way in the exercise of a public right or upon mere permission of the defendant.

See also *Feneff v. Boston & M. R. Co.* (1907) 196 Mass. 575, 82 N. E. 705, where it was assumed for the purpose of the decision that a railway company is liable for a negligent act of its servant which inflicts injury upon the servant of another company which uses the same station.

would depend upon the law of agency, and not upon that of master and servant. But it must be admitted that the courts have not kept this distinction clear, and that they constantly speak of the power of servants to create contractual and noncontractual relationship. It will be observed, however, that in doing so they use the language of the law of agency. The tenor of the decisions is that where the complainant's entrance upon the given premises or the use of the given chattel was induced by the invitation or permission of an employee of the defendant below the grade of a general agent, the nature of the duty with which, for the purpose of determining the right of recovery, the plaintiff shall be deemed to be chargeable, will depend upon the functions of the person from whom the invitation or permission proceeded. If it is shown that the employee was invested with no representative powers in respect of the alleged invitation or permission, his master clearly cannot be held liable except under circumstances which entitle even a trespasser to maintain an action. Both on principle and authority it is apparent that the exercise of any powers of this character which may be incident to the position held by him will bind his master, unless the invitation or permission pertained to the duties of that position; or, in other words, was given in the course of his employment; ⁴ which would appear, as has been said, to be a question of agency.

⁴ In *Hartman v. Muchlebach* (1895) 64 Mo. App. 565, an instruction which did not advert to this limitation was pronounced erroneous. The fact that an invitation given to the plaintiff by a bookkeeper in a brewery, to go to a place where barrels were being pitched, was given while the bookkeeper was actually engaged in the performance of the service for which he was employed, would not, it was declared, be sufficient of itself to make the employer liable for injuries caused by the explosion of a barrel.

In *Fraser v. Younger* (1867) 5 Sc. Sess. Cas. 3d series 943, 39 Scot. Jur. 494, the defendant was held liable for the death of a person killed by an unfenced shaft in a part of his factory which his servants had allowed such person to enter in contravention of defendant's explicit orders.

In *Chicago, M. & St. P. R. Co. v. West* (1888) 125 Ill. 320, 8 Am. St. Rep. 380, 17 N. E. 788, the court said that "conceding, as must be done, the engineer invited plaintiff to ride with

him on his engine, he was acting without the scope of any duty he owed to his employer; and, had any injury come to plaintiff on account of that act of the engineer itself, whether negligently done or not, the master would not be liable." It was, however, held that the rules of the company forbidding any stranger to ride upon the engine clearly made it the duty of the engineer to put him off; and that in so doing he would be acting within the general scope of his employment. On this ground the company was held to be liable to a child of seven years who had been invited to get on the engine by the engineer, and then injured as a result of the engineer's negligently directing him to get off the engine while in motion. It was the duty of an engineer to exercise reasonable care in putting the child off the engine, even though wrongfully there.

In *Siddall v. Jansen* (1897) 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191, the plaintiff was on the premises by invitation of his father, when he was injured

A brief discussion of the principles involved will suffice. The rule deducible from one decision seems to be that any servant who is invested with the function of protecting his employer's premises has a general authority to invite third persons to enter upon those premises.⁵ According to two other decisions, such authority may properly be imputed to a servant who has control of a part of his

by the descending cage of an elevator. The defendant was a bookseller, and the evidence tended to show that the general public was invited to the floor where the injury was received. It was held that it was a question for the jury whether the child was a trespasser, and that a verdict had improperly been directed for the defendant. The court said: "If the father had any right to invite plaintiff, then the invitation to a child of five years (the age of this plaintiff) would, in its ordinary sense, have given him the right to be in those places where his father was."

In *Baltimore & O. R. Co. v. Meyers* (1894) 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 367, an action for injuries received by a passenger who had, by a sudden application of the brakes, been thrown off a car platform, was held to be maintainable on the ground that he had been invited by a brakeman to come out on the platform for the purpose of alighting at the crossing of another line, because the train did not stop at the station where he wished to alight, and that the invitation, although a violation of the defendant's rules, was within the scope of the brakeman's authority.

In *Berry v. Boston Elev. R. Co.* (1905) 188 Mass. 536, 74 N. E. 933, the defendant was held not to be liable to a policeman who was called by one of its conductors to a discarded horse car used as a shelter only, for the ostensible purpose of arresting certain "crooks," but really as a joke on the policeman, and was injured by reason of a defect in the platform as he boarded the car.

Unauthorized permission by a servant in a restaurant to a patron to use a water-closet not intended for the use of patrons will not render the employer liable for an injury to such patron, due to a defective passageway to the closet. *Macartney v. Colwell* (1908) 29 R. I. 21, 68 Atl. 719.

⁵ In *Eaton v. Lancaster* (1887) 79

Me. 477, 10 Atl. 449, where the plaintiff's horse was burnt in the defendant's livery stable, which had been set on fire through the negligence of one or other of three drunken men in lighting a pipe, while they were passing the night in the defendant's hayloft, it was held (1) that in allowing the men to go into the hayloft, the watchman might properly be found to have been acting within the scope of his employment; (2) that it was for the jury to say whether it was negligence on his part to permit them, while in a state of intoxication, to go into the hayloft and spend the night there, knowing, as he did, that they were smokers, and carried their pipes and matches with them; and (3) that the jury was warranted in finding that the loss of the horse was proximately caused by his having given them leave to spend the night in the hayloft. With regard to the third point the court said: "To what extent the men were intoxicated was a fact for the jury. If to the extent to deprive them, substantially, of the use of their mental and physical powers, and they were in the habit of smoking, carrying matches for a light, might not what in fact occurred, have been 'reasonably anticipated?' If it was negligent to let them go into the loft to stay, under the circumstances, it must have been on account of danger from fire. There appears to have been no other danger to be apprehended. The negligence involved was permitting them to go into the loft to sleep. If, in their condition, they were a dangerous element there, the defendants must be held responsible for their acts. The case is the same in principle as where a railroad company, through its agents or servants, knowingly or negligently permits an intoxicated man to enter its cars among the general passengers, and from his intoxication, he commits an assault upon a peaceable passenger; in such case, the company is liable. True, the degree of care required in the two cases is dif-

employer's premises, and is charged in that capacity with the specific duty of excluding third persons from those premises.⁶ The present writer ventures to express the opinion that neither of the doctrines thus applied is satisfactory. It is by no means a self-evident proposition that the power to admit should be taken to be *prima facie* a concomitant of a duty to protect and a duty to exclude. On the contrary, it may be reasonably contended that the nature of those duties is such that a servant intrusted with their performance is guilty of violating them in an essential particular if he assumes to admit persons other than those whose object is to transact business in which his employer has an interest. The case of the janitor of a

ferent, but so far as the test of proximate cause is involved, the principle is the same."

Contrast *Formall v. Standard Oil Co.* (1901) 127 Mich. 496, 86 N. W. 946, where the defendant was held not to be liable for injuries caused by the fall of a door upon a boy whom a stableman had invited into a barn to assist him in his work.

⁶ In *Houston & T. C. R. Co. v. Bulger* (1904) 35 Tex. Civ. App. 478, 80 S. W. 557, where a man in charge of a railway pumping station permitted a minor about thirteen years of age to go on the premises, and allowed him to remain there, with knowledge that such premises were dangerous for persons of plaintiff's age, intelligence, and experience, a verdict finding the railway company to be liable for an injury inflicted upon the man by steam and hot water from the engine was upheld. The court took the position that it was immaterial whether the engineer had or had not received instructions not to permit persons to visit the premises, or whether he was authorized to invite persons to enter the premises. "For he was placed by appellant in exclusive management and control of its pumping house, its appliances, and appurtenant premises; and the rule is that, when one places his property in the exclusive possession and control of another, the right to protect the possession from intruders, and to prevent any interference with the property, arises from the duty of the one placed in such possession to properly control and manage it."

In *Houck v. Chicago & A. R. Co.* (1906) 116 Mo. App. 559, 92 S. W. 738, where an engineer was held to have been acting within the scope of his em-

ployment in admitting a boy to his engine room, the court said: "It was one of the engineer's duties to keep people, especially children, out of the room and away from the machinery, and he swore that he was in the habit of performing this duty. Now, if he was intrusted with the power to deny them admittance, it seems to us that it would be a fallacy to say he acted beyond his apparent authority when he asked a child to enter. Grown people assume that a man clothed with authority to exclude them from a place may, if he chooses, grant them admission. We hold that the engineer acted within what at least appeared to be his duty, if he invited the respondent into the room. This matter is argued by the appellant's counsel in a manner which we conceive not to be exactly pertinent to the facts. The nonliability of the defendant is put on the ground that Kenealy had no authority to employ help in connection with running the engine, and it is said that when he asked the boy to help him, he did what was beyond his right. But asking the boy to help him is not the essence of the injury. Respondent was not injured in turning the wheel; which, he said, was the act Kenealy asked him to do. He had turned the wheel without injury and was on his way out of the room when his coat caught on the shaft. The important fact is that Kenealy's request was equivalent to an invitation or direction to the respondent to go where there was danger, and the invitation prevented him from being a trespasser, and entitled him to the care to avoid injuring him which would have been due to any other person there of right."

building is different, as one of his recognized functions is to determine whether admission shall be granted to persons who seek it. Presumably an invitation given by such an employee would, in most instances, at least, be treated as being, in point of law, within the scope of his authority. It is otherwise in regard to an invitation proceeding from a person hired to perform certain services under a janitor. The extent of the powers of such a subordinate is a question of fact.⁷

With respect to servants of a subordinate class whose functions are confined to the ordinary work of mechanics, artisans, or laborers, it may be assumed that, in the absence of special circumstances indicative of a different conclusion, they must be taken to have no authority to invite third persons to enter the premises of their employers.⁸ In one case the court proceeded upon the doctrine that a person employed to sell intoxicating liquors in a barroom has authority to direct a customer to a part of the premises where sanitary conveniences are provided.⁹ In another case it was held that no recovery could be had for injuries received by the complainant while

⁷In *Foley v. Young Men's Christian Asso.* (1904; — App. Term) 90 N. Y. Supp. 406, the plaintiff was injured by falling through a trapdoor in a passageway on defendant's premises, having been invited there by one W., employed with defendant's knowledge to assist defendant's janitor, he paying W. for his services personally. Plaintiff was invited on the premises to remove from defendant's cellar rags which the janitor had been accustomed to sell for his own benefit. The evidence was conflicting as to whether the sale of the rags was within the duties delegated to W. by the janitor, and whether the removal of such rags was within the necessary duties of W. during the temporary absence of the janitor. It was held that it was error to instruct the jury that "the plaintiff's being there on the invitation of an employee, no matter how limited the employee's employment was, was sufficient to make the defendant liable if an accident occurred to the plaintiff." The court said that "upon the evidence given at the trial, the scope of the servant's authority, in view of the limited nature of his employment, presented matter for the determination of the jury, and could not be resolved adversely to the defendant by a ruling as upon a question of law."

And where the question of implied invitation is based upon custom and usage, and testimony is introduced upon the subject, the question raised is one of fact for the jury. *Lawrence v. Kaul Lumber Co.* (1911) 171 Ala. 300, 55 So. 111.

⁸In *Curtis v. Tenino Stone Quarries* (1905) 37 Wash. 355, 79 Pac. 955, a six-year-old boy was driven from the engine room by the engineer in charge, whereupon he went to the power room, where two other employees of defendant asked him to stay and blow the whistle at the close of work. These boys had no authority to invite strangers to enter the premises. It was held that the employer was not liable to the boy for an injury caused by his having caught his foot in a cogwheel, there being nothing to show that the injury had been wantonly or wilfully inflicted. The principle of the so-called "Turntable Cases" was deemed not to be applicable.

⁹In *Mountney v. Smith* (1904) 1 Austr. Comm. L. R. 146 reversing (1903) 3 New So. Wales St. Rep. 668, the plaintiff, after having had a drink at a hotel bar, asked the barmaid to direct him to the lavatory, which she did. Following her directions, he went to a portion of the premises where,

riding, at the invitation of a packing clerk, upon an elevator which, under the regulations of the establishment, was reserved for the carriage of goods only.¹⁰ And finally it may be said that whether persons in the service of common carriers on trains or vehicles or

while he was looking for the lavatory, he fell down an unguarded lift-well. In an action against the hotel keeper for negligence, it was held that the conversation between the plaintiff and the barmaid was admissible in evidence to prove that the plaintiff was in that part of the premises at the invitation of the proprietor. After referring to § 24 of the liquor act 1898, which provides that "during the continuance of" a hotel keeper's license, "every licensed house shall be provided with at least two decent places of convenience on or near the premises for the use of customers thereof," Griffith, Ch. J., proceeded thus: "The plaintiff, therefore, was entitled to expect that there would be such places provided by the defendant for the use of customers. In that expectation, he asked the barmaid—who, so far as appeared from the evidence, was the only person at or near the bar, representing the proprietor—where the lavatory was to be found, and she gave him the information. The learned judges of the supreme court thought that her answer to this question ought not to have been admitted in evidence, on the ground that the defendant was not present at the time, and that the barmaid had no authority from him to give the information. I must confess that I have some difficulty in understanding on what ground her answer could be objected to. Some of their Honors seem to have thought that there was something unseemly in asking such a question of a woman, but I am quite unable to sympathize with that view. I can see nothing unseemly in asking the only person on the spot representing the proprietor, where the place was that the proprietor was bound to provide for the convenience of his customers. The proprietor was bound to provide such a place, and the customer, who could not be expected to know where it was, was entitled to ask the question from the person who represented the proprietor in that part of his business. Giving such information seems to me to be within what I may call the scope of the barmaid's apparent

authority. Although there is no actual decision on the point, we are justified in using our knowledge of what goes on in the world around us. And I take it that it is within the scope of the apparent authority of any person employed in a business to answer any question that might, in the ordinary course of business, be expected to be put to him. It was contended on behalf of the defendant that the evidence was wrongly received, because the barmaid had not in fact authority to direct persons to the place to which she directed the plaintiff. On that point it is enough to say that, although an agent exceeds the actual limits of his authority, he will yet bind his principal, as regards a third person, if he acts within the scope of the authority that the principal has allowed him to appear to possess. She had, therefore, *prima facie* authority to answer all such questions as might be expected to be put to her by customers."

¹⁰ *Cogswell v. Rochester Mach. Screw Co.* (1879) 39 App. Div. 223, 57 N. Y. Supp. 145. It was urged that, even though the packing clerk possessed no general authority to give such an invitation as the one in question, there was evidence which would justify the jury in finding that, in the given instance, he was impliedly authorized to use the elevator for the purpose of conveying the plaintiff to the second floor, since it appeared; (1) that the defendant's president and secretary were aware of his intention when he went out of the office in company with the plaintiff, and raised no objection thereto; and (2) that it had been customary for passengers to use the elevator as a means of conveyance for a long time prior to the accident. But the court said: "Giving to this evidence . . . all the effect which can possibly be claimed for it, it simply proves that in one or two isolated instances there was a departure from the prescribed order of business in the defendant's establishment; but that the same was never brought to the attention or knowledge of the defendant's officers. This certainly does

vessels have authority to invite third persons thereon depends upon the scope of their agency, just as does their authority to create the relation of carrier and passenger.¹¹ The same may be said

not go far towards establishing a custom, if indeed it can be said to have any tendency in that direction; for in order to charge the master with liability for the unauthorized acts of his servant, it must be shown that he either had actual notice of such acts, or else that they were committed so frequently and under such circumstances as to justify the presumption of notice."

¹¹ In *Drew v. Sixth Ave. R. Co.* (1862) 26 N. Y. 49, the court approved an instruction to the effect that, in inviting and assisting passengers onto a street car, a brakeman acts in the course of his employment, and that his employer is liable if he does this in an improper and negligent way. The court sustained a verdict against the defendant for injuries received by a child whom the brakeman had seized by the coat and attempted to drag on a car while it was moving, and who had slipped out of his hand and fallen under the wheels.

In *Wilton v. Middlesex R. Co.* (1871) 107 Mass. 108, 9 Am. Rep. 11, the court thus discussed the contention that the plaintiff was not entitled to recover, for the reason that she was unlawfully on the defendant's car: "The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge about 7 o'clock in an evening in July. One of the defendant's cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver. Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation. A master is

bound by the acts of his servant in the course of his employment. They are deemed to be the acts of the master. *Ramsden v. Boston & A. R. Co.* (1870) 104 Mass. 117, 6 Am. Rep. 200, and cases cited. The driver of a horse car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions. It follows that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover if she proves that she was using due care at the time of the injury, and that she was injured by the negligence of the driver. *Philadelphia & R. R. Co. v. Derby* (1852) 14 How. 468, 483, 14 L. ed. 502, 508."

On the appeal of a subsequent action brought by the father of the injured child to recover on the ground of loss of services, the court used the following language: "Whether the relation of carrier of passengers for hire existed between the defendant and the plaintiff's daughter was also a question of fact, properly to be decided by the tribunal to which the facts were submitted. The payment of fare is not a necessary condition precedent to such relation; nor does the fact that no fare was to be paid preclude the supposition that such relation existed. The same point was before this court upon the trial of the action of the daughter against this defendant; and it was there held that, under the facts proved in the case, such relation might exist. *Wilton v. Middlesex R. Co.* (1871) 107 Mass. 108, 9 Am. Rep. 11. The question, however, does not necessarily arise in this case. If the defendant's servant, in the course of his employment, carelessly ran over the child, and did an

injury to her which resulted in a loss of service to the parent, the defendant is liable, wholly irrespective of the question whether such child was a passenger."

In *Brennan v. Fair Haven & W. R. Co.* (1877) 45 Conn. 284, 29 Am. Rep. 679, the plaintiff, who, at the time of the accident, was ten years old, was requested by the driver to take a package of newspapers, which was being carried up on the car, and leave it at the postoffice in Fair Haven, where he intended to get off. He took the papers, and without notice to the conductor or driver, and while the car was in motion, before reaching the crossing where the car usually stopped, stepped off at the forward end of the car, and in doing so was thrown under the wheel and received the injury complained of. The managers of the car had no authority to carry passengers free. A notice was conspicuously posted in the car, printed in large letters, forbidding passengers, among other things, "1st. To get on or off, or to occupy the forward platform. . . . 3d. To stand on the steps, or get on or off the cars when in motion." And at the close was the following: "The company will not be responsible for any accident occurring under a violation of any of the above rules." The trial court found that the injury was the result of the careless and negligent driving and management of the car by the defendants' driver and conductor of the same, and that no contributory negligence was imputable to the plaintiff. To the evidence offered by the plaintiff to show that he was permitted to ride on the car by the driver and conductor the defendants objected, upon the ground that neither the driver nor conductor had the power to give the plaintiff a free ride, and the driver had nothing to do with persons on the car; that neither was an agent of the defendants for any such purpose. The court, however, said: "We think this objection is not well taken. The defendants' car was managed and directed by the conductor and driver. It was within the scope of their authority to receive passengers on the car and let them off. Their action was the action of the company. The defendants therefore received the plaintiff as a passenger. This fact cannot be affected by the omission of the conductor to collect fare. Moreover, the matter thus proved

was a part of the *res gestæ*; it shows the time and manner of the accident and the circumstances attending it. . . . For the purpose of showing that he was not a trespasser on the car, but was there by the knowledge and permission of the defendants, and to show that the driver knew that the plaintiff intended to get off at the postoffice, and was negligent and careless in the management of his team and in driving the car, and in not stopping for the plaintiff to get off [the plaintiff, also] offered evidence that the driver requested the plaintiff to take a package of newspapers then on the platform, and deliver it at the postoffice; and that while the plaintiff was getting off the car with the package he was injured. This evidence was objected to on the ground that the driver was not the agent of the defendants for the purpose of leaving papers at the postoffice, or requesting or employing the plaintiff to do so." But the court said: "We think this evidence was admissible for some or all of the purposes for which it was offered. It seems that the defendants were accustomed to carry packages and parcels on their car, and that both the conductor and driver had some duty to perform in respect to them. Admitting it to be true, as the objection assumes, that the driver was not authorized to leave the papers at the postoffice, or to employ the plaintiff to do so, still the evidence was admissible to show that the driver knew that the plaintiff was on the car, and was intending to get off at the postoffice; and we think that such knowledge has some bearing upon the question of negligence."

In *Day v. Brooklyn City R. Co.* (1877) 12 Hun, 435 affirmed without opinion in (1879) 76 N. Y. 593, the defendant was held liable for an injury caused by the negligence of the driver of one of its cars to a person who had entered it at his request, for the purpose of giving him a drink of water. The court said: "The defendant hired a driver for one of its cars, and put him in charge of it and of the team that drew it, and committed to him the management of the same so far as the propulsion of the car was concerned. This was a place of trust and responsibility, and the defendant became legally liable for all injuries inflicted by him through lack of judgment or carelessness while in the discharge of this duty. It was nec-

essary to the performance of this duty that the driver should eat and drink and be clothed. At this time he was thirsty, and the plaintiff got on his car to give him water to drink at his request. As the driver might lawfully ask him to do that, it follows that the plaintiff was rightfully on the car. The request of the driver was not an act of wantonness or malice which would exculpate the defendant. It was not even beyond the scope of his employment, for there are many purposes for which the driver could ask persons to get on the car besides that of becoming a passenger. He might by accident drop his hat or his whip, or any article connected with his business, and ask a person to get on his car to restore them to him, and thus get such person rightfully there. It is not necessary to the liability of the defendant that the relation of passenger and carrier should exist. In the case cited above [*Rounds v. Delaware, L. & W. R. Co.* (1876) 64 N. Y. 134, 21 Am. Rep. 597] the relation did not exist, and the plaintiff was wrongfully on the car, and yet the court held that he was entitled to an opportunity to get down with safety. How much more was the plaintiff entitled to do so in this case? He got on the car at the request of the driver, to do him an act of kindness, and he ought to have been let off in safety. Instead of that, the car was urged forward and the driver refused to stop, although the plaintiff besought him to do so, and this misconduct caused the injury complained of. It must be borne in mind that the act of the servant in this case was not outside of the master's business, but, on the contrary thereof, it was connected with it; and whether the act which caused the injury was one of carelessness or misfeasance, the liability of the defendant is the same. But suppose the plaintiff was wrongfully on the car. He was subject to removal, but not to injury. The driver could order him off, as he did, but had not the right to do so when the car was moving at a rate of speed which would render it dangerous to obey the order. In the case of *Rounds*, the baggage man discovered the plaintiff on the car and ordered him off, and the plaintiff said, 'I can't; the wood is right here; I want you to help me,' and he was kicked off, and the plaintiff recovered."

In *Jenkins v. Central of Georgia R. Co.* (1904) 124 Ga. 986, 53 S. E. 379, it M. & S. Vol. VI.—478.

is said: "At the outset it is pertinent to remark that even were the plaintiff a guest of the railway company, it was not an insurer of his safety, as the pleader apparently assumes in stating his conclusions of law and fact. We cannot undertake to judicially say that, under the facts alleged, the plaintiff came upon the premises of the railway company upon its express invitation and as its welcome guest. To do so would be to hold, as a matter of law, that the conductor of a dirt train is to be regarded as having implied authority to indite and transmit invitations to friends or strangers to visit and consult with him on matters of moment incident to his business. No such authority can be implied from the official designation given to the employee who invited the plaintiff to call. *Central of Georgia R. Co. v. Morris* (1904) 21 Ga. 486, 104 Am. St. Rep. 164, 49 S. E. 606. He came not as a guest, therefore, though he may have been welcomed as one by Mr. Turner, 'the superintendent and person in charge' of the steam shovel, who 'was authorized to invite and permit' the plaintiff to get upon the car in order to warm himself while awaiting the return of the conductor of the dirt train. At best, this authority was limited to extending to visitors calling upon employees license to enjoy the comforts afforded by the compartment into which Mr. Turner 'did invite, permit, and assist' the plaintiff. Relatively to the company, the plaintiff was a mere licensee, and it was under no duty to point out to him the obvious fact that the steps were covered with dirt and ice. Nor was it under any obligation to render him any assistance in entering or departing from the car into which he was invited by Turner; nor does it appear that he was acting within the scope of his duties in rendering the proffered assistance and promising to assist the plaintiff in alighting. The courtesy and kindness with which this employee treated this elderly and infirm gentleman imposed upon the company no duty of holding itself in readiness to leave the safe and comfortable quarters he was permitted to occupy while awaiting the return of its conductor. The plaintiff had the alternative of patiently waiting till Turner returned and was ready to perform his purely gratuitous and distinctly individual undertak-

ing to render him the promised assistance, or voluntarily assuming the risk of leaving the car in safety without such assistance, despite his infirmities. He chose the latter, the hazardous course, and was injured. The company is not bound by his election, whether he did or did not act with ordinary prudence."

In *Mexican Nat. R. Co. v. Crum* (1894) 6 Tex. Civ. App. 702, 25 S. W. 1126, it was laid down that a railroad company owes no duty to a child seven years of age, who is upon one of its cars by invitation of its employees, unless the invitation was within the scope of the authority of the employee who gave it.

An invitation to ride on a freight train, in contravention of the rules of the company, by an employee engaged in the operation of such train, will not render the company liable for a negligent injury to a person accepting such invitation, unless it is shown that the person extending the invitation was authorized by the company to do so. *Pittsburg, C. C. & St. L. R. Co. v. Hall* (1910) 46 Ind. App. 219, 90 N. E. 498, 91 N. E. 743.

Where the driver of a carriage for hire, acting within the scope of his employment, permits another to ride therein, the owner of the carriage, in the absence of fraud or collusion, is liable for an injury sustained by such person, occasioned by the driver's negligence. *Siegrist v. Arnot* (1881) 10 Mo. App. 197.

For other cases in which the defendant was held liable, see *Pittsburg, A. & M. Pass. R. Co. v. Caldwell* (1873) 74 Pa. 421 (a young child which the driver allowed to ride on the platform was injured in attempting to comply with his direction to get off while the car was in motion); *Metropolitan Street R. Co. v. Moore* (1888) 83 Ga. 453, 10 S. E. 730 (child, allowed by driver, who was also conductor, to remain on the platform of a car for a considerable distance, fell off while the driver was negligently absent from the platform).

But in *Finley v. Hudson Electric R. Co.* (1892) 64 Hun, 373, 19 N. Y. Supp. 621, plaintiff, an eight-year-old boy, was injured while getting upon a moving car by invitation of an employee who acted both as motorman and conductor, in payment for his services in opening a switch. It was shown that the company

had ordered the employee not to permit or allow such practice. A judgment in favor of the boy was set aside. The court said: "The scope of the motorman's duty as motorman, or driver of the car, was to conduct or drive the car carefully through the streets; as conductor, . . . it was his duty to see to the welfare of passengers or those seeking to become passengers, he owed, as the servant of the defendant, a duty to no one else. The plaintiff was not injured by reason of any neglect of duty that the defendant owed to other users of the streets, neither was he injured by any neglect of duty that the defendant owed to him as a passenger or one seeking to become a passenger; and it was not within the scope of the conductor's duty to invite him on the car as a guest, and as such the defendant was under no obligation of duty to him. It seems to me that it was not a part of the motorman or conductor's business, or within the scope of his employment, or for the benefit of the defendant, or in furtherance of its interest, to invite the plaintiff upon the car, under the circumstances in this case, and hence that the defendant's assent thereto cannot be implied."

In *Duffy v. Allegheny Valley R. Co.* (1879) 91 Pa. 458, 36 Am. Rep. 675, the liability of the defendant for the death of a newsboy killed in an accident, while traveling on a passenger train, with the conductor's connivance, for the purpose of selling newspapers, was denied on the ground that he was a mere trespasser. The court took the position that it was not like the case of a person who was allowed to ride as a passenger without paying fare, for under such circumstances there is a legal liability for the fare. Where a motorman has authority to receive and let off passengers, and a boy innocently accepts his invitation to ride without paying fare, the boy is not a trespasser; and it is the duty of the company to extend to him the diligence due to passengers of his age and discretion. *Little Rock Traction & Electric Co. v. Nelson* (1899) 66 Ark. 494, 52 S. W. 7 (following the *Wilton Case*, *supra*).

In *Denison & S. R. Co. v. Carter*, (1904) 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782, reversing (1904) — Tex. Civ. App. —, 79 S. W. 320 (where plaintiff was injured while alighting in compliance with the motorman's direc-

tion), it was held that the negligence of a motorman in respect of a minor whom he had, in consideration of certain services, permitted to ride on the car, was imputable to his employers, although he had no authority to make such an arrangement. The court said: "It may be conceded that the agreement the motorman is alleged to have made was beyond the scope of his authority, and did not create any obligation on the part of the company to carry the boys, but it is still true that he was acting within such authority in managing and moving the car, and that for any negligence on his part in doing that, his master would be responsible. With his exclusive control of the car, he necessarily had power to admit to or exclude from it persons desiring to ride on it; and to those actually on the car by his permission, whether given for one reason or another, the master, in operating it through him, might owe duties for the disregard of which it would be liable. His agreement, considered by itself, may have been his act alone; but his management of the car was, in law, his master's management, because that was the business intrusted to him. . . . Here the purpose for which this car was intrusted by the company to the motorman was the carrying of people; and the performance of his duties, as we have said, involved the admission and exclusion of persons from the car. Hence, in receiving and carrying these children upon such a car, if he did so, he was not going beyond the scope of his master's business, as were the servants in the *Black Case* (1894) 87 Tex. 160, 27 S. W. 118, in receiving the plaintiff upon a freight train; nor was he, as were the servants in the other cases relied on, using the property of the master for his own purposes. The fallacy of this contention lies in the assumption that, because the servant permitted the boys to ride for an improper reason, in running the car he was not acting for the master. If, in the control and management of the car, he was guilty of negligence which caused the injury to the plaintiff, the company is responsible."

In *Snyder v. Hannibal & St. J. R. Co.* (1875) 60 Mo. 413, a petition claiming damage in respect of injuries sustained by a child while he was attempting to comply with an invitation of certain employees to get on a car of which they

were in charge was held to be demurrable, on the ground that it did not show that the employees were engaged in carrying passengers, or "had any authority to permit persons to ride on said cars, . . . or that the invitation or permission alleged was in furtherance of the master's interests, or directly or indirectly connected with the service which they had engaged to render."

In *The New World v. King* (1853) 16 How. 469, 14 L. ed. 1019, where the explosion of the boiler of a steamboat inflicted an injury upon the plaintiff, who had formerly been employed as a waiter on board of it, it was held that he was entitled to recover upon evidence which showed that it was customary for the masters of steamboats to permit persons whose usual employment was on board of such boats, to go from place to place, free of charge, and that the master of the one in question had granted him a free passage. The court said: "It has been urged that the master had no power to impose any obligation on the steamboat by receiving a passenger without compensation. But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by owners, and the practice is, even indirectly, beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command. It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it. And the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants."

But in *Caniff v. Blanchard Nav. Co.* (1887) 66 Mich. 638, 11 Am. St. Rep. 541, 33 N. W. 744, it was held that one placed in charge of a vessel laid up during the winter when navigation is suspended, under promise of employment as captain should she be placed in commission the coming season, and who em-

of the effect of an invitation or permission to ride in a place of danger.¹²

played one as mate, cannot render the owner liable, by inviting such person on board, for an injury from falling through an open hatchway, of the existence of which he had no actual knowledge, either by observation or information received from the person in charge.

An invitation by implication to ride on freight trains is not sustained by proof of the failure of the flagmen and trainmen to pursue and drive away boys who attempt to steal a ride while the train is passing a street crossing. *Me-halek v. Minneapolis St. P. & S. Ste. M. R. Co.* (1908) 105 Minn. 128, 117 N. W. 250.

¹² In an Irish case in which the liability of the carrier under such circumstances was elaborately discussed, it was laid down that the employment of a conductor and driver "does not carry with it a power to permit passengers to travel on a part of the car not constructed or intended for such purpose, where they are exposed to special risks, and by such permission to attach exceptional liability to their employers." In *Byrne v. Londonderry Tramway Co.* [1902] 2 I. R. (K. B.) 457 (C. A.) 469, Holmes, L. J., said: "The plaintiff arrived at a railway station at the outskirts of the city of Londonderry about 9 o'clock at night. The station was 1 mile from the town, with which it was connected by the defendants' tramway. It was raining heavily, and there was only one tramcar, which was crowded, both inside and on the back platform. The plaintiff got on the driver's platform, and the driver made no objection to his doing so. The plaintiff stated that he had traveled on the driver's platform some six times before without objection, and had always paid his fare. This evidence was controverted. The servants of the Tramway Company had orders not to allow anyone on the front or back platform, and notices were placed inside the cars that it was forbidden for anyone to stand there. During the journey the tramcar ran off the line, owing to the points being set wrong, and the plaintiff was thrown off and sustained severe injury. No one else in the tramcar was hurt. The jury found that the servants of the defendant company had no authority from the company to allow the

plaintiff to stand on the driver's platform; that the plaintiff stood on such platform with the permission of the defendants' servants; that such permission was not with the consent of the company, and was in violation of their rules; that the plaintiff was traveling on the platform as a passenger intending to pay his fare; that the notice alleged to be posted in the tramcar was not brought to the plaintiff's attention or seen by him; and that reasonable notice was not given to the public of the rule of the company that passengers should not occupy the platform. . . . Held, by the court of appeal (reversing the decision of the King's bench division), that the findings of the jury negatived any authority in the driver to permit the plaintiff to stand on the front platform, whether derived from course of service or scope of employment; that such permission was not an act of agency, but was a personal indulgence outside course of service or scope of employment; and that the defendant company were not liable." Fitzgibbon, L. J., said: "It appears to me that the vital question on which the judge and counsel must have been seen that the result depended, when stated in the concrete form appropriate to the circumstances, was this,—'Had the conductor of this tramcar authority to permit passengers to stand on the driver's platform?' I agree with the Lord Chief Baron that upon that question notice to the plaintiff of an express prohibition was 'absolutely immaterial;' but I cannot agree in imputing to the defendant's counsel, in the face of his requisition for a direction, that the case was tried upon the assumption that the act was within the scope of the conductor's employment, which the jury found to have been done 'without the consent' of the defendants, and 'in violation of their orders,' and also without 'any authority' from them. The third and fourth findings completely negatived any authority in fact, and found the absolute opposite. The first finding was mere redundancy if it did not negative any authority whatsoever, derived from agency, course of service, scope of employment, or anything else. The total omission of the use of the expression 'scope

of employment' from the questions submitted to the jury, and its not having been 'once mentioned during the trial,' is inexplicable, unless the first finding was intended to cover the question of fact required to determine whether the defendants were liable upon that ground. I therefore hold that, on the findings, the defendants are entitled to judgment. . . . In my opinion it is not the law that the opinion of the servant as to what is for his employer's interest is the test of the employer's liability. I hold that the extent of the agency derived from employment is a question to be determined by the jury, so far as it is a question of fact, upon all the evidence and under all the circumstances in the particular case. I agree with Gibson, J., that 'it is a jury question as to the scope of employment, and in this case as to the locus or area to which the conductor's duties extended.' Regarding the question in this light, on whom did the burden of proof rest here? I say upon the plaintiff. Why? The Lord Chief Baron said that receiving a passenger on this platform was not within the scope of the employment of the driver. This is a conclusion of fact justified, if at all, by using the knowledge of human life which judges as well as jurors possess. That same knowledge leads me to hold that, at least *prima facie*, a conductor's duty extends not to receiving a passenger anywhere, but to receiving him in the place proper for passengers. An engine driver could not make a railway company responsible by permitting passengers to ride on the engine. Could a tram conductor make his employers liable by inviting a passenger to ride on one of the horses? That the driver could make his employers liable by considering that it was for their benefit, though in known violation of their orders, to allow the plaintiff to stand beside him, is, to my mind, contrary to the essential idea of the scope of a driver's employment, and inconsistent with the service of the driver, and with the use to which his platform is *prima facie* devoted. . . . The only reasonable inference of fact to my mind is that Dr. Byrne got up on the driver's platform of his own motion, preferring to be alone, or preferring to travel there rather than be left behind, but knowing that he was going to what was not his proper place, and knowing that he went there on sufferance rather

than by permission. In other words, he was presuming on his relations with the company's servants as sufficient warrant for doing what he knew that their employers, if present, would not have permitted him to do. The act of the servants who permitted him to do this was not an act of agency for the defendants: it was a personal indulgence, outside the course of their service and the scope of their employment, and any person who accepts that position must, in my opinion, in point of law, take the risks incident to it, and cannot hold the employers liable for the consequences of a permission which, under such circumstances, he must know not to be given by them. As against them, I therefore hold that there was no reasonable evidence that Dr. Byrne was lawfully on the driver's platform when the injury happened." Walker, L. J., said: "I think the test that should be applied to such a case as this is, Was the position on the driver's platform in itself dangerous to a passenger or the conduct of the car, though the defendants were guilty of no negligence in the management of the tramcar? If the jury found it was so dangerous, I think, as matter of law, the permission to travel on the driver's platform could not be within the scope of the servant's employment." Holmes, L. J., said: "The plaintiff would not have been hurt if he had not been traveling on a part of the car that was not intended or constructed for the carriage of passengers; and I am of opinion that, unless he can show some special circumstances that attach liability to the company notwithstanding his so doing, this action cannot be maintained. The mode in which this is sought to be done is by alleging that he was permitted to stand on the platform by the defendants' servants. This is the point where there comes in the question of 'scope of employment,' which counsel for the plaintiff rightly regard as of supreme importance. Permission from servants, unless in giving it they are acting with authority from their employer, is of no avail; and such authority is sought in this case to be made out by means of the nature of the servant's employment. . . . There remains the second question:—Was there evidence, apart from the mere course of employment, that the conductors of the defendant company had authority to give permission? If there

2501. Injuries to volunteers.—Although there are a few cases not adhering closely to the rule, the weight of authority is that a person who volunteers to assist an employee, by request or otherwise, cannot thereby establish the relation of employer and employee so as to base a claim for negligence on the duty which the master owes to the servant.¹ The rule supported by the best authority would seem to be that a master owes no duty to a volunteer, except to prevent wanton or wilful injury to him, where, without protecting or

was such evidence, it ought to have been submitted to the jury; and I believe that this was what the first issue was intended to cover:—"Had the servants of the company any authority from the company to allow the plaintiff to stand on the driver's platform." This question seems to me to include authority of every kind; and I think that the negative answer decides this case; nor am I at all puzzled by the fact that other questions were put, which, in the light of this finding, were unnecessary. . . . I could understand the proposition that the tramservice had been so managed by the defendant's servants as to convey to the public that the driver's platform was an ordinary and proper place for the carriage of passengers; but Dr. Byrne and his two witnesses, so far from supporting this view, seem to me to disprove it. Their evidence only suggests, at the most, that an occasional passenger is allowed to travel in this way. The jury having found that this permission is in violation of the orders of the company, I am unable to see how the defendants can be affixed with liability by reason of it. Even as regards the permission itself, there are difficulties in the way of Dr. Byrne. The plaintiff must rely on a general permission, for there is no evidence that he was ever seen by the conductor on the night of the accident; and I doubt if there is any evidence to show that he was given liberty to use the driver's platform whenever it suited him to do so."

It is gross negligence for the driver of a street car to allow young children to get on the front platform and to ride there; and it is his duty to compel them to go inside the car, or stop and put them off; and where such a child is injured by his negligence in allowing it to ride on the platform, the street car company is liable for the injury. *Pitts-*

burg, A. & M. Pass. R. Co. v. Caldwell, 74 Pa. 421.

And the act of a driver on a horse car, in charge of the car, of needlessly withdrawing from the front platform, leaving two young boys thereon, and his failure to be there ready to stop the team when one of them fell or was thrown by the other off the platform upon the track in front of the car in a scramble to drive the horses, the reins having been left within their reach, was negligence for which the street car company is responsible. *Metropolitan Street R. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730.

A conductor cannot, in violation of a known rule of the company, license a person to occupy a place of danger so as to make the company responsible. *Pennsylvania R. Co. v. Langdon* (1879) 92 Pa. 21, 37 Am. Rep. 651. In this case a passenger was killed while riding in a baggage car, contrary to the rules of the company. As this was not a rule for the convenience of the company, but for the protection of human lives, it could not be waived by the conductor. "If it is once understood," declared the court, "that a man who rides in a baggage car in violation of the rules does so at his own risk, we shall have fewer accidents of this description."

In *Carroll v. New York & N. H. R. Co.* 1 Duer, 571, the plaintiff was injured while riding in a baggage car, and would have escaped if he had been in a passenger car. The court recognized the fact that the baggage car was a place of danger, but held that inasmuch that he was there with the knowledge and consent of the conductor, he was there rightfully and entitled to recover. But there was no question made as to the violation of a rule forbidding passengers to ride in such a place.

¹ See §§ 1562 *et seq.*

promoting any interest of his own, he assists in the master's service.² The question whether the person assisting is more than a volunteer, so that a higher duty rests upon the master to protect him than is imposed in the case of volunteers, must turn, it would seem, on the authority of the servant to employ assistance.³ And this, as has been said in the preceding sections of this chapter, is a question of agency.

² See note to *Evarts v. St. Paul, M. & M. R. Co.* 22 L.R.A. 663, on assumption by volunteer of the risks of service, and note to *Grissom v. Atlanta & B. Air Line R. Co.* 13 L.R.A.(N.S.) 561, on liability of master for injury to volunteer.

³ *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764; *Central Trust Co. v. Texas & St. L. R. Co.* (1887) 32 Fed. 448; *Barstow v. Old Colony R. Co.* (1887) 143 Mass. 535, 10 N. E. 255; *Johnson v. Ashland Water Co.* (1888) 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823; *Pennsylvania Co. v. Gallagher* (1884) 40 Ohio St. 637, 49 Am. Rep. 689.

In *Hollidge v. Duncan* (1908) 199 Mass 121, 17 L.R.A.(N.S.) 982, 85 N. E. 186, the action was brought to recover for personal injuries alleged to have been received by the plaintiff while walking upon a sidewalk on a public street in a city, by reason of a tongue on a dump cart owned by and in charge of an employee of the defendant, either hitting the plaintiff or falling against a window and breaking glass which fell upon the plaintiff. There was evidence tending to show that the horses had been unhitched from the cart, and that the tongue was left sticking up in the air, and it was admitted by the defendant, in answer to interrogatories by the plaintiff, that the cart was out of order, and that the driver was trying to repair it; and a bystander whom he had asked to assist him "took hold of a blanket which was caught between the seat and the sweep of the cart, and jerked it free; and as he did so, the perch broke and the pole swung around over the sidewalk, and hit a window, breaking the glass." There was evidence that the plaintiff was hit either by the tongue or by the glass. The defendant introduced no evidence. The trial judge, sitting without a jury, found for the plaintiff. Held, that the finding was warranted, both because it was within the scope of the driver's

authority to procure the assistance of the bystander under the circumstances, and therefore what was done by the bystander was as if done by the driver; and also because the unexplained defective condition of the cart could have been found to have been a contributing cause of the accident. The defendant contends in substance that the accident was caused by the jerking or pulling of the blanket by the bystander, and that he is not liable therefor because the driver had no authority to procure assistance from the bystander. But we think that the act of the bystander must be regarded as the act of the driver. The cart was out of order and the driver was trying to fix it, as he was bound to do. For that purpose he asked the bystander to assist him. And in doing so he used the assistance of the bystander as he would have used a tool or appliance which he had procured, and which he must be regarded as having implied authority to procure under the circumstances. The fact that the tool or appliance was an intelligent human being does not affect the matter any more than the fact that another person held the reins did in *Booth v. Mister* (1835) 7 Car. & P. 66. The case is not one where the servant attempted to delegate his duty to another, as in *Gwilliam v. Twist* [1895] 2 Q. B. 84, 64 L. J. Q. B. N. S. 474, 14 Reports, 461, 72 L. T. N. S. 579, 43 Week. Rep. 566, 59 J. P. 484, but a case where the driver needed for a moment, in the performance of his duty in a sudden emergency, another hand, and found it in the assistance given at his request by a stranger; and what was done by the stranger was as if done by himself. See *Althorff v. Wolfe* (1860) 22 N. Y. 355; *Campbell v. Trimble* (1889) 75 Tex. 270, 12 S. W. 863; *Bucki v. Cone* (1889) 25 Fla. 1, 6 So. 160; *Pennsylvania Co. v. Gallagher* (1884) 40 Ohio St. 637, 48 Am. Rep. 689; *James v. Muehlebach* (1889) 34 Mo. App. 512. In *Finley v. Hudson Electric R. Co.*

Where the volunteer has some interest of his own to protect, the master is usually held liable for injuries negligently inflicted upon him.⁴

(1892) 64 Hun, 373, 19 N. Y. Supp. 621, it was said: "But it is claimed that the plaintiff was getting upon the car by invitation of the motorman or conductor, in payment for his services in opening a switch for the motorman; assume that to be the fact; in doing so, the motorman was not acting within the line of his duty, neither was he doing it in furtherance of the defendant's interest or for its benefit. No benefit was to be derived by the defendant from the motorman's act. Not only is it not within the scope of his employment to invite people to ride free, or to employ others to assist him in the performance of his duties, and compensate them by free transportation, but in this particular case the defendant, for the purpose of breaking up a practice of the kind in question, had ordered its motorman not to permit or allow it, and had made rules against it. The master is liable only for the authorized acts of the servant,—those done within the scope or line of the servant's employment. The root of the master's liability for the servant's act is his consent, express or implied; and when his acts are done within the scope of his employment, or for his master's benefit, or in furtherance of his interest, although not strictly in the line of his duty, yet, in the course of his employment, the master's assent is implied, and he is accordingly held liable. *Meehan v. Morewood* (1889) 52 Hun, 566, 5 N. Y. Supp. 710, *Mulligan v. New York & R. B. R. Co.* (1891) 39 N. Y. S. R. 20, 14 N. Y. Supp. 456, and as in the case of *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392, where, although the servant departed from the strict line of his duty, yet what was done was in the line of his business, for the master's benefit, in furtherance of his interests, and what the master might naturally have done if he had been present. . . . The proposition of law is beyond dispute; the difficulty is, as in most cases, in applying it. The scope of the motorman's duty as motorman, or driver of the car, was to conduct or drive the car carefully through the streets; as conductor (for he seems in this case to have been both motorman or driver and conductor), it was his duty to see to the

welfare of passengers or those seeking to become passengers. He owed, as the servant of the defendant, a duty to no one else. The plaintiff was not injured by reason of any neglect of duty that the defendant owed to other users of the streets, neither was he injured by any neglect of duty that the defendant owed to him as a passenger or one seeking to become a passenger; and it was not within the scope of the conductor's duty to invite him on the car as a guest, and as such the defendant was under no obligation of duty to him. It seems to me that it was not a part of the motorman or conductor's business, or within the scope of his employment, or for the benefit of the defendant, or in furtherance of its interest, to invite the plaintiff upon the car, under the circumstances in this case, and hence that the defendant's assent thereto cannot be implied."

The wife of the janitor of an apartment house, who, at her husband's request, goes to the room for the purpose of showing a new tenant where to hang clothes, and who, in returning, steps over a rail or bar across the entrance of an elevator, for the purpose of using it to return, and is injured, is a mere volunteer, to whom the owner owes no duty to see that the elevator is in a safe condition. *Billous v. Moors* (1894) 162 Mass. 42, 37 N. E. 750.

⁴ A passenger on a street railroad who assists, at the request of the driver, in running the car on a siding, which is necessary for the continuance of the journey, may recover for injuries inflicted by the negligence of the company's servants. *McIntire Street R. Co. v. Bolton* (1885) 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. 333.

The employee of a shipper, who, at the request and with the consent of the conductor of a train, undertakes to couple a car to the train for the purpose of having it moved to a place more convenient for loading, is entitled to the same protection against negligence of the company's servants as though he was engaged wholly in his own business. *Eason v. Sabine & E. T. R. Co.* (1886) 65 Tex. 577, 57 Am. Rep. 606.

If a person goes to a railroad station for the purpose of getting his consign-

ment, and, to facilitate the delivery of the goods, assists in shunting a car, he cannot be regarded as a volunteer within the rule which will prevent his recovering for injuries caused by the negligence of the company's servants. *Wright v. London & N. W. R. Co.* (1876) L. R. 1 Q. B. Div. 252, 45 L. J. Q. B. N. S. 570, 33 L. T. N. S. 830.

In *Holmes v. North Eastern R. Co.* (1869) L. R. 4 Exch. 254, affirmed in (1871) L. R. 6 Exch. 123, 40 L. J. Exch. N. S. 121, 24 L. T. N. S. 69, a consignee of coal went to the defendant's station to assist in unloading it, and was injured by a defect in the premises resorted to by consignees for that purpose. The question of volunteers was discussed to some extent, but the case seems to have been made to turn more on the question of whether or not plaintiff was a mere licensee. A recovery was permitted in that case.

A manufacturer of machinery delivered to and accepted by a customer was held, in *Empire Laundry Machinery Co. v. Brady* (1896) 164 Ill. 58, 45 N. E. 486, affirming (1895) 60 Ill. App. 379, to be liable for injuries to an employee of the latter, temporarily assisting the manufacturer's servant who was in control of the machinery for the purpose of making alterations, where the injury was due to the insecure manner in which the manufacturer originally fastened the machinery to the floor.

And employees of a contractor engaged in taking earth away from cars for a consignee, who, to facilitate the work, dumped the earth from the cars on request of a railroad crew, were held in *Welch v. Maine C. R. Co.* (*O'Donnell v. Maine C. R. Co.*) (1894) 86 Me. 552, 25 L.R.A. 658, 30 Atl. 116, not to be volunteers, so as to preclude recovery from the railroad company for injury by the tipping over of a car, due to defects therein and to improper loading.

The purchaser of a threshing engine, who, before delivery, and at the request of the vendor's servant, assisted him in adjusting certain parts of it, was held, in *Meyer v. Kenyon-Rosing Machinery Co.* (1905) 95 Minn. 329, 104 N. W. 132, not thereby to deprive himself of the right to recover for personal injuries received through the negligence of the other's servant.

And a shipper's employee, who, at the request of a brakeman, and to expedite

the business of his employer, assisted in placing a car at a more convenient place for loading, was held, in *Louisville & N. R. Co. v. Ward* (1897) 98 Tenn. 123, 60 Am. St. Rep. 848, 38 S. W. 727, not to become a fellow servant of the members of the train crew, so as to preclude him from recovering for injuries received through there negligence in handling the car.

A cook assisting a manager of outfit cars of a railroad company, in which workmen were lodged and boarded, who lived upon the cars, but was furnished by the manager, and not employed by the company, was held, on *Pugmire v. Oregon Short Line R. Co.* (1907) 33 Utah, 27, 13 L.R.A. (N.S.) 565, 126 Am. St. Rep. 805, 14 Ann. Cas. 384, 92 Pac. 762, to bear such a relation to the company as to require it to exercise ordinary care to prevent injuring her.

This exception to the rule was carried still further in *Cleveland Terminal & Valley R. Co. v. Marsh* (1900) 63 Ohio St. 236, 52 L.R.A. 142, 58 N. E. 821, where the court said: "There is a class [of cases] between mere volunteers and trespassers, and partaking somewhat of the characteristics of each; that is, where the person assists the servant at his request, not only for the purpose of assisting in the work of the master, but also for a purpose and benefit of his own. In such cases it cannot be said that he is wrongfully upon the premises, because he is invited by the servant in charge. The master may not have assented, but neither has he dissented; and, being there upon the invitation of the servant in charge, and there being no dissent of the master, he is regarded as being there by sufferance. And, being there by sufferance, he is rightfully there for the double purpose of aiding the servant and thereby furthering the interests of the master, and of furthering his own private interests in his own behalf and for his own purposes and benefits. In such cases the person so assisting cannot be held to thereby become a servant of the master, because the servant inviting such assistance has no power or authority to employ other servants, and therefore the law of fellow servants is not applicable. As such assistant is not a trespasser, . . . and not a mere volunteer, the law assigns to him, without name, the position of one who, being upon the premises of an-

2502. Injuries to bare licensees, trespassers, or intruders.—The rules with reference to the liability of a master for injuries to bare licensees, trespassers, or intruders are the same as those relating to all other owners of property forming part of the general law of negligence. If the injured person entered the premises of the defendant, or made use of his chattel as a mere licensee, his right of recovery is determined with reference to the doctrine that “he must take the given property as he finds it, and is entitled only not to be led into danger by something like fraud.”¹ He is accordingly precluded from maintaining an action for injuries caused by a merely negligent act of a servant of the licensor, even though the act may have been within the scope of the servant’s employment.² So far as the

other by the sufferance of such other, performing labor or service for his own purpose and benefit, in his own behalf, is entitled of right to be protected against the negligence of the owner of the premises or his servants.” In this case a boy who was engaged by the station agent of a railroad company to attend to switch lamps was injured by exploding a torpedo that he found upon the track while taking a lamp to its proper place. The court said that the lighting, cleaning, and placing of the lamps was beneficial to the railroad company, and also to himself by reason of the compensation received by him from the agent; and that therefore he occupied the anomalous position above referred to.

¹ Pollock, Torts, p. 425 (Webb’s Am. ed. p. 640) citing the judgment of Willes, J., in *Gautret v. Egerton* (1867) L. R. 2 C. P. 371, 36 L. J. C. P. N. S. 191, 16 L. T. N. S. 17, 15 Week. Rep. 638. See also *Batchelor v. Fortescue* (1883) L. R. 11 Q. B. Div. 474, 49 L. T. N. S. 644, and the other cases reviewed in *Beven on Negligence*, pp. 523 *et seq.*

The American cases relating to licensees are collected in *Shearm. & Redf. Neg.* § 705.

The owner or occupier of real property is under no obligation to make it safe, or keep it in any particular condition for the benefit of trespassers, intruders, mere volunteers, or bare licensees coming upon it without his invitation, express or implied. See cases cited in *Thomp. Neg.* §§ 945–953.

² “If a lady who is invited to dinner goes in an expensive dress, and a servant spills something over her dress, which

spoils it, the master of the house would not be liable.” Pollock, C. B. in *Southcote v. Stanley* (1856) 1 Hurlst. & N. 247, 19 Eng. Rul. Cas. 60 (during argument of counsel, p. 249).

“It is settled that the master of a house is not liable for injuries received by a visitor through the fault or carelessness of one of his servants.” *O’Brien v. Arbit* [1907] S. C. 975. There an action brought against a shipowner by a visitor to a ship, who, while going ashore, was injured through the breaking of a plank laid as a gangway by men in the employ of the shipowner, was held not to be maintainable, on the ground that the plank was not intended to be used as a gangway, and that the act of laying it in order that it might be used for that purpose was not within the scope of the men’s duties. The court was also of opinion that a regulation concerning the use of gangways, which had been made pursuant to the powers conferred upon the Secretary of State by § 79 of the factory act 1879, was applicable merely to persons employed in performing work in relation to vessels lying at quays, and did not enlarge the common-law liability of shipowners to third persons.

“To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach or some positive duty; otherwise a man who allows strangers to roam over his property would be answerable for not protecting them against any danger which they might encounter whilst using the license.” Willes, J., in *Gautret v. Egerton* (1867) L. R. 2 C. P. 371.

A mill owner, in analogy to the doc-

relation of licensor and bare licensee, created by the permissive use of the premises or chattel, is concerned, it would seem that the servant's authority to create the relation could be of no importance, since, no higher duty is thus cast upon the master than if the servant had not acquiesced in or permitted the use of his master's property by the licensee. But if any higher duty should be deemed to rest on the master, the authority of one in his service to create the relation would no doubt be governed by the law of agency.

Under the doctrine adopted by some of the authorities, a trespasser cannot maintain an action unless it appears that his injury was due to an act of wanton or wilful misconduct committed after his presence on the given premises or his use of the given chattel was ascertained.³ In one of the jurisdictions where this view pre-

trine of discovered peril, cannot be charged with liability for an injury to a child through failure of his employee to protect it when it comes into the mill, where the employee is the parent of the child, and lets it come to the mill against the orders of the employer. *Blossom Oil & Cotton Co. v. Potteet* (1911) — Tex. —, 35 L.R.A.(N.S.) 449, 136 S. W. 432, reversing judgment (1910) — Tex. Civ. App. —, 127 S. W. 240. The court said: "The father could not, in the circumstances of this case, as we believe, be held to abdicate the high duties of father to the end and with the effect of stamping his conduct as mere employee with such negligence as to render his employer liable."

No duty is owed to a mere licensee except to refrain from doing him intentional harm, and from wantonly and recklessly exposing him to danger. *O'Brien v. Union Freight R. Co.* (1911) 209 Mass. 449, 36 L.R.A.(N.S.) 491, 95 N. E. 861.

For duty of owner of premises to protect licensee against hidden dangers, see note to *Watson v. Manitou & P. P. R. Co.* 17 L.R.A.(N.S.) 916.

For duty to owner of land which licensees are accustomed to cross, to guard against injuries in consequence of changes in the conditions, see note to *Habina v. Twin City General Electric Co.* 13 L.R.A.(N.S.) 1126.

For duty to member of public on private way used by public generally, see note to *Bowler v. Pacific Mills*, 21 L.R.A.(N.S.) 976.

For duty of railroad company to one who goes on station grounds for purpose of mailing letters on mail train, see note to *Atchison, T. & S. F. R. Co. v. Jandera*, 24 L.R.A.(N.S.) 535.

For liability of trespasser or bare licensee for active, as distinguished from passive, negligence, see note to *O'Brien v. Union Freight R. Co.* 36 L.R.A.(N.S.) 492.

For liability to inspectors who enter premises in the performance of their duty, see note to *Dashiields v. W. B. Moses & Sons*, 31 L.R.A.(N.S.) 380.

For duty and liability of owner to one on premises for purpose of seeing his employees, see note to *Indian Ref. Co. v. Mobley*, 24 L.R.A.(N.S.) 497.

³In *Feeback v. Missouri P. R. Co.* (1902) 167 Mo. 206, 66 S. W. 965, it was laid down that the only duty which a railway company owes to a trespasser on a train is to avoid inflicting wanton injuries upon him.

In *McNamara v. Great Northern R. Co.* (1895) 61 Minn. 296, 63 N. W. 726, it was laid down that trainmen are not bound to use reasonable care to see that a trespasser upon a train does not expose himself to personal injury, although advised of his presence.

In *Alabama G. S. R. Co. v. Guest* (1903) 136 Ala. 348, 34 So. 968, where defendant's servants ran certain cars, from which the engine had been detached, at a high rate of speed, and without signals to indicate their approach along a track which they knew that persons were wont to frequent, or where people used the track as a pass

vails, it has been held that, if the actual tort-feasor was a servant of the defendant, recovery, even under these circumstances, is con-

way with such frequency and in such numbers that defendant's employees would be charged with knowledge thereof, and plaintiff's intestate was killed by being struck from the rear by such cars, which defendant's brakeman was unable to stop after discovering intestate's peril, defendant was liable for wilfully killing intestate, notwithstanding he was a trespasser and guilty of no duty owed "except that of exercising reasonable care to avoid injury of him, if and after his peril became apparent to the employees."

A carrier, not a common carrier of passengers, is liable to a licensee or trespasser only for wanton negligence or wilful wrong, including failure to exercise due care to avert injury after the danger is discovered. *Laurence v. Kaul Lumber Co.* (1911) 171 Ala. 300, 55 So. 111.

For duty of property owner to trespassing child, see note to *Walsh v. Pittsburg R. Co.* 32 L.R.A.(N.S.) 559.

For duty as to infant trespassers on track, see note to *Frye v. St. Louis, I. M. & S. R. Co.* 8 L.R.A.(N.S.) 1069.

For right of persons in charge of train to presume that child will get out of danger, see note to *Southern R. Co. v. Chatman*, 6 L.R.A.(N.S.) 283.

For duty to trespasser with reference to excavations maintained on uninclosed land near highway, see note to *Johnson v. Paducah Laundry Co.* 5 L.R.A.(N.S.) 733.

For express authority to certain train employees to eject trespassers, as negating implied authority of other employees, see note to *Daley v. Chicago & W. R. Co.* 32 L.R.A.(N.S.) 1164.

For liability of railroad company for negligence in ejecting trespasser from moving train, see note to *Doggett v. Chicago, B & Q. R. Co.* 13 L.R.A.(N.S.) 364.

For causing trespasser to jump from moving wagon as actionable misconduct, see note to *Hoberg v. Collins, L. & Co.* 31 L.R.A.(N.S.) 1064.

For liability of municipality for acts of its officers in removing trespassers from public grounds, see note to *Fauchew v. St. Martinville*, 35 L.R.A.(N.S.) 435.

For duty to maintain lookout on train, see note to *Smith v. Norfolk & S. R. Co.* 25 L.R.A. 287.

For duty of a railroad company to keep lookout for trespassers on track, see note to *Frye v. St. Louis, I. M. & S. R. Co.* 8 L.R.A.(N.S.) 1069.

For duty of employees in charge of engine to keep a lookout, as affected by other duties, see note to *Louisville & N. R. Co. v. Gilmore*, 21 L.R.A.(N.S.) 723.

For duty to moderate speed of train where trespassers are to be anticipated, see note to *Illinois C. R. Co. v. Murphy*, 11 L.R.A.(N.S.) 352.

For duty and liability of railroad company toward one who goes upon its property to pass around a train blocking the crossing, see note to *Hasting v. Southern R. Co.* 5 L.R.A.(N.S.) 775.

For liability of electric railway for injury to trespasser or licensee from exposed third rail, see note to *Riedel v. West Jersey & S. R. Co.* 28 L.R.A.(N.S.) 98.

For duty of trainmen upon perceiving object the character of which is unknown, but which in fact is a trespasser, helpless on track, see note to *Louisville, H. & St. L. R. Co. v. Hathaway*, 2 L.R.A.(N.S.) 498.

For liability of owner of elevator for injury to trespassers or licensees, see notes to *Davis v. Ohio Valley Bkg. & T. Co.* 15 L.R.A.(N.S.) 402; *Sweeden v. Atkinson Improv. Co.* 27 L.R.A.(N.S.) 124.

For discussion of question whether subsequent wrongful act by one who enters premises under license of owner or occupier makes him a trespasser *ab initio*, see note to *Sheftall v. Zipperer*, 27 L.R.A.(N.S.) 442.

For question whether one who goes upon property on business with the owner is deprived of the right to protection against defects by the fact that he temporarily turns aside to pursue a purpose of his own, see note to *Pauckner v. Wakem*, 14 L.R.A.(N.S.) 1118.

For liability for condition of or injuries on private roads, see note to *Stevens v. Nichols*, 15 L.R.A. 459.

ditional upon its being proved that the wrongful act was within the scope of his employment.⁴

The duty which property owners owe to trespassers and intruders is a duty resulting from the creation of a relation by the act of the trespassers alone; and consequently, since the master himself cannot bring it into being, his servant cannot. In the creation of the relation, therefore, no question of agency can arise. The liability of the master for the wilful torts of his servant has already been discussed.⁵

2503. Injuries due to dangerous agencies.—It may be stated generally that in any instance in which an absolute duty to protect third persons rests upon a master, it will necessarily follow that if it is violated by his servant, the person injured by the violation will be entitled to recover damages, irrespective of whether the act which constituted the violation was or was not within the scope of the servant's employment.¹ An illustration of this class of duties is to be

⁴ *Alabama G. S. R. Co. v. Harris* (1893) 71 Mo. 74, 14 So. 263, where certain instructions (not stated) were held to be erroneous as being inconsistent with this rule.

⁵ See chapter CI.

¹ In *Sawyer v. Norfolk & S. R. Co.* (1906) 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440, it is said: "According to the varying facts of different cases, the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employees of the company; and sometimes the facts present an additional element and involve some independent duty which the corporation may owe directly to third persons, the injured or complaining party. This distinction will be found suggested and approved in 1 Jaggard on Torts, p. 257, § 85; 'Course of Employment: Another conception of the master's liability rests on the proposition that in certain cases the liability arises not from relationship of the master and servant exclusively, but also from the duty owed to plaintiff by defendant in the particular case in issue. In dealing with cases in which the question of the liability of the master for the tort of his servant is raised, reference should be had not alone to the relationship of the master and servant, but also to the relationship

between the master and the third person complaining of injury. It would seem that the scope-of-authority test considers too exclusively the former relationship, and overlooks the latter. In fact, one's right infringed by the wrong of another may be in *personam* or in the nature of the right in *personam*, as where a passenger complains of the torts of a carrier's servants, or a customer of the torts of a proprietor's servant."

In *Jacksonville Ice & Electric Co. v. Moses* (1911) — Tex. Civ. App. —, 134 S. W. 379, it is said: "The duties of private corporations with reference to their employees and to the public, and for the purpose of determining their statutory liability, may be divided into two classes,—the delegable and the non-delegable. The latter consist of those primary or absolute duties which the law, as a matter of sound public policy, for some salutary purpose, imposes as a condition upon which the corporation shall exist and carry on a business which may injuriously affect the persons or property of others. A failure to perform that class of duties is regarded as the personal omission or default of the corporation itself; and if such failure be the result of negligence, the negligence is that of the corporation, and not that of a servant to whom such non-delegable duties may have been intrusted. Among the primary duties of

found in the law of negligence or torts with reference to dangerous agencies. It is generally held that one who has the custody or makes use of a dangerous agency is absolutely bound to protect third persons from injuries therefrom. It matters not whether the person responsible for such an agency is a master, carrying on his business by the aid of servants, or attending to it himself. The rule is the same. So far, therefore, as the liability of the master, where the servant is the tort-feasor, does not depend upon the doctrine of *respondeat superior*, but is predicated solely upon the duty to third persons arising out of the dangerous character of the agency or instrumentality, it would seem not to be a question governed by the relation of master and servant, but one belonging to the law of negligence. If a person sees fit to keep a cage of wild beasts upon his premises it is true he would be liable if his servant let them out to the injury of third persons; but he would be none the less liable if somebody else's servant unloosed them, or even if a stranger did so. It is well to keep the grounds of liability in such cases clearly in mind, for otherwise doctrines which relate to the general law of negligence and to the law of master and servant are apt to be confused and lead to erroneous decisions. There is often much difficulty in determining what constitutes a dangerous agency;² but when once its character as such is established, a master may be held

a corporation operating an electric light plant and using wires for the distribution of a dangerous current of electricity is that of exercising a proper degree of care, not only in the erection of its lines and instrumentalities, but in maintaining them thereafter in a reasonably safe condition. The performance of the latter obligation carries with it another equally absolute,—that of making such an inspection of the condition of its property as may be practicable and reasonably essential to the accomplishment of that end. By this means alone can the corporation vouchsafe to the public that degree of protection which the law requires it to render." It was held that the company was liable for failure of an employee to inspect the appliances, resulting in the death of a person coming in contact with a broken wire.

²It has been said that it is impracticable, if not impossible, to state any general definition by which it may be decided with any degree of certainty what appliances or agencies do, and what do not, fall within the term

"dangerous" as employed by courts and text writers. *Barmore v. Vicksburg, S. & P. R. Co.* (1904) 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594.

But the rule that a master cannot depart from the duty intrusted to him when that duty respects the rights of others in regard to the employment of dangerous agencies in the prosecution of the master's business, without making the master liable for the consequences, applies in all cases in which agencies, liable to be the means of inflicting serious injuries upon others, unless properly cared for, guarded, and used, are placed in the custody of the servant. *Ibid.*

It is held in a well-considered case that the absolute duty of the master, which cannot be delegated, in reference to the degree of care demanded in the custody, control, and operation of dangerous agencies and instrumentalities, applies not to those alone which are operated or propelled by the power of steam, electricity, powder, dynamite, or

liable, not on the ground that he is a master, but because he is a person employing the agency. To state that he cannot shift responsibility to his servants in respect to such agencies is merely to say the same thing in another way.³

kindred forces, but to all instrumentalities employed by the master, which, by reason of the method of their operation, are capable of and liable to inflict serious injuries to others; and that the same rule of liability of a master for the acts of his servants controls whether the injury was caused by an agency intrusted to the servant, which was inherently dangerous, or by one which only became dangerous by reason of misuse. *Ibid.*

And, from this view point, the test of the master's liability has been said to be the question whether the agency or instrumentality is dangerous in itself, or liable to inflict serious injury to others when operated in the customary method of use, and while being devoted to the purposes for which it was designed by the master. *Ibid.*

A person or company using electricity in the public streets is not an insurer of the safety of the public. Such a user is merely bound to know the dangers incident to such use of the street, and to guard against such dangers by the exercise of care commensurate with them. *Rowe v. Taylorville Electric Co.* (1904) 213 Ill. 318, 72 N. E. 711.

And the duty of a person or company using electricity for lighting or otherwise, as to the insulation of its wires, does not extend to the entire system. No duty of that kind is imposed upon the owner on his own premises as to trespassers or bare licensees, who are neither invited upon the premises, nor there for the purposes of business with the owner. And defective insulation of an electric-light wire will not subject the electric light company to an action for negligence for the killing of a telephone lineman who, with full knowledge of the conditions and dangers, and not relying upon the performance of any duty upon the part of the electric light company to insulate its wires, allowed a telephone wire to come in contact with an electric-light wire improperly insulated, believing that no current was turned on at the time. *Ibid.*

Nor is failure upon the part of the

employees of an electric light company to blow its whistle before turning an electric current on its wires, which it is in the habit of doing to warn its own employees, a breach of duty toward third persons, in the absence of any showing of an agreement or understanding with them that the warning is to be given for their benefit, or that the electric light company knows that they are relying upon it. *Ibid.*

³ The duty arising out of the custody and use of dangerous agencies cannot be shifted by a master to his servants, so as to exonerate him from the negligence of a servant in the use and custody of them. *Pittsburgh, C. & St. L. R. Co. v. Shields* (1890) 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658.

The inability of a master to shift the responsibility connected with the custody of dangerous instruments employed in his business from himself to his servant intrusted with their use is analogous to, and may be said to rest upon, the same principle as that which disenables him from shifting to an independent contractor liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. *Ibid.*

The fact that servants intrusted with dangerous agencies deviated from the line of their duty to their master relieves him from liability for resulting injuries, where, while so deviating and disregarding the instructions, they were still doing their master's work. *Harri-man v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

The rule of law applicable to the care and protection of dangerous instrumentalities requires the master to exercise a proper degree of care to guard, control, and protect dangerous instrumentalities owned or operated by him, and, an injury occurring by reason of the improper use of such an instrumentality by a servant, though occasioned while not in the performance of his duty, the master is liable. The principle on which liability is founded in such cases

If the servant causing the injury in using a dangerous agency were, at the time, acting within the scope of his employment, it is probable that the master's liability might be predicated upon either of two grounds: (1) the liability imposed on all persons for injuries to third persons, due to the use of a dangerous agency,⁴ or (2) the liability which is imposed on a master by the doctrine of *respondeat superior*, where the servant is acting within the scope of his authority.⁵ If the servant were acting outside of the scope of

is the failure of the master to properly keep within his control such dangerous agencies. The rule is illustrated in *Mattson v. Minnesota & N. W. R. Co.* (1905) 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498; *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133.

In *Clowdis v. Fresno Flume & Irrig. Co.* (1897) 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373, an action to recover for injuries from a vicious bull, the court said: "In the present case Lovelace and Treece had been put in complete charge of the bull. It is a fundamental and most important principle of the law governing the responsibility of masters that whatever duty they owe to the public (or to their employees) must be performed, and a failure to perform, or improper performance, cannot be excused by a showing that execution was delegated to a servant even of approved carefulness, knowledge, or skill. It must further be shown that the servant in the particular matter exercised the full degree of care and showed the requisite amount of skill. And this is true, however subordinate or menial may be the rank of the servant. Whatever be his position, in that special employment he represents the master, and within its scope his knowledge is the master's knowledge, his acts the master's acts. *Higgins v. Williams* (1896) 114 Cal. 176, 45 Pac. 1041; *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559. Everyone, whether acting individually or through agents, is bound to exercise ordinary care to prevent injury to the person or property of another. Civil Code, §§ 1708, 1714, 2330, 2338. Therefore, when, as here, Lovelace and Treece had been sent upon an independent mission, and put in complete charge of the animal, they stood in the performance

of their task in the place of the defendant, and the question of defendant's responsibility will be answered as may be answered the inquiry: What would have been the master's responsibility and liability had he personally been in charge of the animal? To this there can be but one answer. He would have been liable. Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness, and of the knowledge of that fact brought home to the master."

⁴ A corporation exercising a franchise to operate steam cars on tracks crossing the streets of a town incurs the correlative obligation to use such privilege with due regard to the public safety, and to maintain its track in a safe condition; and it cannot escape liability for failure to discharge such obligation by transferring, or attempting to transfer, it to an employee or other person. *Black v. Rock Island, A. & L. R. Co.* (1910) 125 La. 101, 26 L.R.A.(N.S.) 166, 51 So. 82.

The right to operate a steam locomotive on or across a street in a town involves the use of an agency highly dangerous to life, limb, and property; and the responsibility for the exercise of such right cannot be shifted by the corporation in which it is vested to the person who, by its authority, actually exercises it. *Ibid.*

⁵ *Garner v. Citizens' Natural Gas Co.* (1901) 198 Pa. 16, 47 Atl. 965; *Brunner v. American Teleg. & Teleph. Co.* (1894) 160 Pa. 300, 28 Atl. 690.

So in the case of the sale of food and drugs, the master is responsible for injury done by impure articles furnished by his clerk. See note to *Craft v. Parker*, 21 L.R.A. 139.

A druggist is liable for the act of his clerk in selling, for a preparation to wash a wound, a solution containing

his authority, the master's liability, if it existed, would have to be referred to the first ground; and the fact that the person construc-

over 86 per cent of carbolic acid. *Horst v. Walter* (1907) 53 Misc. 591, 103 N. Y. Supp. 750.

Likewise for the act of an assistant in selling morphine for calomel, and placing it in a box labeled "Calomel, $\frac{1}{2}$ grain." *Smith v. Middleton* (1902) 112 Ky. 588, 56 L.R.A. 484, 99 Am. St. Rep. 308, 66 S. W. 388.

A druggist is liable for the negligent act of his clerk in putting wrong labels on a poisonous medicine which has been put up by him, by reason of which injury is done to a customer. *Thomas v. Winchester* (1852) 6 N. Y. 397, 57 Am. Dec. 455.

A druggist is liable for the act of a clerk in selling poison without labeling it. *Osborne v. McMasters* (1889) 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543.

A master is liable for the negligent act of his servant in exploding fireworks which the master has contracted to do in aid of a celebration. *Colvin v. Peabody* (1891) 155 Mass. 104, 29 N. E. 59.

A railroad corporation, being incorporeal and incapable of acting save through agents selected by it, when it places in the custody and under the control of certain agents so selected its depot, locomotives, and tracks, and vests in them the authority to operate the locomotives over the tracks, with a certain discretion, and subject to certain instructions, but with the actual power to operate them when they please, must be regarded as represented by such agents, within the sphere of authority conferred on them, and should be held liable to a third person, injured through the negligent or improper use, or abuse, of the power and discretion vested in such agents. *Black v. Rock Island, A. & L. R. Co.* (1910) 125 La. 101, 26 L.R.A.(N.S.) 166, 51 So. 82.

Where the agents of a railroad company are placed in charge and control of its depot, locomotives, and tracks in a town, with authority to operate the locomotives over the tracks, for switching and other purposes (connected with the business of the company), and with actual power to operate them when they please, and the agents, whilst operating them for their amusement across a

street of the town, negligently injure a citizen, who is legitimately using the street, such agents will be held to be acting, though improperly, within the scope of authority conferred on them, and the company will be held liable for the injury resulting from such action. *Ibid.*

In *Merschel v. Louisville & N. R. Co.* (1905) 27 Ky. L. Rep. 465, 85 S. W. 710, in holding a railroad company liable for the negligent placing of explosives on a public street, which resulted in injury to a child, the court said: "The demurrer admits that the agent and servant was charged with the safe-keeping of the torpedo and use of it at the time it was placed upon the track or upon the street. Therefore it was the act of the defendant in so placing it. If the master himself has control of forces or explosives calculated to endanger life, the obligation is upon him to control or superintend them. He is under an obligation to use proper care for the protection of life and property therefrom. If he substitutes another to represent him in their care and control, the same obligation remains upon him. . . . It is urged that the petition is defective, because there was no averment that the act was within the scope of the agent and servant's employment. It was not necessary to make this averment, because it was averred in the petition that the agent and servant had the care and custody of the torpedo, and so had it at the time when it was so placed upon the track or street. If the master had imposed the duty upon the servant to care for the torpedo, and that duty was resting upon him at the time it was placed upon the track or street, the wrongful act was within the scope of his employment, though a grossly negligent one. The substance of the averment is that the negligent act was committed by the agent within the scope of his authority. The doctrine enunciated in *Sullivan v. Louisville & N. R. Co.* (1903) 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171, does not apply to the facts averred in the petition. In that case the party who caused the injury to be inflicted did not have the care and custody of the torpedo as the

tively liable happened to be a master, and employed servants, would be immaterial. The courts have sometimes appeared to lose sight

agent or servant of the defendant. The act was not done within the scope of the servant's employment. It was an intentional act, apart from the employment; hence a different rule from the one here invoked was adjudged and applied to the facts of that case. Of course, this opinion is predicated upon the facts admitted by the demurrer, and may or may not have any application to the facts which may be developed on the trial of the case."

In *Euting v. Chicago & N. W. R. Co.* (1902) 116 Wis. 13, 60 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358, in holding a railroad company liable for injuries due to the explosion of a torpedo on the track, the court said: "In considering the motion to direct a verdict, it must be taken as though it were proven that the engineer placed the torpedo on the rail, and moved the engine over it, causing the explosion; and the question is whether a verdict against the defendant could be sustained upon this state of facts. That railroad torpedoes are, in their nature, dangerous agencies, cannot be doubted. It is common knowledge that they are loaded with some high explosive, and with a sufficient amount thereof to cause a loud explosion; and the danger which exists, even in the explosion of toy torpedoes, is too well understood to admit of doubt that railroad torpedoes should be considered as dangerous agencies as matter of law. So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed

from his employment is well understood. If this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult. The question, generally, is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was wilfully or wantonly violating a duty resulting from his employment; namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. . . . There is, however, however, another view which may be taken of the case as made by the plaintiff's evidence, which also leads to the conclusion that it was a proper case for the jury to pass upon. If it be true, as the evidence tends to show, that the engineer placed the torpedo on the track, then he knew that a dangerous explosive was on the track immediately in front of the driving wheel at the moment he moved the engine, and that third persons were in close proximity. If, under such circumstances, and with that knowledge, he moved his engine in the attempt to pull the car upon the

of the first ground of liability where a dangerous agency is employed, and to have confused it with that of the master's liability for the torts of his servant. In some cases, where it is declared that railroad torpedoes are a dangerous agency,⁶ the courts, instead of holding the master liable on that ground, have strained themselves to apply the doctrine of *respondeat superior*, by bringing the act of the servant with reference to the use of the torpedo within the scope of his employment.⁷ As has been stated, the master is, of course,

track, the master would unquestionably be liable for injuries to such third persons which were proximately caused by the engineer's negligent act."

A tugboat company which leaves the management of the boat to its servants cannot avoid liability for the death of a child allowed on board by the servants, on the ground that the action of the servants was contrary to the company's orders. The court, in *Cook v. Houston Direct Nav. Co.* (1890) 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475, placed the liability on both grounds, saying: "As before stated, the petition . . . alleged that the company was guilty of negligence in receiving the child on board the boat without the consent of her parents. Although the defendant company may have owed the deceased no duty as a passenger, it does not follow that they are not responsible for her death. Every person using dangerous machinery is under obligation to operate it in a careful manner. He may owe no duty to one who has attained the years of discretion, and who voluntarily comes in contact with it, to guard him against dangers that are apparent. But as to children, the rule is different. *Evansich v. Gulf, C. & S. F. R. Co.* (1882) 57 Tex. 123; *Evansich v. Gulf, C. & S. F. R. Co.* (1882) 57 Tex. 126, 44 Am. Rep. 586. Not being capable of exercising that degree of circumspection in the face of danger that adults are expected to use, a higher degree of care must be exercised towards them. If it be negligent to leave dangerous machinery in a place where children are likely to tamper with it, without taking precautions to prevent them from injuring themselves, we think it equally negligent to permit them aboard a tugboat where there is danger of them being drowned, without taking adequate precautions to avoid all accidents. The facts of the present case, however, sug-

gest some further questions for consideration. There was testimony that an officer of the defendant company had expressly ordered that the children of plaintiff should not be allowed to come upon the boat, and it appears that they were upon board at the time of the accident by invitation of some of the crew, but without the knowledge of either the captain, who was absent at the time, or of the pilot, who was in charge. The act of inviting them on board was not within the scope of the authority of the company's servants, and if the right of action depended upon the invitation, the company should not be held liable. But we think it was the duty of the company not to permit them on board if their presence there was dangerous. When the company left the management of the boat to its servants, the duty devolved upon them; and it cannot be permitted to say that their action in allowing the children on the boat was contrary to orders, and that it was not liable. A master is liable for the wrongful acts of his servant, done within the scope of his authority, although they be done in disobedience of express orders."

⁶ It is common knowledge that railroad torpedoes used for signaling purposes are loaded with some high explosive; and they are dangerous agencies as a matter of law. *Euting v. Chicago & N. W. R. Co.* (1902) 116 Wis. 13, 60 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358; *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

⁷ The question with reference to the liability of a master for the result of the use by a servant of a dangerous agency placed in his hands is whether the servant departed from his employment, or whether he departed from or neglected a duty in the line of that employment. In the first case the principal

liable under the doctrine of *respondeat superior* if the act of the servant was within the scope of his authority; but, if the master's duty is absolute, because of the dangerous nature of the agency, it is a matter of no importance whether the servant was acting within

is not responsible for his acts, and in the second case he is. *Euting v. Chicago & N. W. R. Co.* (1902) 116 Wis. 13, 60 L.R.A. 158, 96 Am. St. Rep. 936, 92 N. W. 358.

A person having control of explosives calculated to endanger life, like a railroad torpedo, is under duty to use proper care to prevent injury to others therefrom; and where he substitutes another to represent him in their care and control, the obligation remains, and he is responsible for the negligence of the substitute in the course of his employment. *Merschel v. Louisville & N. R. Co.* (1905) 121 Ky. 620, 85 S. W. 710.

The rule is well supported, however, that one who intrusts a dangerous agency, such as a railway torpedo, to a servant, cannot escape liability for injuries resulting therefrom on the ground that it was used at a time and in a manner not within the instructions or authority of the servant, the authority to the servant being to use torpedoes on the road in the management of the trains. *Harriman v. Pittsburgh, C. & St. L. R. Co.* (1887) 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

So, a railroad company intrusting to its servants the management and control of a train of cars, and the custody of railroad torpedoes, to be used in the management and operation of its trains, is responsible for their negligence in placing and leaving such torpedoes on its track at a point where the public, including children, are permitted to pass over it; and it is liable for an injury resulting from the explosion of a torpedo picked up and exploded by a child. *Ibid.*; *Pittsburgh, C. & St. L. R. Co. v. Shields* (1890) 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658.

In the last-mentioned case the court said: "Now in this case, it must be observed that the duty intrusted by the railway company to the conductor in regard to these torpedoes was not only to use them as signals with the requisite care and caution, but to observe like care and caution in the custody of them when not in use. The servant's custody

of them, when not in use, was as much a part of his employment as was the use of them as signals when required. In taking them from the place where they were carried when not in use, and, in mere caprice, placing them on the track for the purpose of frightening the ladies, he was not, it is true, within his employment as to the use of them; but, in so doing, he violated the duties connected with his employment as the custodian of them, and thereby made his master liable for the consequences of his neglect, in the same manner, and to the same extent, as if it had been done by the company itself. It is necessary in this, and in all similar cases, to distinguish between the departure of a servant from the employment of the master, and his departure from, or neglect of, a duty connected with that employment. A servant may depart from his employment without making his master liable for his negligence when outside the employment of the master; and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he cannot depart from the duty intrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master; otherwise the duty required of the master in respect to the custody of such instruments employed in his business may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of a neglect of the duty. To better illustrate the ground of this distinction, we may, for example, suppose a servant, with others under his control, employed with a construction train, repairing the track of his master. He may, for a time, quit his employment, and, with his men, go off on affairs of his own. Whilst thus out of the mas-

the scope of his authority or not.⁸ Since then, the master's liability by reason of the dangerous character of the agency or instrumentality employed is not, strictly speaking, a master and servant question, exhaustive discussion of the cases would be out of place here, but a few of them may be considered by way of illustration.

It seems to be the English doctrine that the duty of a landowner to protect adjacent property is absolute;⁹ but the preponderance of American authority is against this extreme doctrine.¹⁰

ter's employment, he may build a fire, which, through his negligence, may consume the property of another; and, in the meantime, loss of life and property may result from a collision with the train, negligently left standing on the track. Now, whilst, as has been held, the master would not be liable for the loss resulting from the fire, because the act was done outside the servant's employment (*Morier v. St. Paul. M. & M. R. Co.* [1884] 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952), yet it is equally certain that, for the loss occasioned by the servant's negligence in leaving the train on the track, the master would be liable in damages; for the plain reason that, in abandoning the custody of the train, he was guilty of negligence in the employment of the master, whilst, in building the fire, he was not. . . . The custody of these torpedoes was within the servant's orbit. Negligently leaving them on the track was a negligence within that orbit, and therefore imputable to the master. If a master has a duty to perform and intrusts it to a servant, who disregards it, to the injury of another, it is immaterial, so far as the liability of the master is concerned, with what motive or for what purpose the servant neglects the duty."

⁸ For liability for injuries to children from explosives left accessible to them, see notes to *Akin v. Bradley Engineering & M. Co.* 14 L.R.A.(N.S.) 586; and *Finkbeiner v. Solomon*, 24 L.R.A.(N.S.) 1257.

⁹ The leading case with regard to the absolute duty of a landowner to insure adjacent property against damage is *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129, affirming (1866) L. R. 1 Exch. 267.

¹⁰ See Shearm. & Redf. Neg. § 701a.

In *Filliter v. Phiffard* (1847) 11 Q.

B. 347, it was observed that "the ancient law, or rather custom, of England, appears to have been that a person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, must make good the loss." But it seems to be somewhat uncertain whether the broad liability which seems to be imposed in the older cases to which the statement has reference was not, in point of fact, predicated on cases where negligence was shown. See the remark made, *arguendo*, in *Lothrop v. Thayer* (1885) 138 Mass. 466, 469, 52 Am. Rep. 286, and the review of the authorities in 1 Beven, Neg. pp. 587 *et seq.*

In England, the absolute liability of the occupant of a house, if it ever existed, was abolished by the act of 6 Ann. chap. 31 § 7, which provided that no action should be maintained against any person in whose house or chamber any fire should "accidentally" begin. The subject-matter of this statute was extended to "stables, barns, or other buildings," by the act of 14 Geo. III., chap. 78, § 86. With reference to this statute it was held in *Filliter v. Phiffard*, *supra*, that a fire intentionally kindled by the defendant or his servant on his land, and negligently guarded, was not an "accidental" fire. The court, discussing "a very singular doubt" which had arisen from the mode in which this enactment was referred to in Blackstone's Commentaries, said: "The passage is introduced by that learned writer incidentally, as an illustration of the principle on which masters are held responsible for the acts of their servants. (1 Bl. Com. 431). Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master; because this negligence happened in his service.' 'But

In a case where the master sent his servant, a young mulatto girl, to bring his gun, which she negligently discharged, injuring a third person, the master was held liable, the court saying: "The owner of an instrument of mischief must keep it from the reach of doing injury; and if he chooses to remove it, he must do so with due precaution and by a safe conveyance."¹¹ The operation of steam and electric cars has been held to be within the rule of liability imposed by the dangerous-agency doctrine.¹² And the same rule has been

now' (he proceeds) 'the common law is altered by statute 6 Ann. chap. 3' . . . 'which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or servant's carelessness.' This reason, by the way, is not stated in the act of Parliament, and must be allowed to be very far from satisfactory; because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers. Besides, making servants punishable for fires resulting from their negligence is no exemption of masters from responsibility for the same fault; for fires which accidentally begin are not fires produced by negligence."

In the earlier case of *Canterbury v. Atty-Gen.* (1842) 1 Phill. ch. 306, Lord Lyndhurst had remarked that Blackstone "thus states it distinctly as his opinion that for a fire in a dwelling house, originating in the negligence either of himself or his servant, the master is not responsible. No authority, indeed, or decision, is referred to in the support of this opinion, nor does the learned author explain how this construction of the act is to be reconciled with the words 'shall accidentally begin.' But although this work has gone through many editions and been subjected to much criticism, no observation that I can find has ever been made upon this passage, or any objection urged against it." The case, however, was decided upon grounds which rendered it unnecessary to settle the point thus raised.

¹¹ *Dixon v. Bell* (1816) Holt N. P. 233, note.

For liability for injury to trespasser by discharge of firearms, see note to *Magar v. Hammond*, 3 L.R.A.(N.S.) 1038.

For civil liability for death or injury of trespasser, caused by spring gun or other dangerous mantrap on one's own premises, see note to *Scheuermann v. Scharfenberg*, 24 L.R.A.(N.S.) 369.

For criminal responsibility for death caused by spring gun or other dangerous mantrap upon one's own property, see note to *State v. Marfaudille*, 14 L.R.A.(N.S.) 346.

¹² The doctrine of the common law, that the master is not liable for the torts of his servants, not committed in the line of the master's service, or with his assent or ratification, has been greatly modified as applied to railroad companies, on account of the absolute necessity for more stringent rules for the protection of life and property against the perils of the steam engine and its capacity for mischief. A corporation, in such case, can act only through its agents and servants; and having placed under the control of its agents an instrument of so much peril, it is but reasonable that the law should demand of the corporation the utmost caution in the selection of its agents, and hold it to strict accountability for injuries which befall the citizen from such want of caution. *Nashville & C. R. Co. v. Starnes* (1871) 9 Heisk. 52, 24 Am. Rep. 297; *Bittle v. Camden & A. R. Co.* (1893) 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305.

And if the servants of a railroad company, while in charge of its engines and machinery, and engaged about its business, negligently, wantonly, or wilfully pervert such agencies, and injury results, the company must respond in damages. *Bittle v. Camden & A. R. Co.* *supra*; *Toledo, W. & W. R. Co. v. Harmon* (1868) 47 Ill. 299, 95 Am. Dec. 489; *Chicago, B. & Q. R. Co. v. Dickson* (1872) 63 Ill. 151, 14 Am. Rep. 114.

In the *Bittle Case*, *supra*, the court said: "Whilst no liability attaches for

damages for these acts so long as they are exercised in accordance with the statutory authority with ordinary care, yet liability ensues when they are done negligently or wantonly. The rule obtains, generally, that a master is not answerable in damages for the wanton and malicious acts of his servant; yet this immunity is not generally extended to railroad corporations, whose servants are intrusted with such extensive means of doing mischief. Accordingly, it has been established that if such servants, while in charge of the company's engines and machinery, and engaged about its business, negligently, wantonly, or wilfully pervert such agencies, the company must respond in damages; and this is the principle deducible from the authorities upon this subject."

In the *Toledo, W. & W. R. Co. Case*, *supra*, it is said: "It is, however, contended that if the engine driver did the act wantonly or wilfully, it was outside of his authority, and hence the company are not liable for the damages resulting from the misconduct of the engineer. He was their servant, was engaged in the performance of the duty assigned to him, and if, while so engaged, he used the engine put into his possession and under his control, to accomplish the wanton or wilful act complained of, why should not the company be held liable? It is said that he was not employed for the purpose, nor directed to perform the act; and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants. . . . There can be no pretense that where an agent commits an act wilfully, or otherwise, while he is not engaged in the performance of his duty to the company, they would be liable for the wrong; or even while so engaged, if he were to personally perform an act not connected with the business of the corporation, they would be liable. But when employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskilful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he wilfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages. They should not be permitted to say, 'It

is true he was an agent, was authorized by us to have the possession of our engines, was engaged in carrying on our business, and whole so engaged, he wilfully perverted the instruments which we placed in his hands to something more than we designed or authorized, and therefore we should not be liable for the injury thus inflicted.'"

And the rule that the intrusting of such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, rendering the person thus intrusting it liable for injuries caused thereby, applies equally to the management of steam power on water, and to all officers, though having different duties, engaged in its management. *Duggins v. Watson* (1854) 15 Ark. 118, 60 Am. Dec. 560.

Nor is the rule that the personal safety of passengers transported by the dangerous agency of steam should not be left to the sport of chance or the negligence of careless agents affected by the question whether the consideration for the transportation was pecuniary or otherwise. *The New World v. Ding* (1853) 16 How. 469, 14 L. ed. 1019.

In *Danbeck v. New Jersey Traction Co.* (1895) 57 N. J. L. 463, 31 Atl. 1038, the court said: "The defendant has introduced, and is in the habit of using, in the public streets of a city, a machine of a highly dangerous character; and as children have the right to frequent such streets, it is the duty of the company to provide in all reasonable ways for their safety, so far as the same is imperiled by the business it thus transacts. It cannot be reasonably contended that if the master be liable for the carelessness of his servant for leaving a dangerous machine in the street, where it is likely to be meddled with by children, he will not be liable if his servant permits children to meddle with such machine. In such transactions, the knowledge of the servant of the situation aggravates his negligence. It is the plain duty of these street railroad companies to prevent children, except under proper safeguards, from entering their cars, and if this duty be neglected, they become responsible for the consequences."

It is negligence *per se* for railway employees to permit a child of tender years to climb upon and ride upon a car

applied to the sale of poisons and other deleterious drugs and substances.¹³ But whether or not a particular agency is dangerous,

loaded with loose earth, which is liable to slip and throw the child off at any time, which would charge the railroad company, or a receiver thereof, with liability for a resulting injury; such a car, so loaded, being such an inducement as would naturally lead children into danger, and it being negligence not to keep them away from the cars under such circumstances. *Burke v. Ellis* (1900) 105 Tenn. 702, 58 S. W. 855.

¹³ In a business which is hazardous, having to do directly and frequently with the health and lives of a great number of people, like that of a druggist, the highest degree of care and prudence for the safety of those dealing with the dealer is required; and that degree of care exacted of such dealer is required also of each servant intrusted by him with the conduct of his calling. *Smith v. Middleton* (1902) 112 Ky. 588, 56 L.R.A. 484, 99 Am. St. Rep. 308, 66 S. W. 388.

Evidence that a druggist's clerk was a careful, sober, painstaking man is inadmissible in an action against the druggist for an injury alleged to have resulted from the act of the clerk in furnishing morphine on a prescription instead of calomel; the sole question for the jury being, Whether the clerk furnished morphine on the prescription instead of calomel? and whether such act was or was not grossly negligent. *Ibid.*

Proof of the mere fact that one article was put up and delivered by a druggist's clerk when another was called for, however, does not, alone, establish liability for a resulting injury on the part of the druggist; to recover, it must be shown that the clerk was careless in the delivery of the wrong article, and did not exercise that degree of care which his duty and the business he was engaged in required of him. *Brown v. Marshall* (1882) 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392.

And, where a druggist's clerk sells and delivers a poison instead of a harmless drug, the mistake should be submitted to the jury in an action against the druggist for damages for an injury thereby caused, not as something necessarily in itself constituting a cause of action, but as a matter of evidence on

the question of negligence, of the co-gency of which it is their right and their duty to judge. *Ibid.*

The question whether or not a clerk in a drug store, who, in vending drugs, negligently put up, sold, and delivered by mistake a deadly poison in place of a harmless drug called for, was a registered pharmacist or a druggist, is of no effect upon the liability of his employer for an injury resulting from his act. *Smith v. Hays* (1887) 23 Ill. App. 244. "It is the duty of druggists to know the properties of the medicines they sell, and to employ such persons as are capable of discriminating when dealing out medicines."

And the druggist, in such a case, cannot escape liability for a resulting injury on the ground that the clerk was his special agent to put up and sell medicines, but not his agent in making a mistake in so doing. *Ibid.*

It is the duty of druggists to know the properties of medicines which they vend, and to employ such servants as are capable of discriminating and compounding according to prescription, and, if they depart from prescription, or ignorantly introduce other and poisonous drugs, they are responsible for the consequences to the party injured. *Fleet v. Hollenkemp* (1852) 13 B. Mon. 219, 56 Am. Dec. 563; *Smith v. Hays* (1887) 23 Ill. App. 244; *Brown v. Marshall* (1882) 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392.

Nor can a druggist who himself, or through his employees, departs from a prescription in compounding it, or ignorantly introduces other and poisonous drugs, escape responsibility for resulting injuries to third persons by proof that extraordinary care had been used by them in general. *Fleet v. Hollenkemp* (1852) 13 B. Mon. 219, 56 Am. Dec. 563.

Nor do rules of law as to the degree of care and diligence necessary to be used in certain cases generally to exempt a party from liability for consequences, and as to the extent or degree of negligence necessary to devolve civil responsibility upon the party guilty thereof, apply to a case in which a druggist was required to compound certain medicines, and his clerks, in doing

within the rule, is a question beyond the confines of this treatise.¹⁴ In a number of cases the dangerous-agency theory seems to be rejected by implication, the courts refusing to hold the master liable for injuries inflicted upon third persons by a servant acting outside of the scope of his authority.¹⁵

so, ran them through a mill in which they knew poisonous drugs had been ground, having failed to cleanse it properly so as to prevent injury. *Ibid.*

¹⁴ For a discussion of the liability of the master for injury done by a servant to a third person in the use of a dangerous agency placed in his hands, see note to *Galveston H. & S. A. R. Co. v. Currie*, 10 L.R.A.(N.S.) 367. This note includes cases where the liability is based on the ground of the dangerous nature of the agency, and on the ground of *respondent superior*.

For liability of railroad companies for injury to children playing on turntables, see notes to *Pannill v. Potomac, F. & P. R. Co.* 4 L.R.A.(N.S.) 80; *Conrad v. Baltimore & O. R. Co.* 16 L.R.A.(N.S.) 1129.

For doctrine of attractive nuisance, see notes to *Cahill v. E. B. & A. L. Stone Co.* 19 L.R.A.(N.S.) 1094, and *Kelly v. Benas*, 20 L.R.A.(N.S.) 903.

For doctrine of attractive nuisance as applied to injury from hot water or ashes, see note to *Fitzmaurice v. Connecticut R. & Lighting Co.* 3 L.R.A.(N.S.) 149.

For measure of duty of company maintaining electric wires on another's premises, toward trespasser, see note to *Guinn v. Delaware & A. Teleg. & Teleph. Co.* 3 L.R.A.(N.S.) 988.

¹⁵ In *Sullivan v. Louisville & N. R. Co.* (1903) 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171, it was said that the best-considered and most-numerous authorities generally draw the line, not at whether the servant was using his master's property when inflicting the injury in question, but at whether he was then representing the master in the act and in the scope of his employment.

A railroad company is not liable for the tort of an agent to whom it had entrusted an engine, where such agent stepped aside from the line of his duty to commit it. *Nashville & C. R. Co. v. Starnes* (1871) 9 Heisk. 53, 24 Am. Rep. 297.

And the act of an engineer and fire-

man of a train in permitting a person to ride in the cab without authority, and playing a practical joke upon him, by which they scald him, inflicting a serious injury, is not in furtherance of the business of the railroad company, nor in the accomplishment of the object for which they were employed; and the railroad company is not liable for the injury. *International & G. N. R. Co. v. Cooper* (1895) 88 Tex. 608, 32 S. W. 517.

A person furnished with benzin to clean parts of machinery, and charged with the duty to use that benzin in a shallow pan and to empty the pan into a can in which it was to be kept for further use, who emptied the benzin used by him out of the window upon an adjoining roof, where it was ignited by a roofer's stove, causing injury to the roofer, was engaged in the performance of his duty when he emptied the benzin, though he was acting in disobedience of his master's orders; and the master is responsible for the injury resulting therefrom. *Riegler v. Tribune Asso.* (1899) 40 App. Div. 324, 57 N. Y. Supp. 989.

A fireman on a railway train, who, not for the purpose of giving a signal necessary or proper in the management of the train, but from wantonness and a desire to help celebrate a Fourth of July, placed torpedoes under the cars of his train, thereby abandoned the service of the company; and the latter is not liable for an injury to third persons resulting from his act. *Chicago, B. & Q. R. Co. v. Epperson* (1887) 26 Ill. App. 79.

This seems to be the theory of *Galveston, H. & S. A. R. Co. v. Currie* (1906) 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073.

Nor is it the duty of the conductor of a railway train, or of the railroad company, for a violation of which it can be held responsible for the consequences, to keep constant watch of the rails on both sides of the train, while standing, to ascertain whether dangerous ex-

plosives, like torpedoes, have been placed under the cars, by either strangers or employees of the company, not acting in furtherance of its business, or within the scope of their employment. *Chicago, B. & Q. R. Co. v. Epperson, supra.*

And the mere presence of a signal torpedo upon the planking where a highway crosses a railroad track does not warrant the jury, in an action for damages for an injury caused thereby, in inferring that it was there through the act of an employee, done in accordance with the railroad company's business; and the burden rests with the plaintiff to prove that it so came there. *Ober-toni v. Boston & M. R. Co.* (1904) 186 Mass. 481, 67 L.R.A. 422, 71 N. E. 980; *Smith v. New York C. & H. R. R. Co.* (1894) 78 Hun, 524, 29 N. Y. Supp. 540.

So, the mere presence of a signal torpedo upon the planking where a highway crosses a railroad track is not of itself evidence of negligence upon the part of the railroad company and its employee in failing properly to care for it. *Ober-toni v. Boston & M. R. Co. supra.*

Nor is a railroad company liable for injury to a boy from a torpedo which he picked up near the track, merely upon evidence that a brakeman tossed it to a flagman, who threw it back, and, upon the brakeman's failure to catch it and letting it fall to the ground, no attempt was made to recover and remove it to a safe place, in the absence of anything to show that they were acting within the scope of their employment. *Ibid.*

Nor will a railroad company be held liable for an injury resulting from the explosion of a railroad torpedo on the theory that the station agent who placed it upon the track was acting within the scope of his employment in the performance of a duty imposed upon him by his employer, where the explosion of torpedoes at the place where this occurred was prohibited by the rules of the company, and the explosion which occurred was not a signal under regulations of the company. *Smith v. New York C. & H. R. R. Co.* (1894) 78 Hun, 524, 29 N. Y. Supp. 540.

For a case in which injuries caused to a switchman by the explosion of a torpedo which the foreman of the crew had, as a prank, placed on the rail in front of a locomotive, were held not to be imputable to the railroad company, see *Sullivan v. Louisville & N. R. Co.*

(1903) 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171, § 1466, *ante.*

An employer whose employee stored dynamite in his charge in a blacksmith's shop against the objection of the blacksmith, which dynamite was accidentally exploded by sparks thrown from the blacksmith's anvil, is liable for an injury resulting therefrom to the blacksmith, in the absence of contributory negligence on his part, where the dynamite was so stored to preserve it from rain, by the employee in furthering the interests of his employer; but the employer would not be liable if the storing was done for a purpose of his own. *Birmingham Waterworks Co. v. Hubbard* (1887) 85 Ala. 179, 7 Am. St. Rep. 35, 4 So. 607.

Evidence, in an action for an injury to a person by the frightening of his horse by an explosion of a dynamite cap by an employee of the defendant, that the employee was employed for other purposes than to handle caps, but that an employee employed for that purpose, finding some of the caps wet, handed them to the other to determine whether they would explode, and in testing them he exploded one, frightening the plaintiff's horse, is sufficient to go to the jury on the question of the defendant's negligence. *Brunner v. American Teleg. & Teleph. Co.* (1894) 160 Pa. 300, 28 Atl. 690.

And a foreman of a switching crew in a railroad yard, who found a torpedo among some rubbish in a tool box on the switch engine, and, as a prank, placed it on the railroad in front of one of the driving wheels of a locomotive, which passed over it and exploded it, a fragment striking a member of the crew and injuring him, having no use for torpedoes in his work, was not acting within the scope of his employment; and the railroad company is not liable for the injury. *Sullivan v. Louisville & N. R. Co. supra.*

And the railroad company, in such case, cannot be held responsible for the injury because of the failure of the switchman to remove the torpedo which he knew was on the track and certain to explode and possibly do injury, since the act of the foreman in placing and leaving the torpedo on the track was one continuing act, having in view but one object, it not being possible to segregate a continuous act. *Ibid.*

In *Baker v. Snell* (1908) 2 K. B. (C.

A.) 825, 2 B. R. C. 1, 77 L. J. K. B. N. S. 1090, 24 Times L. R. 811, 52 Sol. Jo. 681, affirming (1908) 2 K. B. 352, 24 Times L. R. 599, 77 L. J. K. B. N. S. 726, 52 Sol. Jo. 483, it was held that the question whether a servant who incited a dog known to be savage to attack a third person was acting within the scope of his authority should have been left to the jury. Kennedy, L. J., dissented on the ground that a person keeping an animal *feræ naturæ*, or an animal *mansuetæ naturæ*, which is known to him to be savage, is answerable for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person.

